No. 17-024

IN THE

Yuma Indian Nation Supreme Court

THOMAS SMITH AND CAROL SMITH,
Petitioners,

v.

YUMA INDIAN NATION,
Respondents.

ON INTERLOCUTORY APPEAL
FROM THE YUMA INDIAN NATION
TRIAL COURT

BRIEF FOR RESPONDANTS

TEAM NO. 149
Counsel of Record

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QUESTIONS PRESENTED

1) Whether the trial court has the authority to determine jurisdiction over the Appellants in the first instance when Appellants seek a declaratory judgement the Arizona federal district court.

2) Whether the Yuma Indian Nation courts have personal and subject matter jurisdiction over a civil dispute arising from a consensual contractual relationship between the Appellants and the Yuma Indian Nation.

3) Whether the inherent sovereign immunity of the Yuma Indian Nation extends to the YIN Economic Development Corporation and its CEO and accountant and has not been unambiguously waived.

STATEMENT OF THE CASE

Statement of the Facts. The Yuma Indian Nation ("YIN") is one the hundreds of federally recognized Indian tribes in the United States of America. R. at 1. The YIN, like the other tribes across the country, seeks to provide for its members the governmental services and environment necessary for a happy, prosperous, and stable life. R. at 1. One aspect of this pursuit for the YIN, like most tribes, is economic development and security for the tribe. R. at 1.

In pursuit of economic security and growth, the YIN retained Thomas Smith, a certified financial planner and accountant, to provide the tribe with financial advice regarding economic development issues as they arose. R. at 1. The contract, signed in 2007, between Thomas Smith and the YIN for Thomas Smith's services required Thomas to maintain absolute confidentiality regarding tribal economic development plans. R. at 1. Additionally, the contract contains a clause providing that all disputes arising from the contract are to be litigated in a court of competent jurisdiction. R. at 1.

In 2009, the YIN decided that having a separate organization devoted entirely to economic development would be best to "promote the prosperity of the tribe and its citizens," thus creating and assisting "in the development of successful economic endeavors, of any legal type of business, on the reservation and in southwest Arizona." R. at 1. So, the YIN chartered the YIN Economic Development Corporation ("EDC") under a tribal commercial code. R. at 1. The EDC was funded by the YIN Tribal Council with a one-time $10 million loan from the YIN's treasury. R. at 1-2. In turn, fifty percent of all EDC net profits are paid to the YIN treasury on an annual basis to aid in the EDC's mission of tribal economic growth. R. at 2.

The EDC was created, according to its charter, as a wholly owned subsidiary of the YIN and as an arm of the tribe. R. at 1. Additionally, the EDC is authorized to buy and sell real property, both on and off reservation, buy other types of property, and to sue and be sued. R. at 2. But, the EDC is not permitted to encumber the YIN with any sort of debt, borrow and lend money on behalf of the YIN, or permit liens to be attached on YIN assets. R. at 2.

The EDC is operated by its own board of directors, consisting of five directors who are required to be experienced in business endeavors and three of the five must be YIN tribal members. R. at 1. While the board of directors self-selects its membership (following the first board that was entirely appointed by the YIN Tribal Council), the Tribal Council has the absolute and exclusive authority to remove any director—with or without cause by a 75% vote. R. at 1. The charter of the EDC also mandates that the board of directors, the EDC itself, and all employees of the EDC are protected by tribal sovereign immunity. R. at 2. Further, the EDC charter requires the EDC to apply tribal hiring preferences for hiring employees and contracting with outside entities. R. at 2.

Following the creation of the EDC, Thomas Smith transitioned from daily contact with the tribal leadership regarding economic development to daily contact with the EDC for the same purpose. R. at 1. Then, in 2010, with the explicit permission from the YIN's Tribal Council, Thomas Smith retained his sister Carol Smith, a licensed stockbroker, to provide advice regarding stocks, bonds, and securities for the YIN's economic development through the EDC. R. at 2. The contract between Carol Smith and the YIN was identical to the one between Thomas Smith and the YIN. R. at 2. Carol Smith provided all her advice to Thomas Smith who then used that advice to provide further financial advice to the EDC. R. at 2. Carol

Smith's payments under the contract were handled by the EDC. R. at 2. Also, Thomas Smith and Carol Smith (collectively the "Appellants") have visited the reservation on at least two occasions regarding their services for the YIN in addition to their frequent email and telephone communication with the EDC and the YIN. R. at 2.

In 2016, the EDC began exploring economic opportunities related to the marijuana industry. R. at 2. While medical marijuana is legal under Arizona state law, recreational use is still illegal. R. at 2. However, the EDC felt that the YIN as a sovereign Indian tribe might benefit from economic development in this up-and-coming industry and began investigating development of a recreational marijuana operation. R. at 2. But, unbeknownst to the YIN or the EDC, the Appellants had personal moral objections to marijuana business exploration and were personally opposed to providing their contracted-for services in furtherance of this particular economic venture. R. at 2. Acting on these personal feelings regarding the EDC's business ventures and in direct violation of confidentiality agreement, Thomas Smith informed the Arizona Attorney General of the EDC's private business plans. R. at 2. In response, the Arizona Attorney General wrote the YIN and the EDC a cease and desist letter regarding the development of marijuana business operations. R. at 2. This suit arises from this incident. R. at 3.

Statement of the Proceedings. Following the Appellants' decision actively to violate the confidences of the YIN, the YIN brought suit in the YIN's tribal court against the Appellants for breach of contract, violation of fiduciary duties, and violation of duties of confidentiality. R. at 3. The YIN sought recovery of the liquidated damages set out in the

contract signed by Thomas Smith and the identical contract signed by Carol Smith (collectively the "Contracts"). R. at 3.

The Appellants responded by filling special appearances with the trial court as well as motions to dismiss the YIN's suit for lack of personal and subject matter jurisdiction. R. at 3. The Appellants also argued that as an alternative to a ruling by the trial court about jurisdiction, the trial court proceedings should be stayed while the Appellants pursue a federal court determination regarding the trial court's jurisdiction over them. R. at 3. Both the proposed stay and the motion to dismiss were denied by the trial court. R. at 3.

The Appellants, still claiming to be filing under special appearances, then answered the YIN's initial complaint and put forth several counterclaims. R. at 3. The Appellants' counterclaims sought damages from the YIN, the EDC, and the EDC's CEO Fred Captain ("CEO") and accountant Molly Bluejacket ("Accountant") for monies due under their contract as well as for defamation. R. at 3. The trial court dismissed all of these claims due to sovereign immunity. R. at 3.

Following this dismissal, the Appellants filed an interlocutory appeal with this Court requesting the Court decide, on de novo review, the jurisdictional questions presented both by the initial complaint by the YIN and the counterclaims and to issue a writ of mandamus to the trial court to stay the suit. R. at 3.

SUMMARY OF THE ARGUMENT

This case is about whether the Yuma Indian Nation's tribal courts have jurisdiction over a civil dispute arising from a voluntary consensual contractual relationship between the Appellants and the YIN. The YIN retained the Appellants in pursuit of economic security and growth for the Tribe. The Appellants signed contracts to provide as needed financial advice to the YIN whilst maintaining confidentiality. In addition, the contracts provided that all disputes arising from the contract were to be litigated in a court of competent jurisdiction. Tribal courts have the authority in the first instance to determine their jurisdiction and the Appellants must exhaust all Tribal court remedies before seeking a ruling from a federal district court. Therefore, on de novo review this court should decline to issue a writ of mandamus to the trial court to stay the suit pending a ruling from the Arizona district court. On de novo review, this Court should find the Yuma Indian Nation tribal courts have subject matter and personal jurisdiction over the Appellants because a voluntary consensual contractual relationship falls within the jurisdictional framework provided by *Montana v. U.S.,* 540 U.S. 544. 565 (1981). Additionally, on de novo review, this Court should dismiss the Appellant's counterclaims because the YIN, the EDC, and the EDC's CEO and Accountant are protected by sovereign immunity that was not waived.

After retaining Thomas Smith and before Carol Smith, the YIN's created the EDC as an organization to "promote the prosperity of the tribe and its citizens," and chartered it under a tribal commercial code. Carol Smith was retained in connection with EDC's economic ventures. The EDC was funded by the YIN Tribal Council with a one-time $10 million loan from the YIN's treasury. In turn, fifty percent of all EDC net profits are paid to the YIN treasury

on an annual basis to aid in the EDC's mission of tribal economic growth. The EDC was created, according to its charter, as a wholly owned subsidiary of the YIN and as an arm of the tribe. The EDC is not permitted to encumber the YIN with any sort of debt, borrow and lend money on behalf of the YIN, or permit liens to be attached on YIN assets. The charter of the EDC also mandates that the board of directors, the EDC itself, and all employees of the EDC are protected by tribal sovereign immunity. The EDC is operated by a board of directors, consisting of five directors who are required to be experienced in business endeavors and comprised by a majority of YIN tribal members. The board of directors self-selects its membership (following the first board that was entirely appointed by the YIN Tribal Council), the Tribal Council maintains absolute and exclusive authority to remove any director—with or without cause by a 75% vote. The charter of the EDC mandates that the board of directors, the EDC itself, and all employees of the EDC are protected by tribal sovereign immunity and requires the EDC to apply tribal hiring preferences for hiring employees and contracting with outside entities.

Over five years after the YIN retained the Appellants to provide as needed financial advice to the YIN, EDC began exploring economic opportunities in the marijuana industry, which is medically legal under Arizona state law. But, unbeknownst to the YIN or the EDC, the Appellants had personal moral objections to marijuana business exploration and were personally opposed to providing their contracted-for services in furtherance of this particular economic venture. Acting on these personal feelings regarding the EDC's business ventures and in direct violation of confidentiality agreement, Thomas Smith informed the Arizona Attorney General of the EDC's private economic development plans. In response, the Arizona

Attorney General wrote the YIN and the EDC a cease and desist letter regarding the development of marijuana business operations by the YIN. This suit arises from this incident.

Because the Appellants were retained via a voluntary, consensual contractual relationship to provide confidential as-needed financial advice to the YIN regarding its plans to provide economic security and growth for the YIN and its members, the contractual relationship between the YIN and Appellants implicates an essential aspect of self-governance for the YIN. The exercise of jurisdiction over nonmembers is under Tribal authority when it is necessary to protect self-rule. Thus, the YIN tribal courts have subject matter and personal jurisdiction over the Appellants.

In addition, the Yuma Indian Nation has sovereign immunity from Appellants' claims, which has not been unambiguously waived, that extends to the EDC due to its status as an arm of the tribe and to the CEO and Accountant of the EDC due to their official capacity as officers of the tribe.

Following the Appellants' decision actively to violate the confidences of the YIN, the YIN brought suit in the YIN's tribal court against the Appellants for breach of contract, violation of fiduciary duties, and violation of duties of confidentiality. The YIN sought recovery of the liquidated damages set out in the Contracts.

The Appellants responded by filling special appearances with the trial court as well as motions to dismiss the YIN's suit for lack of personal and subject matter jurisdiction. The Appellants argued that as an alternative to a ruling by the trial court about jurisdiction, the trial court proceedings should be stayed while the Appellants pursue a federal court determination

regarding the trial court's jurisdiction over them. Both the proposed stay and the motion to dismiss were denied by the trial court.

The Appellants, still claiming to be filing under special appearances, then answered the YIN's initial complaint and put forth several counterclaims. The Appellants' counterclaims sought damages from the YIN, the EDC, and the EDC's CEO Fred Captain ("CEO") and accountant Molly Bluejacket ("Accountant") for monies due under their contract as well as for defamation. The trial court correctly dismissed all of these claims due to sovereign immunity.

ARGUMENT

I. YUMA INDIAN NATION TRIBAL COURTS ARE THE PROPER FORUM TO DETERMINE CIVIL JURISDICTION IN THE FIRST INSTANCE AND THIS COURT SHOULD NOT STAY A DECISION PENDING A RULING FROM THE ARIZONA FEDERAL DISTRICT COURT.

This Court should not issue a writ of mandamus to stay a decision until a ruling from the District Court, and it should affirm the ruling of the trial court for jurisdiction. Regardless of whether the Court finds jurisdiction, a Tribe has authority in the first instance to determine its own jurisdiction, *National Farmers Union Ins. Co. v. Crow Tribes*, 471 U.S. 845, 852 (1985).

When the activity of a non-member or non-Indian occurs on reservation lands, jurisdiction "presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 11 (1987). There are no such specific treaty provisions or federal statutes at issue to prohibit this exercise of tribal court jurisdiction. Although the existence of tribal jurisdiction over non-members is a federal question, one must exhaust all tribal remedies before challenging tribal court finding in federal court. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. at 11; *Nat. Farmer's Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 852 (1985). Tribal court is the proper forum to decide whether the court has civil jurisdiction before seeking relief from a federal court. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. at 11 ("[r]egardless of the basis for jurisdiction, the federal policy

supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a full opportunity to determine its own jurisdiction").

This exhaustion is required even without parallel proceedings in tribal court. *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 143 n.10 (1980) (affirming the United States' "firm federal policy of promoting tribal self-sufficiency and economic development"); *Crawford v. Genuine Parts Co.,* 947 F.2d 1405, 1410 (9th Cir. 1997) (requiring Indian plaintiffs to exhaust tribal court remedies before bringing diversity case against a non-Indian defendant in federal court for a claim arising within Indian country); *Wellman v. Chevron USA, Inc.*, 815 F.2d 577, 579 (9th Circuit 1987). Indeed, the "federal policy of promoting tribal self-government encompasses the development of the entire tribal court system." *Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, at 977 (1987). Repeatedly, "[t]ribal courts have . . . been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of *both Indians and non-Indians.*" *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978) (emphasis added); *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians,* 471 U.S. 845, 856 (1985) (explaining that the tribal exhaustion doctrine provides tribal courts with "the first opportunity to evaluate the factual and legal bases for [a] challenge" to their jurisdiction).

There are three exceptions to the tribal exhaustion doctrine, that do not apply to the case at hand. *Nat'l Farmers Union,* 471 US at 856 n 21. These exceptions are: if (1) it is "clear that the tribal court lacks jurisdiction so that the exhaustion requirement would serve no purpose other than delay"; (2) "the tribal court action is patently violative of express jurisdictional prohibitions"; and (3) "exhaustion would be futile because of the lack of an

adequate opportunity to challenge the [tribal] court's jurisdiction.*"* *Id*. The Court stated that a nonmember need not even exhaust his tribal remedies if "an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith." *Id.* The same is true if the litigant can demonstrate that the tribal court is unable to provide "an adequate opportunity to challenge" tribal jurisdiction, in which case the defendant may challenge tribal court jurisdiction directly in the federal courts. *Id.*

In the case at hand, the Appellants have not alleged that the tribal court jurisdiction being asserted is motivated by a desire to harass or conducted in bad faith. *Id.* R. at 3. It is not clear that tribal courts lack jurisdiction as discussed in Section II and a civil case, unlike a criminal case which must be timely tailored as personal liberties are at stake, does not serve to delay. R. at 3. A Tribal Court exercising jurisdiction over this case, which arises from a voluntary contractual relationship, is not patently violative of express jurisdictional prohibitions because this situation does not give rise to a "superior federal interest" unlike other situations. *See, e.g., UNC Res., Inc. v. Benally,* 518 F. Supp. 1046, 1052 (D. Ariz. 1981) (holding that "the assertion of tribal jurisdiction over the present dispute also conflicts with the superior federal interest in regulating the production of nuclear power").

Because this suit arises from a voluntary consensual contract there was opportunity for the Appellants to challenge jurisdiction in the first instance through their contractual negotiations with the Tribe. R. at 1-2. Courts have upheld tribal court jurisdiction for cases involving contracts between members and non-Indians. *See Dollar General Corp. v. Mississippi Band of Choctaw Indians,* 136 S.Ct. 2159 (2016); *Agamenv, LLC v. Laverdure,* 866 F. Supp. 2d 1091, 1100 (D.N.D. 2012) (finding tribal jurisdiction over claims against non-

Indian corporations arising out of a contract to build and operate a tribal casino). *See e.g. Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe,* 107 P.3d 402, 408 (Colo. Ct. App. 2004) (enforcing contractual forum-selection clause against tribe); *Bradley v. Crow Tribe of Indians,* 67 P.3d 306, 315 (Mont. 2003) (similar). And, if a tribal court issues a decision that does not comport with due process or equal protection requirements, state or federal courts may decline to enforce it. *See, e.g. MacArthur v. San Juan County*, 497 F.3d 1057, 1067 (10th Cir. 2007) ("[A] tribal court judgment must not be enforced where the party against whom enforcement was sought was not afforded due process of law."); *Bird v. Glacier Elec. Coop., Inc,* 255 F.3d 1010, 1152 (9th Cir. 1999) (declining to enforce multi-million dollar judgment against nonmember because trial was infected by racial prejudice); *Langdeau v. Langdeau*, 751 N.W.2d 722, 734 (D.S.D. 2008) (requiring proof that tribal court "order or judgment was obtained by a process that assures the requisites of an impartial administration of justice"); *Starr v. George,* 175 P.3d 50, 55 (Alaska 2008) (similar).

The procedures of this Court allow for an adequate opportunity to challenge its jurisdiction and affords parties the basic tenets of equal protection and the due process of law. 2 YUMA TRIBAL CODE § 102 (2017). The tribal code states "[t]he Tribal Court may exercise jurisdiction over any person or subject matter on any basis consistent with the Constitution of the Tribe, the Indian Civil Rights Act of 1968, as amended, any specific restrictions or prohibitions contained in federal law." *Id.* "One is afforded the lack of jurisdiction as a defense to pleadings," with 2 YUMA TRIBAL CODE § 212 (2017), defense and objections, when and how presented-by pleadings or motions-judgment on the pleadings, "(2)(a) lack of jurisdiction over the subject matter, (b) lack or jurisdiction over the person." *Id.*

The facts in the case at hand indicate that this Court's rules are similar to Federal Rules of Civil Procedure further laying to rest any fears that due process may not be afforded to defendants in Tribal Court. R. at 3. Indeed, Arizona's Rules of Rules of Procedure for the Recognition of Tribal Court Civil Judgments, Rule 5(c) (2017) applies a presumption of validity, to tribal court judgements subject to a review for procedural and substantive fairness. ARIZ. TRIBAL CT. CIV. JUDGMENTS R. 5(C). Yet, procedural fairness is not at issue here. Tribal Code provides in 2 YUMA TRIBAL CODE § 314 (2017) the minimum contacts required for effective long arm service that a defendant can submit to jurisdiction by voluntarily entering into sufficient contacts with the Tribe, its members, or its territory to justify Tribal jurisdiction in accordance with the principles of due process of law and federal Indian law.

The Tribal Code provides: "[t]he Courts of this Tribe shall have jurisdiction over the following persons: (a) any person who transacts, conducts or performs any business or activity within the reservation, . . . for any civil cause of action or contract or in quasi contract or by promissory estoppel or alleging fraud." 1 YUMA TRIBAL CODE § 104 (2017). The Appellants voluntarily entered contracts to provide confidential financial advice for YIN regarding economic development which can properly be considered well within the requirements of § 104(a). *Id.* Further, Tribal Code, Title 1, Rules of the Court, Section 107 states:

> Tribal Courts shall have general civil jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the Tribe, including the Tribal common law, *over all general civil claims* which arise within the Tribal jurisdiction, and over all transitory claims in which the defendant may be served within the Tribal jurisdiction. Personal jurisdiction shall exist over all defendants served within territorial jurisdiction of the Courts, or served anywhere in cases arising within the territorial jurisdiction of the Tribe, *and all persons consenting to such jurisdiction*. . . . *The act of entry upon the territorial jurisdiction by an extraterritorial seller, merchant or their agent(s) shall be considered consent* by the seller or merchant or their agent(s) to the jurisdiction of the Courts for *any*

> *dispute arising out of any sale or commercial transaction regardless of where the sale or transaction was entered into or took place . . . .*

YUMA TRIBAL CODE § 107 (2017) (emphasis added). By signing a contract with YIN, the Smiths consented to Tribal jurisdiction. One may reasonably expect a suit arising from a contract to provide YIN financial advice and purporting the language "for any and all suits from the contract to be litigated in a court of competent jurisdiction" coupled with the well-recognized tribal exhaustion doctrine to be litigated in the first instance in Tribal Court.

The exercise of Tribal court jurisdiction over reservation-based claims brought by Indian plaintiffs over nonmember defendants is greatest when tribal interest in regulating the conduct is strong. *Stock West, Inc. v. Confederated Tribes of the Colville Rese*, 873 F.2d 1221, 1228 (9th Circuit 1989). Economic development is considered a strong interest of a Tribe as a necessary component of Tribal self-governance. It is reasonable to expect a court of competent jurisdiction to include the Tribal Court and the tribal exhaustion doctrine mandates the Tribal Court has first opportunity to determine jurisdiction over this suit.

II. THE YUMA INDIAN NATION TRIBAL COURTS HAVE SUBJECT MATTER AND PERSONAL JURISDICTION OVER THE APPELLANTS UNDER THE *MONTANA* EXCEPTIONS.

A. The dispute arises directly from the Appellants' voluntary contractual relationship with the Yuma Indian Nation.

Tribes have domestic dependent nation status. *Oliphant v. Suquamist Indian Tribes*, 435 U.S. 191, 210 (1978). Accordingly, Tribal Courts are not courts of general jurisdiction, *Nevada v. Hicks*, 533 U.S. 353, 375 (2001). As domestic dependent quasi-sovereign nations, the jurisdiction of Indian tribes over non-Indians is strictly limited, and a

tribe's adjudicative jurisdiction over nonmembers cannot exceed its legislative jurisdiction., *Nevada v. Hicks,* 533 U.S. at 375. Therefore, efforts by a tribe "to regulate nonmembers, especially on non-Indian fee land [within an Indian reservation] are presumptively invalid." *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 544 U.S. 316, 341 (2008). A tribe can overcome this presumption by arguing the case falls under one of the two narrow exceptions set out in the path marking Supreme Court case *Montana v. United States*, 450 U.S. 544, 565 (1981).

The Supreme Court held that Tribes retain inherent power to protect self-government and control internal relations and that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes." *Id.* at 564. The Court further clarified that nonmembers may be subject to a tribe's authority when necessary to protect tribal self-government or to control internal relations as may be appropriate through regulations over non-member conduct in two situations: "(1) 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; and (2) a tribe may exercise civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe and the exercise of jurisdiction is needed to preserve the tribe's right to make their own laws and be governed by them" *Id.* at 329-30, 332; *MacArthur v. San Juan Cty.*, 497 F.3d 1057, 1075 (10th Cir. 2002).

After *Montana,* courts presume that a Tribal Court's exercise of jurisdiction over nonmembers is invalid unless one of the *Montana* exceptions applies or Congress has otherwise conferred the power. *See, e.g., Plains Commerce Bank,* 544 U.S at 328-30; *Nevada v. Hicks,* 533 U.S. at 359. The burden rests on the Tribe to establish one of the exceptions to *Montana's* general rule. *Atkinson Trading Co.,* 532 U.S. at 644. Further, these exceptions are limited ones, and cannot be construed in a manner that would swallow the rule, or severely shrink it. *Plains Commerce Bank,* 554 U.S. at 330 (quoting *Atkinson Trading Co.,* 532 U.S. at 654-55, 57 and *Strate v. A-1 Contractors,* 520 U.S. 438, 458 (1997)).

In *Strate v. A-1 Contractors*, 520 US 438, 458 (1997) the Court held the Tribal Court lacked jurisdiction over a civil case between nonmembers arising out of a vehicle accident on a state highway traversing reservation. The Tribe's interest in safe driving within the reservation was not sufficient to qualify for second *Montana* exception because such a construction "would severely shrink the [*Montana*] rule," *Montana,* 450 U.S. 458. However, in *Nevada v. Hicks*, when interpreting the tribe's assertion of jurisdictional authority under one of the Montana exceptions the Court found "the ownership status of land is only one factor, and not a dispositive factor, to consider." 533 US 353, 359 (2001). *But see Hornell Brewing Co.,* 133 F.3d 1087, 1091 (8th Cir. 1998) (holding that exhaustion is not required where conduct did not occur on reservation). Here the Court may find the conduct occurred well within the reservation as the Appellants contracted to directly provide YIN with financial advice over economic development matters specifically for the Tribe. R. at 1-2. They communicated frequently with the YIN and visited the reservation on at least two occasions.

R. at 2. Further, by voluntarily entering into the Contracts with the YIN, this situation falls well within *Montana*'s first exception. R. at 2.

Because this civil dispute arises from a voluntary contractual relationship, this Court should find that there exists a sufficient nexus, a direction connection, between the conduct and the consensual relationship that is reasonably anticipated as required by further iterations of the *Montana* exceptions provided in *Plains Commerce v. Long Family Land and Cattle Co.*, 544 U.S. 316, 341 (2008) and *Atkinson Trading Co., Inc. v. Shirley* 532 U.S. 645, 654 (2001). *See, e.g., Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 941 (9th Cir. 2009) ("The mere fact that a nonmember has some consensual commercial contacts with a tribe does not mean that the tribe has jurisdiction over all suits involving that nonmember, or even over all such suits that arise within the reservation; the suit must also arise out of those consensual contacts."). Tribal Courts retain the power to "resolve civil disputes involving nonmembers" if the nonmember has "consented, either expressly or by his actions" *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 544 U.S. 316, 341 (2008).

For consent to be knowing and voluntary, nonmembers must be provided clear notice of what activities will subject them to tribal authority and what the governing law requires of them. *Id.* at 337-38. Here the suit arises directly from the consensual contract with the Appellants. R. at 3. There was express consent in this case, the Appellants availed themselves to a contract with the YIN providing for a court of competent jurisdiction and knew or should have known they were consenting to the jurisdiction of the Tribe by doing so. R. at 1-2. In addition to signing the contract to provide sensitive and confidential financial advice to the YIN, the Appellants also visited the reservation on at least two occasions after signing their

contracts, and they exchanged nearly daily communications with the Tribe and should not be surprised to be held to a Tribal Code, similar to the Federal Rules of Civil Procedure. R. at 3.

Like *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 166 (1982), the Court held that nonmembers could be subject to a tribal oil and gas tax imposed several years after the nonmembers entered into mineral lease agreements with the tribe. The Court rejected the assertion that the tax was invalid because the nonmembers had not explicitly consented to it in the lease agreements. *Id.* at 145-148. Rather, the tax was a legitimate exercise of the tribe's sovereign power over its land. *Id.* The nonmembers should have anticipated that by entering into the mineral leases, they were exposing themselves to assertions of tribal sovereignty over conduct related to those agreements. *See also Atkinson Trading Co.,* 532 U.S. at 649.

When the Appellants entered into contracts with the YIN they could reasonably expect a suit to arise in Tribal Court and easily could have negotiated in the contract otherwise. R. at 1-2. This case directly involves the sort of "consensual relationships" contemplated in *Montana* as a "commercial dealing, contracts, leases, and other arrangements," *Montana,* 450 U.S. at 565. R. at 1-2.

"[W]here tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts." *Strate v. A–1 Contractors,* 520 U.S. at 453. A tribe's regulation of nonmember conduct through tort law is analyzed under the *Montana* framework. *See, e.g., Attorney's Process & Investigation Services, Inc. v. Sac & Fox Tribe,* 609 F.3d 927, 938 (8th Cir.2010); *Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.,* 569 F.3d 932, 939 (9th Cir.2009) ("The *Montana* framework is applicable to tribal adjudicative jurisdiction, which extends no further

than the *Montana* exceptions."). In considering regulation through tort law, "courts applying *Montana* should not simply consider the abstract elements of the tribal claim at issue, but must focus on the specific nonmember conduct alleged, taking a functional view of the regulatory effect of the claim on the nonmember." *Attorney's Process,* 609 F.3d at 938. *Plains Commerce* narrowed the *Montana* consensual relationship exception, allowing tribes to regulate consensual relationships with nonmembers only upon a showing that the specific relationships "implicate tribal governance and internal relations." *Plains Commerce,* 554 U.S. at 344-35. In *Plains Commerce,* the Supreme Court described the *Montana* consensual relationship exception as stemming from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations. *Id.* at 337. The ability of a tribe to exercise authority over nonmembers depends on whether or not conduct "intrudes on internal relations of tribe or threatens self-rule" and its adjudicatory jurisdiction cannot exceed its regulatory jurisdiction." *Id.* at 330. The conduct to be regulated must have a "discernable effect on the tribe or its members" *Id.* at 332. Regulating the conduct of nonmembers who voluntarily enter into private contracts, particularly regarding aspects of self-governance such as economic development, with the YIN is well within the first *Montana* exception and has a discernable effect on the tribe and its members. R. at 1.

B. The regulated conduct implicates self-rule and internal relations.

The YIN's tribal court also has jurisdiction under the second *Montana* exemption because regulating civil disputes arising from private voluntary contracts regarding YIN economic development implicates internal relations and self-rule. *Plains Commerce* 554 U.S. at 334-35 ("a business enterprise employing tribal members . . . *may* intrude on the internal

relations of the tribe or threaten self-rule," and that "[t]o the extent [it does], [its] activities ... may be regulated."). R. at 2. The exercise of jurisdiction must stem from the tribes' retained rights to "set conditions on entry, preserve tribal self-government, or control internal relations." *Plains Commerce Bank,* 554 U.S. at 337. As a condition of doing business with the Tribe one may negotiate alternative venues for disputes but if not, the Tribe may exercise jurisdiction. *Id.* If the nonmember's conduct is "demonstrably serious and imperil[s] the political integrity, the economic security, or the health and welfare of the Tribe." *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation,* 492 U.S. 408, 431 (1989). The Court has held the conduct requires more than injuring the tribe, it must "imperil the subsistence' of the tribal community or that tribal court jurisdiction is "needed to preserve the [Tribe's] right to make its own laws and be governed by them." *Plains Commerce Bank,* 554 U.S. at 329-30, 332; *Williams v. Lee,* 358 U.S. 217 (1959); *MacArthur,* 497 F.3d at 1075. The "challenged conduct must be so severe as to 'fairly be called catastrophic for tribal self-government," *Evans v. Shoshone-Bannock Land Use Policy Comm'n,* 736 F.3d 1298, 1306 (9th Cir. 2013) (quoting *Plains Commerce Bank* 554 U.S. at 341). The Smiths voluntarily signed a contract to provide confidential financial advice to YIN regarding Tribal economic development. R. at 1-2.

The Appellants are sophisticated parties with the capacity to negotiate contracts. Carol Smith is a licensed stock broker and Thomas Smith is a certified financial planner and accountant. R. at 1-2. If the Appellants wanted to avoid tribal court jurisdiction they could have negotiated for that in their contracts. R. at 1-2.

Additionally, the negotiated contracts were to provide advice as-needed regarding economic development for YIN and stated "contract to be litigated in a court of competent

jurisdiction," as well as for the Smiths to maintain absolute confidentiality regarding any and all tribal communications and economic development plans." R. at 1-2. Thereafter, YIN created EDC in 2009 under tribal commercial code to promote the prosperity of the Nation and its citizens. R. at 1. This suit arises directly from the contracted services to provide economic development advice, which greatly affects the political integrity, health, and welfare of the Tribe. R. at 1. Disputes arising from such a contract regarding sensitive Tribal matters are essential to self-government. By entering into a contract with YIN regarding an essential aspect of self-governance and providing confidential advice to Tribal Council, the Appellants subjected themselves to the Tribe's authority to regulate their contract related conduct.

III. THE YUMA INDIAN NATION HAS SOVEREIGN IMMUNITY FROM APPELLANTS' CLAIMS, WHICH HAS NOT BEEN WAIVED, THAT EXTENDS TO THE ECONOMIC DEVELOPMENT CORPORATION DUE TO ITS STATUS AS AN ARM OF THE TRIBE AND TO THE CEO AND ACCOUNTANT OF THE ECONOMIC DEVELOPMENT CORPORATION DUE TO THEIR STATUS AS OFFICERS OF THE TRIBE.

The dismissal of the Appellants' counterclaims against the YIN and the YIN's EDC should be upheld by this Court because both possess sovereign immunity from these claims that was not waived. Additionally, this Court should affirm the dismissal of the claims against the EDC's CEO and Accountant because the YIN's sovereign immunity extends to protect these tribal officers from the type of relief the Appellants seek.

A. The Yuma Indian Nation has sovereign immunity stemming from its status as an inherently sovereign tribe that has not been unambiguously waived in regard to the Appellants' claims.

One of the pillars of Indian law is the long-standing doctrine of inherent tribal sovereignty. *See Cherokee Nation v. Georgia*, 30 U.S. 1, 13 (1831) (describing Indian tribes

as "domestic dependent nations"). Rooted in inherent tribal sovereignty is the idea that tribes have sovereign immunity like the sovereign immunity held by states and the federal government. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). Sovereign immunity is "a necessary corollary" to sovereignty and self-governance; without the ability to protect its financial resources a tribe would have difficulty engaging in economic development and increasing its self-sufficiency. *Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986).

As a matter of federal law, Indian tribes are subject to suit only if Congress has abrogated the tribe's sovereign immunity or the tribe has waived its sovereign immunity. *Kiowa Tribe of Okla.*, 523 U.S. at 754. Further, neither a congressional abrogation nor a tribal waiver can be implied, it must instead be "unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). The tribe's intent to surrender its immunity must be made in "clear and unmistakable terms." *C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001). In short, courts are skeptical of any argument advanced in favor of a waiver of sovereign immunity that is not expressly presented and therefore employ a strong presumption against its waiver. *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1016 (9th Cir. 2016).

The YIN possesses sovereign immunity due to its status as an Indian tribe. *See Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991). R. at 1. Therefore, absent a clear waiver of its sovereign immunity from Congress or the tribe itself, Appellants' claim against the YIN should be dismissed as lacking in subject matter jurisdiction. *Kiowa Tribe of Okla.*, 523 U.S. at 754. Here there is not a clear abrogation

by Congress of the tribe's sovereign immunity, nor is there a clear waiver of suit by the YIN. R. at 1-3.

When the YIN and the Appellants entered into the Contracts there was not a "unequivocally expressed" waiver of sovereign immunity. *Santa Clara Pueblo,* 436 U.S. at 58. R. at 1-2. There may be some ambiguity as to the meaning of the phrase "litigated in a court of competent jurisdiction," however this one ambiguous phrase is not a clear waiver of sovereign immunity. *C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe,* 532 U.S. at 418 (2001). R. at 2. Further, even if "litigated in a court of competent jurisdiction" is clear, a "court of competent jurisdiction" means just that: a court which has jurisdiction over the claims presented. This does nothing to waive sovereign immunity by itself and would require something more to constitute a waiver of sovereign immunity. For example, some courts have held that an arbitration clause, that provides for judicial enforcement in a "court of competent jurisdiction," is a sufficiently unambiguous waiver of sovereign immunity. *See e.g. C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 422, 121 S. Ct. 1589, 1596, 149 L. Ed. 2d 623 (2001); *cf. Rosebud Sioux Tribe v. Val-U Const. Co. of S. Dakota*, 50 F.3d 560, 562 (8th Cir. 1995) (holding that an arbitration agreement without a "court of competent jurisdiction" enforcement clause was a sufficiently unambiguous waiver because the arbitration agreement was itself the waiver). However, the difference there is that the agreement to arbitrate waives sovereign immunity, and not its enforceability in a "court of competent jurisdiction." *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* 532 U.S. at 422. The agreement between the YIN and the Appellants to litigate disputes in a "court of competent jurisdiction" is not a waiver of sovereign immunity and would

require additional waiver language to be sufficient. R. at 1. Additionally, YIN explicitly purports not to waive sovereign immunity in the charter of the EDC. R. at 2.

Even if the EDC waived its sovereign immunity by the "sue and be sued" clause in its charter, a waiver of sovereign immunity by a tribal corporation is not imputed to be a waiver of tribe's sovereign immunity See *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 493 (9th Cir. 2002). R. at 2. Therefore, the YIN did not waive tribal sovereign immunity for these claims through the EDC. *Id.* R. at 2. Additionally, as a final point, the YIN by initiating the lawsuit against the Appellants did not waive sovereign immunity for suits coming from the Appellants because initiating a lawsuit does not waive sovereign immunity for counterclaims, even those arising from the same situation. *See McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989). R. at 3. Therefore, YIN has not waived its sovereign immunity here and this Court lacks subject matter jurisdiction to hear the Appellants' claim against the YIN.

B. The Yuma Indian Nation's Economic Development Corporation and its CEO and Accountant are protected by the Yuma Indian Nation's sovereign immunity because the Economic Development Corporation is an arm of the tribe.

1. The Economic Development Corporation is an arm of the Yuma Indian Nation and therefore is protected by the Yuma Indian Nation's sovereign immunity. Further, this sovereign immunity was not unambiguously waived for the Appellants' claims.

Further, since the EDC is an arm of the tribe and did not clearly and expressly waive its sovereign immunity, this Court lacks subject matter jurisdiction over the Appellants' claim against the EDC. Therefore, the Appellants' claims against the EDC were properly dismissed.

Generally, tribal corporations are not immune from lawsuit merely by virtue of being created, owned, or operated by members of a tribe or being located on tribal land. Cf. *Puyallup Tribe, Inc. v. Dep't of Game of State of Wash*., 433 U.S. 165, 171–72 (1977) (noting that individual members of a tribe do not poses sovereign immunity, but instead sovereign immunity rests with the tribe). However, a tribal corporation whose "activities could properly have deemed those of the tribe" would be shielded by the sovereign immunity of the tribe. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2052 n.4 (2014) (noting, without comment, that a number of circuit courts extend tribal sovereign immunity to "arm of the tribe" corporations), *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 726 (9th Cir. 2008), *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006). In short, the tribal corporation must act as an "arm of the tribe" to receive sovereign immunity protection. *Cook v. AVI Casino Enterprises, Inc*. 548 F.3d at 726.

However, courts have created a maze of overlapping standards to determine what differentiates a mere tribal business from an arm of the tribe. The Supreme Court of Colorado set out a three-part test, the Ninth Circuit Court of Appeals uses a six-part analysis, and other courts use a myriad of other factors to determine when a corporation is an arm of the tribe. *White v. University of California*, 765 F.3d 1010, 1025 (9th Cir. 2014), *Cash Advance & Preferred Cash Loans v. State*, 242 P.3d 1099, 1109 (Colo. 2010); *see, e.g., People ex rel. Owen v. Miami Nation Enterprises*, 386 P.3d 357, 371 (Cal. 2016) (changing a previous test into a five-part test for "arm of the tribe" status). But, simply put, a corporation is considered an "arm of the tribe" when, looking holistically at the corporation's creation and operation in relation to the tribe, the corporation acts so that it can be considered closely linked with the

governmental activities of the tribe, particularly looking at the financial relationship between the tribal government and the corporation. *Cf. Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006) ("With the Tribe owning and operating the [tribal corporation], there is no question that these economic and other advantages inure to the benefit of the Tribe.").

The YIN created the EDC specifically to "promote the prosperity of the [YIN] and its citizens." R. at 1. The EDC was created with a $10 million loan from the YIN's treasury. R. at 1. And, while the EDC does not have the ability to further draw financial assistance from the tribe, 50 percent of the EDC's net profit goes back to the YIN's treasury. R. at 2. This means the tribe has a direct financial stake in the profit of the EDC similar to corporate shareholders. R. at 2. Additionally, the charter mandates that a majority of the directors on the board must be members of the YIN and all directors on the board are removable at the sole discretion of the YIN's government. R. at 2. So, the operation of the EDC relies heavily on the control of the YIN's government and its financial success directly relates back to the YIN's treasury. R. at 2.

Yet, even if the EDC's creation, operation, and financial relationship with the YIN are insufficient to prove "arm of the tribe" status, there is no need for this Court to wade further into the debate over what the proper test for "arm of the tribe" status is because the charter for the YIN's EDC is modeled after Section 17 of the Indian Reorganization Act. 25 U.S.C. § 477 (2017). Section 17 provides for the creation of corporate "alter-egos" for tribes. *Id.* Courts largely agree that a Section 17 corporation is an arm of the tribe because the language of Section 17 itself seems to imply that—calling the entity an "incorporated tribe." 25 U.S.C. § 477 (2017); *see e.g. Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917,

921 (6th Cir. 2009). There is no need to analyze the EDC using a seemingly arbitrary multi-part test because the very origin of the EDC's creation refers to it as an "incorporated tribe." Therefore, the EDC is an "arm of the tribe." 25 U.S.C. § 477 (2017); *see e.g. Linneen v. Gila River Indian Cmty.*, 276 F.3d at 493.

Since the EDC is an arm of the tribe, it is therefore protected by sovereign immunity and the only way a claim could be brought against the EDC is if Congress has abrogated the sovereign immunity or the YIN has unambiguously waived it. *Kiowa Tribe of Okla.*, 523 U.S. at 754; *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58. The EDC's charter explicitly purports to not have waived its sovereign immunity however, the "sue and be sued" provision of the charter will likely be attacked by the Appellants as a general waiver of sovereign immunity by the EDC. R. at 2. Yet, "sue and be sued" provisions do not constitute a sufficiently "unequivocally expressed" general waiver of sovereign immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58.

There is some dispute among courts regarding the effect of a "sue and be sued" in a tribal corporation's charter, especially since the clause is taken from the model charter provided by Section 17. *See* William V. Vetter, *Doing Business with Indians and the Three "S"Es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 Ariz. L. Rev. 169, 175 (1994). However, the "sue and be sued" clause in a Section 17 corporation's charter does not act as a generally waiver of sovereign immunity.

When state courts interpret "sue and be sued" clauses in terms of waiving state sovereign immunity, a comparable concept to tribal sovereign immunity, they are skeptical of these clauses acting as general waivers of immunity. *See e.g. Harris Cty. Hosp. Dist. v. Tomball*

Reg'l Hosp., 283 S.W.3d 838, 843 (Tex. 2009) (holding that the clause "in and of itself does not mean that immunity to suit is waived" as well as noting ambiguity in terms of a waiver should be resolved in favor of no waiver); *Ransom v. St. Regis Mohawk Educ. & Cmty. Fund, Inc.*, 658 N.E.2d 989, 995 (N.Y. 1995) (holding that a "sue and be sued" clause did not "satisfy the high threshold for a valid waiver of immunity"); *Self v. City of Atlanta*, 377 S.E.2d 674, 675 (Ga. 1989) (holding a "sue and be sued" clause conferred "the status and capacity to enter our courts" but was not a waiver of sovereign immunity).State courts recognize that it is rarely the intent of a possessor of sovereign immunity to prospectively waive that immunity in all cases.

Additionally, federal courts have interpreted "sue and be sued" clauses in Section 17 corporation charters narrowly. See e.g. *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 493 (9th Cir. 2002); *Cain v. Salish Kootenai Coll., Inc.*, No. CV 12-181-GF-BMM, 2014 WL 12738908, at *4 (D. Mont. Dec. 3, 2014); *Boe v. Fort Belknap Indian Cmty. of Ft. Belknap Reservation, Montana*, 455 F. Supp. 462, 464 (D. Mont. 1978). These courts have generally taken the position that a "sue and be sued" clause in a corporate charter acts to waive sovereign immunity for the entity's corporate activities but not its governmental ones. *Linneen v. Gila River Indian Cmty.*, 276 F.3d at 493. This comports with the overarching goals of tribal sovereign immunity to protect a tribe's political and financial autonomy but not necessarily its individual members. *Cogo v. Cent. Council of Tlingit & Haida Indians of Alaska*, 465 F. Supp. 1286, 1288 (D. Alaska 1979) (discussing the importance of sovereign immunity to encourage and protect tribal autonomy and growth). So, a "sue and be sued" clause may waive some

aspects of sovereign immunity but in the case of Section 17 corporations, it does not act as a general waiver.

The YIN's addition of language explicitly purporting to not waive sovereign immunity for the EDC shows that is was not the intent of the YIN to waive sovereign immunity. R. at 2. While, the "sue and be sued" clause possibly could be interpreted as a waiver of sovereign immunity for the EDC's corporate activities, this would not extend to the its "governmental" activities. *Linneen v. Gila River Indian Cmty.*, 276 F.3d at 493. The Appellants did deal largely with the EDC, yet the Contracts were between the YIN and the Appellants. R. at 1-2. Additionally, Mr. Smith was initially retained for financial advice for the "economic development" of the tribe—a governmental activity. R. at 1. The EDC was created to take over the tribe's economic development, which had originally been a function of the tribal government. R. at 1. This transition of the governmental function of economic development from the tribal government to the EDC was evidenced by Mr. Smith's day-to-day contact with the tribe changing from the tribal government to the EDC. R. at 1. Therefore, even if the "sue and be sued" clause in the EDC's corporate charter waived some sovereign immunity it would not waive sovereign immunity for these claims because the Appellants were involved with the EDC's governmental actions and not its corporate actions. *Id.*

Accordingly, the EDC, as an arm of the YIN, possesses sovereign immunity, which was not unambiguously waived. Therefore, the Appellants' claims against the EDC were properly dismissed and the trial court's decision should be affirmed.

2. The Economic Development Corporation's sovereign immunity extends to protect its CEO and Accountant for the Appellants' claims because they were acting in their official capacity as officers of the Yuma Indian Nation.

Additionally, the appellants' claims against the EDC's CEO and Accountant were correctly dismissed. R. at 3. Whether the CEO and Accountant are members of the YIN, their status as tribal officials acting within the authority of their positions extends the YIN and the EDC's sovereign immunity over them.

Tribal sovereign immunity does not, as a rule, protect individual tribal members. *Puyallup Tribe, Inc. v. Dep't of Game of State of Wash.*, 433 U.S. at 171–72. However, tribes cannot exercise self-governance except through the actions of people working for the tribe. So, if tribal officials were subject to suit when acting on behalf of the tribe, there would be an effective loophole to evade tribal sovereign immunity. *See Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1161 (9th Cir. 2002) ("[I]f [a plaintiff] alleged some wrongdoing on the part of Nation officials, his real claim is against the Nation itself."). So, tribe's sovereign immunity protects tribal officials acting in their official capacity. *Miller v. Wright*, 705 F.3d 919, 927 (9th Cir. 2013).

Accordingly, the proper inquiry here to determine if the tribal sovereign immunity extends to protect a tribal officer from a particular suit is whether the remedy would operate against the Tribe. *Maxwell v. County of San Diego*, 708 F.3d 1075, 1087-90 (9th Cir. 2013). A remedy against an individual tribal officer that would strike at the core of tribal sovereignty and expend itself on the tribal treasury would be in essence a claim against the tribe and

therefore barred by sovereign immunity. *Shermoen v. United States*, 982 F.2d 1312, 1320 (9th Cir. 1992).

However, this is not to say that a tribal official is entirely protected by sovereign immunity in all situations. There is at least one exception to this general rule—a plaintiff may sue a tribal official in their official capacity for an injunction under *Ex parte Young*, 209 U.S. 123, 128 (1908). *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2035 (2014). The United States Supreme Court has consistently held that tribal immunity would not bar a suit for injunctive relief against a tribal officer engaging in unlawful conduct. *See, e.g.*, *Michigan v. Bay Mills Indian Cmty*., 134 S. Ct. at 2035. This exception allows Courts to compel tribal officials to obey the law and to remain within the bounds of the powers given to their positions without opening the tribe up to financial liability. *Maxwell v. Cnty. of San Diego*, 708 F.3d 1075, 1088 (9th Cir.2013). However, it is well established that *Ex parte Young* does not permit individual officers of a tribe to be sued when the relief requested would, in effect, require the tribe's specific performance of a contract. *Tamiami Partners ex rel. Tamiami Dev. Corp. v. Miccosukee Tribe of Indians of Fla.*, 177 F.3d 1212, 1226 (11th Cir. 1999).

The CEO and Accountant both are officers of the YIN by virtue of their positions in the EDC—an arm of the tribe. R. at 1. Additionally, the claims brought against them are based on actions taken by the tribal officers in accordance with their duties as tribal officers. R. at 1-3. Therefore, any relief sought against them for these claims would in reality be an attempt to subvert the sovereign immunity of the tribe. *See Maxwell*, 708 F.3d 1087-90. The Appellants' claims for damages under their contracts as well as for defamation are attempts by the Appellants' to get at tribal treasury funds by circumventing sovereign immunity. *See*

Dawavendewa v. Salt River Project Agr. Imp. & Power Dist., 276 F.3d at 1161. R. at 3. The claims against these two tribal officers are not personal in nature but instead are solely based on their official positions within the EDC and the YIN itself. R. at 3. Therefore, the YIN's sovereign immunity extends to protect the two tribal officers from these claims because they are in reality claims against the tribe. *Miller v. Wright*, 705 F.3d at 927. R. at 3.

Also, here the *Ex parte Young* exception to the CEO and Accountant's sovereign immunity would not apply. *Ex parte Young* 209 U.S. at 128. Firstly, neither tribal officer conducted themselves in a manner that was unlawful or in excess of the authority granted to them under federal and tribal law. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. at 2035. While there may be an argument about the legality of the YIN's plans involving marijuana cultivation and sale through the EDC—though likely not a good argument—that is not at issue in the Appellants' claims against the CEO and the Accountant. R. at 3. At issue here is a contract claim and a suit for defamation, neither of which would be considered unlawful conduct that could be solved with a prospective injunction against two individuals. See *Ex parte Young* 209 U.S. at 128, *Tamiami Partners ex rel. Tamiami Dev. Corp. v. Miccosukee Tribe of Indians of Fla.*, 177 F.3d at 1226. R. at 3. Secondly, Appellants seek damages rather than prospective injunctive relief. R. at 3. A suit brought under *Ex parte Young* is limited to prospective injunctive relief; here the Appellants' seek monetary damages. *Ex parte Young* 209 U.S. at 128. R. at 3. Because this Court cannot give the Appellants the remedy they seek via prospective injunctive relief nor can the *Ex parte Young* exception be used to compel the YIN's performance of the contract; this exception to sovereign immunity is inapplicable here.

Tamiami Partners ex rel. Tamiami Dev. Corp. v. Miccosukee Tribe of Indians of Fla., 177 F.3d at 1226. R. at 3.

Thus, the Appellants' counterclaims against the CEO and Accountant were properly dismissed because the YIN's sovereign immunity extends to protect its individual officers when they act in their official capacities.

CONCLUSION

Accordingly, all of the trial court decisions should be upheld by this Court. The trial court has both personal jurisdiction over the Appellants as well as subject matter jurisdiction over the claims brought by the YIN. Also, the proceeding should not be held up while the Appellants seek a ruling determining jurisdiction by a federal court because the authority rests within tribal courts to determine jurisdiction in the first instance and the Appellants must exhaust tribal remedies before they may seek a judgement from a federal court.

Further, the trial court was correct to dismiss the counterclaims by the Appellants against the YIN, the EDC, and the CEO and Accountant. These parties are all protected by the YIN's sovereign immunity and none of the parties unambiguously waived this immunity. Therefore, the trial court does not have jurisdiction over these claims and the countersuit cannot move forward.