No. 17-024

IN THE

Supreme Court of the Yuma Indian Nation

YUMA INDIAN NATION,

Appellee,

v.

THOMAS SMITH & CAROL SMITH

Appellant.

On Interlocutory Appeal to the Yuma Indian Nation Supreme Court

BRIEF IN SUPPORT OF APPELLEE

TEAM NUMBER 165

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QUESTIONS PRESENTED

I. Whether Thomas and Carol Smith's third-party complaint impleading the Economic Development Corporation, Fred Captain, and Molly Bluejacket was improper.

II. Whether the Yuma Indian Nation courts have personal jurisdiction and subject matter jurisdiction over Thomas and Carol Smith given the Smiths' substantial electronic and in-person communications with the Nation's representatives in fulfillment of their contracts with the Nation itself.

III. Whether sovereign immunity protects the Yuma Indian Nation, the Economic Development Corporation, and its official-capacity employees given there has been no express waiver of that immunity, and whether qualified immunity protects CEO Fred Captain and accountant Molly Bluejacket against personal capacity suits for actions taken in their official capacities.

STATEMENT OF THE CASE

I. Statement of the Facts

This case centers around simple breach of contract claims between the Yuma Indian Nation ("YIN") and its trusted advisors, Thomas and Carol Smith. The YIN is located in the southwestern United States, in present-day Arizona. In an effort to expand and promote a thriving economy, the Nation sought the advice of Thomas Smith ("T. Smith"), a certified financial planner and accountant from Phoenix. R. at 1. For a decade, T. Smith ("T. Smith") worked as a prized economic adviser to the YIN until he divulged sensitive and confidential tribal information in violation of the terms of his 2007 contract. R. at 1, 2. T. Smith was entrusted by the Nation's Tribal Council in 2010 to sign a contract between he and his sister, Carol Smith, ("C. Smith") to give financial advice to the YIN, the Economic Development

Corporation ("EDC"), and T. Smith. R. at 2. To further its corporate charter mission and provide economic advantage to the Nation, the EDC, an arm of the tribe, procured passage of a tribal ordinance legalizing marijuana cultivation and use. R. at 2. T. The EDC, after disclosing its plans to the Smiths, began researching the opportunity of developing a marijuana operation. R. at 2. Without consultation, and in subterfuge of the EDC's mission, T. Smith breached his and C. Smith's contracts, and violated fiduciary duties and duties of confidentiality by disclosing the Nation's intentions to the Arizona Attorney General. R. at 2, 3.

Although the contract between the YIN and T. Smith was signed off reservation, it explicitly declared all disputes to be resolved in a court of competent jurisdiction, and further mandated absolute confidentiality in T. Smith's role as tribal economic advisor. R. at 1. From 2007 until formation of the EDC in 2009, T. Smith communicated on a near-daily basis with the YIN tribal chairs and Tribal Council members. R. at 1.

Upon creation of the EDC, T. Smith's frequent correspondence regarding development issues was confined to Fred Captain, EDC CEO ("Captain"), and Molly Bluejacket, an EDC employee and accountant ("Bluejacket"). R. at 1. However, T. Smith retained his close relationship with the YIN itself by submitting quarterly written reports to Tribal Council members, and frequently visiting the Reservation to present those reports at Tribal Council meetings. R. at 1. In fact, it was the Tribal Council who permitted T. Smith to contract with C. Smith, a licensed stockbroker living in Portland, Oregon. R. at 2. Her contract was identical in terms to T. Smith's 2007 contract with the YIN. R. at 2. C. Smith supplied her advice to T. Smith, who then forwarded her information to the Tribal Council, Captain, and Bluejacket. R. at 2. In addition, C. Smith directly contacted Captain with her

monthly bills for the duration of her seven-year contract, and her payments were issued by the EDC. R. at 2. Her close relationship with the YIN is shown by this abundance of electronic communications and her two visits to the reservation with T. Smith. R. at 2.

The EDC was chartered under the YIN Code in 2009 "to create and assist in the development of successful economic endeavors." R. at 1. The charter also maintains that the Nation's sovereign immunity extends to protect the EDC and its employees as an "arm of the tribe." R. at 1. As a wholly owned corporation, the EDC is overseen by the Tribal Council, as evidenced by the Council's ability to remove EDC directors, comprehensive requirements for board members, tribal hiring and contracting preferences, and regular presentation and approval of financial records. R. at 1, 2. The charter also specifies that the Council will protect the EDC and the Nation from "unconsented litigation." R. at 2.

The YIN Tribal Council enacted an ordinance in 2016 allowing for the legal cultivation and use of marijuana "for any and all purposes." R. at 2. The passage of the tribal ordinance gave the EDC the legal ability to further inquire into the economic development potential of marijuana operations. R. at 2. T. Smith, in an effort to advance his and C. Smith's personal beliefs used the information he gained in his advisory role and informed the Arizona Attorney General of the Nation's activities. R. at 2.

II. Statement of the Proceedings

After receiving a cease and desist letter from the Arizona Attorney General and learning of T. Smith's deceit, the YIN Tribal Council's only recourse was to file suit in YIN court against the Smiths for breach of contract, violation of fiduciary duties, and violation of their duties of confidentiality, seeking liquidated damages. R. at 2, 3.

The Smiths, believing that the YIN court lacked personal and subject matter jurisdiction over them, filed special appearances and identical motions to dismiss the Nation's claims. R. at 3. Alternatively, the Smiths requested that the trial court stay the suit while they sought a jurisdictional ruling in Arizona federal district court. R. at 3. After the YIN trial court denied the Smith's motions, the Smiths filed answers denying all claims and asserted counterclaims for monies due under their contracts and defamation against the YIN. R. at 3. The Smiths also filed a third-party complaint asserting the same claims and impleading the EDC, Captain, and Bluejacket ("third-party defendants") in their official and individual capacities. R. at 3. The YIN trial court dismissed all claims presented against the YIN and the third-party defendants because of sovereign immunity protections. R. at 3.

The Smiths, still unsatisfied, filed an interlocutory appeal in the YIN Supreme Court requesting a decision on trial court's preliminary determinations and an issuance of a writ of mandamus ordering the trial court to stay the suit. R. at 3. The YIN Supreme Court granted the interlocutory appeal, and are now charged with deciding: (1) whether the tribal court has personal and subject matter jurisdiction over the Smiths, or whether it should order the trial court to stay the suit; and (2) whether sovereign immunity, or another form of immunity, protects the YIN and the third-party defendants from suit. R. at 3.

ARGUMENT

I. The EDC, Captain, and Bluejacket were improperly impleaded as third-party defendants.

The Smiths' third-party complaint improperly impleads the EDC, Captain, and Bluejacket as third-party defendants. To successfully implead third-parties, the Smiths' third-party complaint must allege that the third-party defendants are ultimately liable for the claims brought by the original plaintiff, in this case, the YIN. No facts in the record indicate that

such an allegation could be reasonably asserted. The Smiths were employees of the YIN, not the EDC, and the EDC did not agree to indemnify the Smiths from suit by contract or otherwise.

Impleader, or "third party practice," allows a defendant to bring in, through a third-party complaint, third-parties not included in the original action. *See* YIN Code 2-217 ("At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff."); *see also* Fed. R. Civ. P. 14(a)(1). In a third-party complaint, the original defendant becomes the "third-party plaintiff," and the impleaded parties are "third-party defendants." YIN Code 2-217. Because the YIN Code "has rules of procedure very similar to the Federal Rules of Civil Procedure[,]" R. at 3, it is helpful to analyze federal courts' application of Rule 14 in order to understand application of YIN Code 2-217 in a tribal court context.

While federal courts have "liberally construed" Rule 14, "it is not a catchall for independent litigation." *U.S. Fid. & Guar. Co. v. Perkins*, 388 F.2d 771, 773 (10th Cir. 1968). Whether impleader is appropriate depends upon whether the "third-party's liability [is] in some way derivative of the outcome of the main claim." *United States v. Joe Grasso & Sons, Inc.*, 380 F.2d 749, 751 (5th Cir. 1967). An original defendant's "separate and independent" claims cannot be brought in a third-party complaint, even if those claims originate from the same facts as the original plaintiff's claim. *Id.* Third-party actions are permitted only "where the proposed third-party defendant would be secondarily liable to the original defendant in the event the latter is held to be liable to the plaintiff." *Monarch Life*

Ins. Co. v. Donahue, 702 F. Supp. 1195, 1197 (E.D. Pa. 1989) (quoting *Barab v. Menford*, 98 F.R.D. 455, 456 (E.D. Pa. 1983)). Stated differently, the third-party action must be "in the nature of indemnity or contribution." *Howard v. Ward Cty.*, 418 F. Supp. 494, 507 (D.N.D. 1976). For a third-party plaintiff to successfully bring a third-party complaint arguing indemnity, the substantive law underlying the complaint must have an applicable indemnification provision which "transfer[s] to the third-party defendant the liability asserted against him by the original plaintiff." *Monarch Life Ins. Co.*, 702 F. Supp. at 1197. The rule allowing impleader is a procedural one, and does not in itself create a substantive right to indemnification. *See Blunt v. Brown*, 225 F. Supp. 326, 328 (S.D. Iowa 1963).

A. The Smiths have failed to allege that the third-party defendants, the EDC, Captain, or Bluejacket, will be ultimately liable for damages awarded in the YIN's breach of contract claim.

The Smiths' third-party complaint against the EDC, Captain, and Bluejacket is merely an attempt to bring together two separate and independent claims. The YIN's original claims against the Smiths were based solely on the Smith-YIN contracts, and the Smiths' subsequent breach and violations of duties under the contracts. R. at 3. The Smiths, by way of third-party complaint, wish to expand the scope of the YIN's action to include the EDC, CEO Captain, and Accountant Bluejacket. However, these third-party defendants have little to do with the original claims before the Court.

The Smiths' counterclaims against the YIN and third-party complaints against the EDC, Captain, and Bluejacket fail to allege that the third-party defendants are ultimately liable to the YIN for the claims it asserted against the Smiths. R. at 3. Rather, the Smiths' complaint alleges only that the third-party defendants are liable to the Smiths for monies due under their contracts with the YIN and defamation. R. at 3. Even if the Smiths promise to

give the YIN monies they receive from their claims against the third-party defendants, this does not mean that the third-party defendants are liable to the YIN for all or part of the YIN's claims against the Smiths. The Smiths' contracts were with the YIN, not the EDC, Captain, or Bluejacket. R. at 1, 2. Nothing included in the YIN's complaint against the Smiths, or in the Smiths' third-party complaint, suggests otherwise. *See* R. at 3.

Even though the third-party complaint arises out the Smiths' overall relationship with the YIN and its entity, the third-party complaint is not contingent upon the outcome of the YIN's claims against the Smiths, and are therefore separate, independent claims and an improper basis for impleader.

B. The EDC's indemnification provision does not apply to the Smiths.

A proper impleader requires the Smiths to show that, as third-party defendants, the EDC, Captain, and Bluejacket would be liable for all or part of the YIN's claims against the Smiths. The third-party defendants here are not liable for the Smiths' actions, and their impleading in this case was improper. Title 11 of the YIN Code provides the EDC's indemnification ordinance and defines whom the ordinance extends to cover. 11-521. Subdivision 2 of YIN Code 11-521 states that "a corporation shall indemnify a person made or threatened to be made a party to a proceeding by reason of the former or present official capacity of the person[.]" The Smiths were not sued in their official capacities as "employees" of the EDC; rather, they were sued for breach of contract, violation of fiduciary duties, and violation of their duties of confidentiality by the YIN, as employees of the Nation. R. at 3.

Although T. Smith regularly communicated with Captain and Bluejacket, his contract was signed with the YIN two years before the EDC was formed. Further, T. Smith advised

the YIN Tribal Council via written reports each quarter and Council meeting presentations, evidence that T. Smith was an employee of the YIN. R. at 1. T. Smith had to ask and receive permission from the Tribal Council, not the EDC, before entering a contract with his sister, C. Smith. R. at 2. C. Smith was hired by the YIN to advise T. Smith, the EDC, and the YIN on the Nation's financial affairs. R. at 2. Although C. Smith submitted bills to the EDC and its CEO Fred Captain, her advice was received by her brother, for the benefit of the YIN and its entities, including the EDC. R. at 2. Although Subdivision 9 of 11-521 says that the EDC could indemnify by contract, the Smiths' contract was not with the EDC, and this provision does not apply. *See* YIN Code 11-521, Subdivision 9. C. Smith's contract, identical to T. Smith's, was signed with the YIN and makes her relationship with the YIN, and nonexistent employment by the EDC, indistinguishable from that of T. Smith and the YIN. R. at 2. Additionally, none of the facts in the record indicate that Captain or Bluejacket would be liable, in either their official or personal capacities, to the Smiths for the claims asserted by the YIN. *See* R. at 1-3.

Any communication or advising done by the Smiths to the EDC and its employees was within their capacity as YIN economic advisors, not employees of the EDC. The EDC, Captain, and Bluejacket were improperly impleaded as third-party defendants, and the claims against them should be dismissed.

II. The YIN courts have personal and subject matter jurisdiction over Thomas Smith and Carol Smith.

The YIN trial court was correct to deny the Smiths' motions to dismiss for lack of personal and subject matter jurisdiction. Tribal statutes make clear that the contractual nature of the relationship between the parties and the regularity of their communications establishes the minimum contacts necessary for exercise of personal jurisdiction. Application of the

Montana test reveals that subject matter jurisdiction was also proper, due to the consensual, contractual relationship entered into between the Nation and the Smiths.

Further, because the interlocutory appeal has not afforded the trial court an opportunity to develop the record, it would be premature to order the trial court to stay the suit. Allowing the federal court to determine jurisdiction would be in direct contravention of the policy of promoting tribal self-governance; exhaustion of *tribal* remedies prior to review in federal court is crucial. *See Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985).

A. The Smiths have submitted themselves to personal jurisdiction in the YIN courts because the minimum contacts requirement of the long-arm statute is met.

It is apparent from review of applicable YIN ordinances that the Smiths have yielded personal jurisdiction to the Nation's courts. The YIN Code 1-104 provides for personal jurisdiction over "[a]ny person who transacts, conducts, or performs any business or activity within the reservation, either in person or by an agent or representative, for any civil cause of action or contract[.]" Where long-arm jurisdictional statutes are utilized, the due process requirement of the United States Constitution must be satisfied. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985). For personal jurisdiction to be proper, due process of law requires "certain minimum contacts with [the forum] such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington, Office of Unemployment Comp. & Placement*, 66 U.S. 310, 316 (1945).

"[F]air play and substantial justice" has evolved into two types of personal jurisdiction, general and specific. *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014). Specific personal jurisdiction is pertinent when a claim "aris[es] out of or relate[s] to the

defendant's contacts with the forum[.]" *Id.* (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)). A three-factor test has emerged to analyze whether specific personal jurisdiction exists: "(1) the defendant purposefully directed its activities at residents of the forum, (2) the claim arises out of or relates to those activities, and (3) assertion of personal jurisdiction is reasonable and fair." *Autogenomics, Inc. v. Oxford Gene Tech. Ltd.*, 566 F.3d 1012, 1018 (2009). *See also Burger King*, 471 U.S. at 472-73. Below, each of these factors are discussed and applied to the facts at hand.

1. The Smiths' economic advising under their contractual obligations was purposefully directed toward the Nation, the EDC, and the Nation's residents.

The first factor in determining specific personal jurisdiction is satisfied by showing that the non-resident "purposefully directed" his actions to the forum that seeks jurisdiction. *Burger King*, 471 U.S. at 472 (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)). Parties who enter into "interstate contractual obligations… and create continuing relationships and obligations with" an external forum are said to have "purposefully directed" their activities. *Id.* at 473 (citing *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 647 (1950)). This subjects the individual "to regulation and sanctions in the other [forum] for the consequences of their activities." *Id*. Courts have held that the Due Process Clause cannot be used to escape voluntary contractual commitments because public policy mandates that it would be unjust for a party who "purposefully derive[d] benefit" from a contractual agreement with an interstate forum to skirt its responsibility. *Id.* at 473-74 (quoting *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)).

In *Burger King Corporation v. Rudzewicz*, Florida-based corporation, Burger King, used a long-arm statute to successfully assert personal jurisdiction over Michigan-based

Rudzewicz. *Id*. at 464. The defendants, as Burger King franchisees, communicated with corporate headquarters both directly, with monthly payments to headquarters and assistance with essential affairs, and indirectly by way of district offices that relayed day-to-day matters to headquarters. *Id.* at 465-66, 468. The defendants' contracts were governed by Florida law, and while the defendant "did not maintain offices in Florida, and . . . had never even visited there[,]" the suit arose from "a contract which had a *substantial* connection with that State." *Id.* at 479 (emphasis in original) (quoting *McGee*, 355 U.S. at 223). The court made clear that due to modernization, business is inevitably conducted electronically, which "obviat[es] the need for physical presence[.]" *Id.* at 476. These connections established that the defendants' actions were purposefully directed at the forum state. *Id.* at 487.

Much like the defendants in *Burger King*, our facts show that the Smiths' activities were purposefully directed at the YIN. Under their contracts, the Smiths had frequent, sustained communications with the YIN. As economic advisor to the YIN, T. Smith was in near-constant contact via telephone and email with the Tribal Council members and the EDC, and participated in Council meetings throughout their ten-year relationship. R. at 1. C. Smith only physically entered the Nation's land twice; however, she had persistent and regular electronic contacts with the EDC concerning billings and payment spanning their 7-year contractual relationship. R. at 2. C. Smith purposefully provided T. Smith with advice concerning the Nation's economic plans, with knowledge that T. Smith would relay her advice to the YIN. R. at 2. These facts show a strong resemblance between the relationship of the parties in *Burger King* and the connection the Smiths maintained with the YIN.

By entering into interstate contractual obligations with the YIN, and providing economic and financial advice to the YIN for a number of years, the Smiths purposefully directed their actions toward the YIN and its residents.

2. The YIN's claims against the Smiths arise out of and directly relate to the Smiths' advisory role under their contract.

The next factor in determining whether specific personal jurisdiction is proper asks whether the claim arose out of, or is related to, the defendant's contacts with the forum. *Burger King*, 471 U.S. at 472 (citing *Helicopteros*, 466 U.S. at 414). This factor "focus[es] the court's attention on the nexus between a plaintiff's claim and the defendant's contact with the forum." *Baskin-Robbins Franchising LLC v. Alpenrose Dairy, Inc.*, 825 F.3d 28, 35 (1st Cir. 2016) (quoting *Sawtelle v. Farrell*, 70 F.3d 1381, 1389 (1st Cir. 1995)).

In *Hirsch v. Blue Cross, Blue Shield of Kansas City*, the court held that the second specific personal jurisdiction element was satisfied because the plaintiffs' claims arose out of a breach of contract, and the "contract constitute[d] Blue Cross's contacts with California[.]" 800 F.2d 1474, 1480-81 (9th Cir. 1986).

Just as the parties in *Blue Cross*, YIN's claims against the Smiths arise directly from a breach of the contract. The contract itself is enough to establish contact between the parties in satisfaction of the second factor.

3. Through their long-standing relationship with the YIN, the Smiths should have reasonably anticipated that contractual disputes would be litigated in the YIN's courts.

The final factor questions whether the forum's exercise of personal jurisdiction over the defendant was reasonably foreseeable by asking if allowing personal jurisdiction would reasonably "offend traditional notions of fair play and substantial justice." *International Shoe Co.*, 326 U.S. at 316. Courts apply a "reasonableness test" to "give[] a degree of

predictability to the legal system[,]" and to determine whether personal jurisdiction is proper. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 266, 297 (1980). This test is flexible, and courts consider a number of factors, including:

> "[1] the extent of the defendant's purposeful interjection into the forum state's affairs; [2] the burdens on the defendant; [3] the forum State's interest in adjudicating the dispute; [4] the plaintiff's interest in obtaining convenient and effective relief[;] [5] the interstate judicial system's interest in obtaining the most efficient resolution of controversies; [6] the shared interest of the several states in furthering fundamental substantive social policies."

Hirsch, 800 F.2d at 1481. By applying the facts at hand, it is evident that the Smiths should have reasonably foreseen that claims arising from their contract with the YIN would be brought in the YIN trial court.

As to the first factor, to determine if purposeful interjection has occurred courts have considered the wording of a contract, contract negotiations, the expectation of a continuing relationship with the forum and its residents. *Fed. Deposit Ins. Corp. v. British-American Ins. Co., Ltd.*, 828 F.2d 1439, 1443 (9th Cir. 1987). Where the contract is a one-time agreement, or the relationship is "random," fortuitous," or "attenuated[,]" purposeful interjection has not occurred. *Id.* at 1443-44 (citing *Burger King*, 471 U.S. at 486).

The Smith-YIN contracts state that "any and all disputes arising from the contract [are] to be litigated in a court of competent jurisdiction." R. at 1. While the contracts were signed off-reservation, the Nation itself was a party to the contracts. R. at 1. Any person contracting with a tribal nation should reasonably expect disputes arising from that contract to be litigated in that sovereign's court system. This is particularly true for T. Smith, who has had a sustained, substantial relationship with the Nation, and whose contractual relationship included near-daily contact for ten years. R. at 1. C. Smith's seven-year relationship with the Nation consisted of direct communications with both Captain and T. Smith, who, on behalf

of the YIN, acted as intermediary and relayed her advice. R. at 2. The Smiths' interjection into the YIN's economic affairs indicates the YIN court's jurisdiction should have been expected.

Factor two contemplates the burden on the Smiths. "The burden of litigating in a foreign forum has become less significant as a result of advances in communication and transportation." *Fed. Deposit Ins. Corp.*, 828 F.2d at 1444 (citing *Decker Coal Co. v. Commonwealth Edison Co*., 805 F.2d 843, 841 (9th Cir. 1986)). The more contacts the defendant has with the forum, the lower his burden of defending in that forum becomes. *See id.* Both T. Smith and C. Smith have maintained contact with the YIN for several years by technological advancements, including phone and email. R. at 1, 2. These prolonged communications show that there is no burden on the Smiths in submitting to personal jurisdiction in the YIN courts.

The third factor measures the YIN's interest in adjudicating the contractual disputes. Where a forum's law governs a dispute, that forum retains a substantial interest in adjudicating the suit. *Id.* (*see Jacobs/Kahan & Co. v. Marsh*, 740 F.2d 587, 592 (7th Cir. 1984)). YIN Code 1-109 provides that the YIN courts "shall apply the Tribal Constitution, and the provisions of all statutory law hereto or hereafter adopted by the Tribe." The Nation formed the EDC under Title 11 of the YIN Code to "promote the prosperity of the Nation and its citizens." R. at 1. Considering the fact that the YIN Tribal Council is the governing body of the Nation and party to the contract, the YIN has a compelling interest in protecting the YIN's economic integrity. The YIN sought to diversify its economy, and signed contracts with the Smiths to receive economic advice in furtherance of that goal. R. at 1, 2. Were the

YIN courts denied the ability to litigate these types of contractual disputes, it would have significant effects on the Nation's effectiveness in contracting for future business endeavors.

Balancing the fourth factor, the YIN's interest in obtaining convenient and effective relief is significant because the contracts were signed by the YIN, and the Smiths' advice was utilized in the Tribal Council's economic decision-making on behalf of its citizens. *See Hirsch*, 800 F.2d at 1481; R. at 1.

Factor five asks whether the contractual dispute would be most efficiently resolved in the YIN courts. "A court sitting in the district where the injury occurred and where the evidence is located ordinarily will be the most efficient forum." *Decker Coal Co.*, 805 F.2d at 841 (quoting *Olsen by Sheldon v. Gov't of Mexico*, 729 F.2d 641, 650 (9th Cir. 1984)). Here, the EDC was formed and is governed by the YIN's laws, and the Smiths were contracted with by the YIN to provide advice regarding the EDC's activities. R. at 1, 2. Therefore, the contracts are governed by YIN law, obligating the federal court to interpret and apply the YIN's Code. This application of tribal law in federal court would be an inefficient use of judicial resources because the YIN courts are more adept at applying its own laws.

The six factor considers the shared policy interests of the several states. Case law indicates that there is a "well-established federal policy of furthering Indian self-government." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62 (1978) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). This policy is respected by the several states, as evidenced by *Williams v. Lee*, where the Court held that "the question has always been whether the state action infringed upon the right of reservation Indians to make their own laws and be ruled by them." 358 U.S. 217, 220 (1959). While there is no state action at issue

here, the overarching policy in favor of tribal self-governance should be respected and the YIN courts should retain jurisdiction.

These factors, when considered together with the facts and circumstances, show personal jurisdiction is reasonable because the Smiths should have anticipated that disputes arising from their contractual obligations to the YIN would be litigated in the YIN courts.

The minimum contacts required by the Due Process Clause have been established and the YIN court should be able to exercise personal jurisdiction via the YIN's long-arm statute. *See* YIN Code 1-104. In the spirit of "traditional notions of fair play and substantial justice[,]" specific personal jurisdiction exists here. *International Shoe Co.*, 66 U.S. at 316. The Smiths purposefully directed their activities toward the Nation, the breach of contract dispute arose directly out of those activities, and the exercise of personal jurisdiction over them would be reasonable and fair. *See Autogenomics, Inc.*, 566 F.3d at 1018.

B. The YIN courts have subject matter jurisdiction over this dispute.

"Indian tribes retain those fundamental attributes of sovereignty...which have not been divested by Congress[.]" *Water Wheel Camp Recreational Area v. LaRance*, 642 F.3d 802, 811 (9th Cir. 2011) (noting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982)). As "competent law-applying bodies," tribal courts determinations of their own jurisdiction should be afforded "some deference." *Id.* at 808 (citing *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990)). Under the YIN Code, "The Tribal Court may exercise jurisdiction over any person or subject matter on any basis consistent with the Constitution of the Tribe." 2-102. The YIN Code also states that the Nation has "exclusive original jurisdiction in all matters in which the Tribe or its officers or employees are parties in their official capacities[.]" 1-110.

Although federal case law has stated that, generally, tribes do not have subject matter jurisdiction over non-members' activities, those cases are concerned with whether the incidents at issue occurred on tribally-held lands within reservation boundaries. *Montana v. United States*, 450 U.S. 544, 565 (1981). This land-status based distinction has been central to the outcome in a number of cases, and where a tribe attempts to assert subject matter jurisdiction over a nonmember or non-Indian in a claim arising on non-Indian land, the tribe must then show that it meets one of two exceptions under *Montana v. United States*. *Id.* (*see Montana*, 450 U.S. 544 (concerning a tribe's attempt to regulate hunting and fishing of nonmembers on non-Indian land within the reservation boundaries); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (concerning the tribe's civil jurisdiction over a nonmember's claims arising from a car accident on a State highway within reservation boundaries); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) (holding that the tribe lacked jurisdiction because the legal incidence of its hotel occupancy tax fell upon nonmembers on non-Indian fee land); *Water Wheel Camp Recreational Area*, 642 F.3d 802 (upholding tribal court jurisdiction over non-Indians whose actions instigated a breach of a lease of tribal lands occurring within reservation boundaries)).

The YIN does not attempt to assert subject matter jurisdiction over a land-based incident. Rather, their claims against the Smiths arise from a breach of contract with the Nation generally. Therefore, because of the nature of the dispute, the YIN need not show that its relationship with the Smiths meets one of the *Montana* exceptions. However, should the court be tempted to question the YIN's subject matter jurisdiction, the YIN can meet the first *Montana* exception because the obligations created by the Smith-YIN contracts constitute a consensual relationship.

Through their inherent sovereign powers, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. When discerning whether tribal sovereignty extends to nonmember activity, existence of a geographical connection to Indian country is "highly relevant...but not absolute[.]" *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980). Agreeing to tribal subject matter jurisdiction can be found "expressly or by the nonmember's actions." *Water Wheel Camp Recreational Area*, 642 F.3d at 818. A nonmember's commercial dealings with the tribe need not be in the form of a written contract to constitute a consensual relationship. *Id.* However, a "nexus" must exist between the claim at issue and the contractual relationship of the commercial entity and the nonmember. *Dolgencorp, Inc. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 175 (5th Cir. 2014) (*aff'd by an equally divided Ct.*, 136 S. Ct. 2159 (2016)).

In *Dolgencorp,* a non-Indian corporation, Dollar General, entered a lease agreement with the tribe to operate its business within reservation boundaries. *Id.* at 169. A business employee, "in his capacity as manager of the store" agreed to participate in the tribe's youth job training program, from which a tort action against the company and manager arose. *Id.* The corporation unsuccessfully argued that the first *Montana* exception could not be satisfied because of a lack of a consensual relationship between itself and the tribe. *Id.* at 173. The court found that a logical nexus existed through a series of connections, starting from the business lease with the tribe, to placement of the manager there, then to the manager's agreement to participate in the tribal job program, and finally to the tortious conduct claimed. *Id.* at 173-74. The court disagreed with Dollar General's insistence that the first *Montana*

exception should be narrowly applied, and held that a requirement of showing a specific relationship that "intrude[s] on the internal relations of the tribe[,]" would render the first exception futile in "a single employment relationship[.]" *Id.* at 175 (quoting *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*, 554 U.S. 316, 335 (2008)).

Here, the Smiths' voluntarily agreement to the terms of their contracts with the YIN is an express acquiescence to the subject matter jurisdiction of the YIN courts. R. at 1, 2. The Smiths have further consented to tribal subject matter jurisdiction impliedly by their continuous and frequent contact with the Nation over a number of years, and the routine acceptance of payment from the YIN, via the EDC, in exchange for services rendered. R. at 1, 2. Even on the occasions where the Smiths were not physically within reservation boundaries when they gave advice, their recommendations on tribal economic matters were received within the Nation's geographic boundaries and were used by Tribal officials in their economic decision-making for the Nation. Just as the court in *Dolgencorp* found a consensual relationship to exist, the same reasoning applied to the facts at hand will generate a similar finding. The necessary nexus here is simple: the Smiths entered into a contract with the YIN to provide economic advice, and later breached that contract. R. at 1, 2. Upon creation of the wholly owned EDC, the Smiths' advice was primarily directed to the commercial operations of that corporation, providing an even stronger link from the Smiths relationship with the YIN to the claims at issue. R. at 1, 2. Because the advice given by the Smiths was directed at the Nation and its citizens' present and future finances, the Smiths' activities directly intruded into the internal relations of the YIN.

The YIN courts may exercise subject matter jurisdiction over this claim because of the Nation's inherent sovereignty and its decision to structure its tribal code to include

jurisdiction over any person or subject matter, on any basis, consistent with the Nation's laws. In addition, the YIN courts meet the first *Montana* exception and therefore retain subject matter jurisdiction over the Smiths, because a consensual relationship was created with the Nation as a result of their employment contracts.

C. The suit should not be stayed by writ of mandamus, and the Smiths should exhaust all tribal remedies.

1. Issuance of a writ of mandamus is inappropriate because the YIN trial court acted within its discretion when it determined that jurisdiction over the Smiths was proper.

Writs of mandamus are an "extraordinary remedy[,]" and are reserved for "exceptional circumstances[.]" *LaBuy v. Howes*, 352 U.S. 249, 256 (1957). The YIN Code 2-1502 states that writ of mandamus "may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law." *See also Marbury v. Madison*, 5 U.S. 137, 147 (1803) (holding that where "another *adequate, specific, legal remedy*" exists, a writ of mandamus should not be used) (emphasis in original)). A writ of mandamus is only to be applied when a statute mandates a judge or officer to perform in a certain way on the issues before them, and that judge or officer disregards that mandate. *United States ex rel. Girard Tr. Co. v. Helvering*, 301 U.S. 540, 542-43 (1937). Conversely, where a judge has discretion, and exercises it, their decision-making is "impregnable to mandamus." *United States ex rel. Alaska Smokeless Coal Co. v. Lane*, 250 U.S. 549, 555 (1919) (*see also Helvering*, 301 U.S. at 542-43).

The U.S. Supreme Court has developed a three-part test to determine whether a writ of mandamus should be issued: (1) "the party seeking issuance of the writ must have no other adequate means to attain the relief he desires[;]" (2) "the petitioner must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable[;]" and (3) "even if the

first two prerequisites are met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Cheney v. United States District Court for District of Columbia*, 542 U.S. 367, 380-81 (2004) (internal citations omitted). The first condition is in place to protect against the use of the writ as an alternative to the appeals process. *Id.*

A writ of mandamus in this case is not appropriate because the three necessary conditions have not been fulfilled. First, when the YIN trial court ruled that jurisdiction over the Smiths was proper, the Smiths were not deprived of "another adequate...legal remedy[,]" as evidenced by the present interlocutory appeal to the YIN Supreme Court. *Marbury*, 5 U.S. at 147. The Smiths' request for a writ of mandamus to stay the suit, so that they may seek a federal court ruling, is a veiled attempt to circumvent the tribal appeals process. Next, the need for issuance of the writ is not "clear and indisputable" because the YIN trial court did not act in opposition to a statutory mandate. *Cheney*, 542 U.S. at 381. Rather, the trial court acted within its discretion to exercise "general civil jurisdiction over all civil actions" when it denied the Smiths' motions to dismiss. YIN Code 1-110. Finally, as to the third factor, the issuance of this "extraordinary remedy" is inappropriate in commonplace jurisdictional questions and contractual disputes.

2. To protect the integrity of the YIN courts, the Smiths should exhaust all tribal court remedies and allow the Nation's courts to develop an adequate record.

Federal policies of "deference to tribal courts" and "promoting tribal self-government" should be considered when determining whether tribal court jurisdiction is appropriate. *Water Wheel Camp Recreational Area*, 642 F.3d at 808 (quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16-17 (1987)). These policies further the growth of tribal trial

and appellate court systems. *See id*. To avoid a "procedural nightmare" and further federal policies, exhaustion of tribal remedies is appropriate where a tribal forum's jurisdiction is challenged. *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985). Further, developing a "full record" in tribal court assists a federal court if it later analyzes the issues and ruling on appeal. *Id.*

Deference should be afforded to the YIN court's determination that jurisdiction over the Smiths was proper. The interlocutory appeal has deprived the trial court a chance to develop a full and helpful record, and it should be given the opportunity to do so. Should the writ be issued and the suit stayed, the Smiths would not have exhausted all their tribal remedies.

In light of the Smiths' inability to fulfill the requisite conditions necessary for a writ of mandamus, the claims should be adjudicated fully in all levels of the YIN courts.

III. Immunities protect the YIN and all impleaded third parties.

The YIN trial court was correct to dismiss the Smiths' counterclaims against the YIN and third-party complaint against the EDC, Captain, and Bluejacket because each is entitled to immunity from suit. Sovereign immunity is one of the attributes of a tribe's inherent sovereign powers. Case law indicates that tribes may only waive sovereign immunity expressly, and because the YIN has not made such an expression, it retains its inherent sovereign immunity protections. The EDC, a wholly owned corporation of the YIN, was formed to strengthen the YIN's economic welfare. The YIN's immunity thus extends to cover the EDC, as it operates as an arm of the tribe. As employees of the EDC, both Captain and Bluejacket are shielded by sovereign immunity from suit in their official capacities, because each was acting within the scope of their employment when dealing with the Smiths.

Qualified immunity protects Captain and Bluejacket from the Smiths' claims against them in their personal capacities, because all interactions Captain and Bluejacket had with the Smiths were done in good faith as employees of the EDC. The Smiths' claims against them are merely asserted because of Captain and Bluejacket's official association with the EDC, and not because of any behavior of Captain or Bluejacket.

A. Sovereign Immunity shields the YIN, the EDC, Captain, and Bluejacket against suit.

1. As a sovereign nation with inherent sovereign powers, the YIN is immune from suit.

"Indian tribes are generally immune from suit." *Lewis v. Clarke*, 137 S. Ct. 1285, 1288 (2017). This is "settled law[.]" *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998). Tribes' status as "distinct political communit[ies]," with their own governments and laws, means that they cannot be subjected to any court's jurisdiction. *United States v. Turner*, 248 U.S. 354, 357-58 (1919). Unlike the immunity enjoyed by the federal government and states, tribal immunity is derived from federal common law, and "is a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986). "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." *Kiowa Tribe of Oklahoma*, 523 U.S. at 760.

The YIN has several provisions in its Code that assert the Nation's immunity from suit. The YIN Code 1-919 concerns "[a]ctions by or against [the Nation]" and declares that the Nation "shall be immune from suit in any civil actions[.]" While the YIN Code 2-106

states that "[n]othing in [the Code] shall be construed to be a waiver of the sovereign immunity of the Tribe...beyond the limits...specifically stated by Tribal law."

a. The "competent jurisdiction" provision in the contract between the Smiths and the YIN is not an express waiver of sovereign immunity.

Waiver of a tribe's sovereign immunity can only occur where the tribe has "unequivocally expressed" intent to do so, *Kiowa Tribe of Oklahoma*, 523 U.S. at 760, or where "Congress has authorized the suit[.]" *Id*. at 754. A tribal nation cannot impliedly waive its immunity. *Santa Clara Pueblo*, 436 U.S. at 58-59 (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)). "There can be no waiver of tribal immunity based on policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case[.]" *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1295 (10th Cir. 2008) (quoting *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989)).

In *Nanomantube v. Kickapoo Tribe*, the plaintiff singled-out one sentence of an employee handbook and argued that it constituted a waiver of immunity. 631 F.3d 1150, 1152 (10th Cir. 2011). The court disagreed, and held that the provision "in no way constitute[d] an express and unequivocal waiver of sovereign immunity[.]" *Id.* at 1153 (quoting *Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282, 1289 (11th Cir. 2001)). Similarly, in *Allen v. Gold Country Casino*, the plaintiff argued that inclusion of two phrases in employee documents was an express waiver of tribal immunity. 464 F.3d 1044, 1047 (9th Cir. 2006). The first was an equal opportunity provision mentioning "applicable federal laws." *Id.* The other was a clause allowing for employee termination "for any reason consistent with applicable state or federal law[.]" *Id.* The court held that "[a]t most [these

provisions] might *imply* a willingness to submit to federal lawsuits, but waivers of tribal sovereign immunity may not be *implied*." *Id.* (emphasis added).

The facts surrounding the Smith-YIN contract are comparable to the facts of *Nanomantube* and *Allen*. Here, the contract contains a solitary, ambiguous sentence stating that "disputes arising from the contract [are] to be litigated in a court of competent jurisdiction[,]" which says nothing that could be construed to signal an express waiver. R. at 1. Like the phrase in *Allen*, even a generous reading of the "competent jurisdiction" provision would merely imply openness to the possibility of suit. This implication falls short of the requirement for an express, unequivocal waiver of the YIN's sovereign immunity.

In contrast, the Court in *C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma* found an express waiver of immunity in a contract between a tribe and a non-Indian company. 532 U.S. 411, 423 (2001). There, the contract included a choice-of-law provision selecting Oklahoma state law, a binding arbitration clause, as well as a clause providing that the arbitration proceedings be governed by American Arbitration Association Rules. *Id.* at 418-19. While the arbitration clause ambiguously mandated that the award be enforced "in any court having jurisdiction thereof," the Court held that this phrase, in conjunction with the explicit Oklahoma choice-of-law provision was a clear acceptance of Oklahoma jurisdiction over the suit and waiver of sovereign immunity. *Id.* at 419.

The facts of *C & L Enterprises* are distinguishable from the facts in the present suit. While there the case turned on the coinciding provisions of choice-of-law, assigning Oklahoma state law, and the binding arbitration clause, the Smith-YIN contracts contained no such corresponding provisions. R. at 1. The Smith-YIN contracts included no choice-of-law provision. R. at 1. Unlike the binding arbitration clause at issue in *C & L Enterprises*, the

Smith-YIN contracts included only a "competent jurisdiction" provision for potential disputes. R. at 1. While the arbitration clause mandated resolution of contractual disputes, the phrase in the Smith-YIN contracts orders no such resolution, but merely provides for its possibility. R. at 1.This can hardly be considered an express waiver of the YIN's sovereign immunity.

b. The YIN did not waive its sovereign immunity against the Smiths' underlying counterclaims by initiating the action for breach of contract.

Courts have "held 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." *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) (citing *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 511-12 (1940)). Under the YIN Code 2-214(1), compulsory counterclaims must be stated in the pleading "if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim[.]" "Possessing … immunity from direct suit, we are of the opinion [that Indian nations] possess a similar immunity from cross-suits." *Id.* at 509 (quoting *U.S. Fid. & Guar. Co.*, 309 U.S. at 513). The YIN Code 2-212(1) concerns the presentation of defenses in suits, and categorizes sovereign immunity as a defense to subject matter jurisdiction. "Once challenged, the party asserting subject matter jurisdiction has the burden of proving its existence." *Miller v. Wright*, 705 F.3d 919, 923 (9th Cir. 2013) (quoting *Robinson v. United States*, 586 F.3d 683, 685 (9th Cir. 2009)).

In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, a tribe filed suit in federal court for an injunction against a state agency over a tax

levied against cigarette sales on tribal trust land, and the state in turn filed a compulsory counterclaim. 498 U.S. at 507-08, 509. The state argued that the tribe waived its sovereign immunity to the counterclaims when it initiated suit, and that due to the "compulsory" nature of its counterclaim, it should not have to provide the federal court with a "jurisdictional basis to hear [its] claims." *Id*. The court, disregarding this argument, held that a tribe cannot be subject to further litigation simply by commencing suit. *Id.* at 509-10.

In no way does the YIN's initiation of a claim in the YIN courts remove the Nation's inherent immunity. Just like the state's action in *Oklahoma Tax Commission*, the Smiths' counterclaims are compulsory because they "arise[] out of the transaction or occurrence that is the subject matter of the [YIN's] claim." YIN Code 2-214(1). The Nation has expressly asserted its immunity via the YIN Code. 1-919 ("[T]he Tribe shall be immune from suit in any civil actions."). The Smiths' counterclaim will fail because they are unable to establish that the tribe has expressly waived its immunity, so they cannot establish subject matter jurisdiction..

The phrase concerning "competent jurisdiction" in the Smith-YIN contracts is not an express waiver of the Nation's sovereign immunity. R. at 1. Additionally, the YIN's filing of suit does not serve as a waiver of immunity, so the Smiths' counterclaims for damages and defamation are barred. R. at 3.

2. Sovereign immunity extends to protect the EDC, an "arm of the tribe."

The federal policies of tribal self-determination and self-governance are furthered when a tribe is economically "self-sufficient[.]" *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030, 2043 (2014). This objective is attained when tribes can finance their own essential governmental functions, without dependence upon federal support. *See id.* "[T]ribal

business operations are critical to the goals of tribal self-sufficiency because such enterprises in some cases may be the only means by which a tribe can raise revenues." *Id.* (quoting Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 Ariz. St. L. J. 137, 169 (2004)). The inherent sovereignty of Indian tribes is of a "special brand[,]" *Id.* at 2037, and it is for Congress alone "to create an exception to tribal immunity for off-reservation commercial activity." *Id.* at 2039. The YIN Code provides for extension of its sovereign immunity to entities formed under Title 11. In YIN Code 11-081, the Nation makes clear that neither the adoption of the Code nor the formation of a corporation under that Code, amounts to a waiver of sovereign immunity. Further, the Nation clearly extended its immunity to "all Tribal corporations wholly owned, directly or indirectly, by the Tribe." YIN Code 11-1003.

a. The EDC, as an arm of the tribe, is protected by the YIN's sovereign immunity.

"Tribal sovereign immunity may extend to subdivisions of a tribe, including those engaged in economic activities, provided that the relationship between the tribe and the entity is sufficiently close to properly permit the entity to share in the tribe's immunity." *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1183 (10th Cir. 2010). The tribe's immunity is extended to business entities classified as "an arm of the tribe[.]" *Allen*, 464 F.3d at 1046. Courts have used these factors to determine if a tribal business operates as an arm of the tribe:

> "(1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe's intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entities."

Breakthrough Mgmt. Grp., Inc., 629 F.3d at 1187.

First, creation of an entity under tribal law supports "the conclusion that the entity was created by the Tribe acting in its governmental...capacity." *Id.* at 1191 (quoting *Native Am. Distrib.*, 546 F.3d at 1294). "[T]he Tribe's own descriptions of the [entity is] significant." *Id*. at 1191-92. "[C]ategorization of the [entity] as a wholly owned...enterprise of the Tribe naturally suggests that the [entity] enjoys a close relationship to the Tribe." *Id.* at 1192. Here the EDC was created under tribal law "to promote the prosperity of the Nation and its citizens." R. at 1. The EDC was established under the YIN Code, and classified as a "wholly owned subsidiary" and "arm of the tribe," clearly indicating that the Nation acted in its governmental capacity when it organized the EDC. R. at 1. The facts indicate the creation of the EDC was done in the Nation's governmental capacity.

"The second factor … weighs strongly in favor of immunity [when the entity is] created for the financial benefit of the Tribe and [is] enable[d] to engage in various governmental functions." *Breakthrough Mgmt. Grp., Inc.*, 629 F.3d at 1192. Where tribal law provides for direct "allocation of [the entity's] revenue" to the tribe, the entity was formed with the purpose of being an arm of the tribe. *Id*. The corporate charter of the EDC states that its primary purpose is "to create and assist in the development of successful economic endeavors[.]" R. at 1. This is a clear indication of an intention to further the financial standing of the YIN through the EDC. The EDC takes part in governmental functions by its ability to buy and sell real property, and the YIN decrees through the EDC corporate charter a hiring and contracting preference of tribal members and businesses, which aligns with the YIN's desire for economic prosperity. R. at 1, 2. Additionally, the EDC is required to pay 50% of its net profits to the YIN general fund each year. R. at 2. The facts indicate that the purpose of the EDC was to provide for the YIN and its citizens.

Third, to determine whether the tribe controls the structure, ownership, and management of an entity, courts have accepted various characteristics. The YIN controls the inner-workings of the EDC by requiring it to provide jobs and contractual opportunities for the citizens of the Nation, and "to keep detailed corporate and financial records and submit them on a quarterly basis to the Tribal Council for review and approval." R. at 2. *See Allen*, 464 F.3d at 1046 (holding that the tribal entity was more than a "mere revenue-producing tribal business" because of the tribe's oversight, and approval of the entity's creation by tribal government was required at multiple levels). Additionally, the EDC employs twenty-five tribal citizens including Captain and Bluejacket, and as required by the corporate charter, the majority of the EDC's board of directors must be tribal members. R. at 2. *See Breakthrough Mgmt. Grp., Inc. Mgmt. Grp., Inc*, 629 F.3d at 1193 (considering whether the directors and officers of its entities were tribal members). Another example of the YIN's oversight of the EDC includes the power of the Tribal Council to "remove any director for cause, or for no cause, at any time, by a 75% vote." R. at 1. *See J.L. Ward Assocs., Inc. v. Great Plains Tribal Chairmen's Health Bd.*, 842 F. Supp. 2d 1163, 1176 (D.S.D. 2012) (concerning whether the entity's directors could be held accountable by the tribe, and whether the entity and the tribe were "closely linked in terms of management and composition"). These examples, taken together, show that the structure of the EDC and the ownership and management by the YIN was intentional to create an arm of the tribe.

Fourth, the Nation's intention to extend its immunity to the EDC is apparent from the EDC corporate charter and the YIN Code. The YIN Code confers "[t]he sovereign immunity of the Tribe . . . on all Tribal Corporations wholly owned, directly or indirectly, by the Tribe." 11-1003, Subdivision 3. The EDC charter, in an effort "to protect the entity and the

Nation from unconsented litigation and to assist in the success of the EDC's endeavors[,]" "mandates . . . that the EDC, its board, and all employees are protected by tribal sovereign immunity to the fullest extent of the law." R. at 2. These statements display the YIN's explicit desire to extent its immunity to the EDC.

Fifth and finally, guarding "the sovereign Tribe's treasury . . . is one of the historic purposes of sovereign immunity[,]" and the treasury is preserved when immunity assertions by arms of the tribe are respected. *Allen*, 464 F.3d at 1047. "[T]he financial relationship between a tribe and its economic entities is a relevant measure of the closeness of their relationship[.]" *Breakthrough Mgmt. Grp., Inc.*, 629 F.3d at 1187. For example, in *Breakthrough Management Group, Inc. v. Chukansi Gold Casino and Resort*, the Tribe "depend[ed] heavily" on the revenue generated by its entity "to fund its governmental functions, its support of tribal members, and its search for other economic development opportunities[,]" and any judgment against the entity "would therefore reduce the Tribe's income." *Id.* at 1195. The same is true here. While "no debts of the EDC [can] encumber . . . the assets of the Nation[,]" and the EDC cannot "borrow or lend money in the [Nation's] name[,]" the EDC is still required to share "fifty percent of [its] net profits" with the Nation. R. at 2. Upon formation of the EDC, the YIN provided a $10 million loan "from the Nation's general fund[,]" of which only $2 million has been repaid. R. at 1, 2. Any adverse judgment against the EDC would impede repayment of that loan, and cause detriment to the Nation's treasury, and ultimately, its citizens. R. at 1.

The foregoing application shows that the EDC operates as an arm of the YIN, and is therefore protected by its sovereign immunity.

b. The inclusion of a clause in the YIN Code permitting the EDC to sue others, and authorizing it to consent to be sued, does not constitute a waiver of the EDC's or the YIN's sovereign immunity.

YIN Code 11-1003 is specifically applicable to wholly owned corporations of the Nation, and provides that "[a] corporation wholly owned, directly or indirectly, by the Tribe shall have the power to sue and is authorized to consent to be sued in the Court, and in all other courts of competent jurisdiction[.]" In order for the EDC's consent to be "effective" it must be "*explicit*, contained in a *written contract* or commercial document *to which the corporation is a party*, and specifically *approved* by the board of directors of the corporation[.]" YIN Code 11-1003 (emphasis added). Under YIN Code 11-061, "[s]ections 11-1001 through 11-1091" apply to all wholly owned tribal corporations, and "shall override any other provisions in this Code to the contrary." Therefore, YIN Code 11-1003, requiring explicit, written consent to suit by the corporation, overrides Subdivision 3 of YIN Code 11-161, which simply states that "[a] corporation may sue and be sued[.]"

In *Ninigret Development Corporation v. Narragansett Indian Wetuomuck Housing Authority*, enactment of a tribal ordinance containing a sue and be sued clause and allowing the tribal entity to waive its immunity "by contract" was not an express waiver. 207 F.3d 21, 30 (1st Cir. 2000). Had the sue and be sued clause waived immunity, the phrase "by contract" would have been "utter surplusage[.]" *Id.* at 30. Absent a "compelling reason," "[s]tatutes and ordinances normally should be read to give effect to every word and phrase[.]" *Id.* Additionally, *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.* held that a sue and be sued clause is insufficient to constitute waiver when the entity's ability to consent to suit is limited, as in this case where the entity could consent only upon "written resolution of the board of directors[.]" 585 F.3d 917, 921-22 (6th Cir. 2009). In *Ramey*

Construction Company, Inc. v. Apache Tribe of Mescalero Reservation, Ramey brought suit against the Mescalero Apache Tribe and the tribal corporate entity, which had a "sue and be sued clause in its tribal corporate charter." 673 F.2d 315, 319 (10th Cir. 1982). Because Ramey's dealings were confined to the tribe and not its corporate entity, the court found that the sue and be sued clause did not affect the tribe's immunity. *Id.* at 320.

The YIN Code 11-1003 authorizes the EDC to be sued "by consent[.]" Consent must be given in a "written contract . . . to which the corporation is a party[,]" and "specifically approved by the board of directors[.]" YIN Code 11-1003. None of these requirements were met in the Smith-YIN contracts. First, like the ordinance in *Ninigret*, the phrase "by consent" in the YIN Code is not superfluous and should not be disregarded. Next, like the phrase in *Memphis Biofuels*, YIN Code 11-1003's requirement for board approval limits the EDC's ability to waive its immunity, and this limitation cannot be read as a broad immunity waiver. Finally, similar to *Ramey*, T. Smith's contract was signed with the YIN Tribal Council, and not the EDC, a full two years before the EDC was formed. R. at 1. While C. Smith's contract was signed after the EDC's formation, her contract was merely an extension of her brother's because it contained identical terms and a clause binding her to the original. R. at 2. Neither contract meets the requirements of YIN Code 11-1003, because each was signed with the YIN, and not with the EDC. R. at 1, 2. The "sue and consent to be sued" clause was created to be applicable only to the EDC and cannot be extended to waive the YIN's immunity.

By forming the EDC under the YIN Code for the purpose of developing the Nation's economy, structuring the EDC to allow for close oversight, expressly extending the YIN's immunity to the EDC, and tying the YIN's economic success to the success of the EDC, the YIN insured that the EDC would be viewed as an arm of the tribe. As such, the YIN's

sovereign immunity should extend to protect the EDC, and is not waived by the inclusion of a "sue and consent to be sued" clause in the YIN Code.

3. Sovereign immunity protects both Captain and Bluejacket from the Smiths' official-capacity claims.

"It is clear that a plaintiff generally may not avoid the operation of tribal immunity by suing tribal officials; the interest in preserving the inherent right of self-government in Indian tribes is equally strong when suit is brought against individual officers of the tribal organization as when brought against the tribe itself." *Native Am. Distrib.*, 546 F.3d at 1296 (quoting *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1497, 1462 (10th Cir. 1989)). As such, in official-capacity claims, the immunity of the tribe extends to tribal officials "acting in their representative capacity and within the scope of their authority." *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985). While officials may be subject to "individual-capacity suits *arising out of* actions they took in their official capacities[,]" suits brought against tribal officials "*because of* their official capacities" are barred by sovereign immunity. *Id.* (emphasis in original). The type of relief sought in the plaintiff's complaint helps a court discern "whether the sovereign is the real, substantial party in interest." *Id.* at 1296-97 (quoting *Frazier v. Simmons*, 254 F.3d 1247, 1253 (10th Cir. 2001)).

The YIN Code specifically provides that the Nation's immunity extends to protect tribal officers and employees. *See* 2-106 ("Nothing in this Act shall be construed to be a waiver of the immunity of the Tribe, its officers, [or] employees[.]"); 1-919 ("Unless specifically waived . . . the [Tribe's] . . . officers and employees shall be immune from suit for any liability arising from the performance of their official duties.").

The policy of tribal self-government is served by the extension of sovereign immunity to Captain and Bluejacket against the Smiths' claims because the YIN is the real party in

interest. Captain and Bluejacket were acting within the scope of their authority as employees of the EDC by communicating with T. Smith and handling C. Smith's billing and payments, and as such are protected by the YIN's sovereign immunity. R. at 1, 2. Neither Captain nor Bluejacket were parties to the Smith-YIN contracts, so the Smiths' suit for monies owed under said contract could hardly arise out of actions either Captain or Bluejacket took in their official capacities. R. at 1, 2. Therefore, neither can be held liable for claims arising from that contract. Further, no facts show that Captain or Bluejacket used their representative capacities in a way that would make them answerable to the Smiths' defamation suit. R. at 3.

The Smiths' claims against Captain and Bluejacket in their official capacities are clearly an attempt to reach the sovereign they represent.

B. Qualified immunity protects EDC CEO Captain, and EDC employee Bluejacket from personal liability for actions taken in their official capacities.

The policy behind allowing government officials to assert a qualified immunity defense is to protect those employees from "insubstantial claims[,]" *Harlow v. Fitzgerald*, 456 U.S. 800, 813 (1982), and "undue interference with their duties and from potentially disabling threats of liability." *Id*. at 806. However, this policy is balanced against "the need to hold public officials accountable." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). This "good faith" defense asks whether the individual capacity suit against an official arose from actions taken within the scope of official authority. *Id.* at 815; *see Burrell v. Armijo*, 603 F.3d 825, 832 (10th Cir. 2010). Federal courts have established a two-part test that looks at the "objective" and "subjective" good faith of the official. *Harlow*, 457 U.S. at 815. The objective contemplates whether the "official *knew or reasonably should have known*" their actions would violate the law. *Id.* (emphasis in original) (quoting *Wood v. Strickland*, 420

U.S. 308, 322 (1975). The subjective asks whether the official acted "*with the malicious intention*" to cause the plaintiff injury. *Id.* (emphasis in original). In order to overcome a qualified immunity defense, the plaintiff must "clearly establish[]" that the official acted unlawfully. *Pearson*, 555 U.S. at 245.

Viewing their actions objectively, both Captain and Bluejacket had no reason to think that any action performed in their official capacities would violate the law. There are no facts to show that Captain or Bluejacket performed any action in their roles as EDC employees to impugn the Smiths' professional skills. *See* R. at 1-3. Neither were party to the Smith-YIN contracts, nor did they bring the original suit for breach of contract and violation of duties against the Smiths. R. at 1-3. Viewed subjectively, there is no evidence that Captain or Bluejacket acted with any malicious intent to injure the Smiths. All communications from Captain and Bluejacket to the Smiths were made in good faith in their official capacities as employees and representatives of the EDC. The Smiths have produced no evidence to show that Captain's or Bluejacket's actions were illegal or outside of the scope of their authorities.

EDC employees Captain and Bluejacket are protected by qualified immunity from the Smiths' personal-capacity claims. Those claims are unsubstantiated; therefore, Captain and Bluejacket should not be subjected to the lengthy and expensive burdens of trial.

CONCLUSION

For the foregoing reasons, the court should find that the third-party defendants are improperly impleaded, the YIN does not have jurisdiction, and that all parties are immune from suit. Further, the court should not grant a writ of mandamus staying the suit.