

No. 17-024

IN THE YUMA INDIAN NATION SUPREME COURT

Yuma Indian Nation,

Plaintiff-Appellee

v.

Thomas Smith and Carol Smith,

Defendant-Appellant

ON WRIT OF CERTIORARI TO YUMA INDIAN NATION SUPREME COURT

BRIEF FOR RESPONDENT

Team No. 235

Counsel for Plaintiff-Appellee

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QUESTIONS PRESENTED

- I. Whether the YIN trial court correctly denied both the Smiths' motion to dismiss and to stay the suit to instead seek a ruling in the Arizona federal district court due to the fact that the YIN tribal courts properly had both subject matter and personal jurisdiction over the Smiths?
- II. Whether sovereign immunity, or any other form of immunity, protects the Yuma Indian Nation, the YIN Economic Development Corporation, and/or the EDC CEO and accountant from the Smiths' claims?

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

This case is about preserving the sovereignty of the Yuma Indian Nation (“YIN”), by permitting the Nation to enforce civil liability when contracts that non-Indians consensually entered into are broken. The YIN is an Indian tribe located in the southwestern part of Arizona.

In 2007, the YIN entered into a contract with Thomas Smith, a citizen of Arizona, for the provision of financial services. R. at 1. In addition to providing a provision for litigating in a court of competent jurisdiction, the contract required Thomas to maintain absolute confidentiality regarding any and all tribal communications and economic development plans to which he was privy. R. at 1. From 2007 to 2017, Thomas provided the Nation with financial advice on a wide range of economic development issues, exchanging emails and telephone calls on a nearly daily basis with various tribal chairs and Tribal Council members. R. at 1. While Thomas generally worked remotely, quarterly, Thomas presented reports in person at Council meetings on tribal land. R. at 1. In 2009, after the Nation created the YIN Economic Development Corporation (“EDC”), Thomas principally communicated with Fred Captain, the EDC CEO, and EDC employee/accountant Molly Bluejacket. R. at 1.

The EDC was created with the express purpose to “create and assist in the development of successful economic endeavors, of any legal type of business, on the reservation and in southwestern Arizona” and in order to promote the prosperity of the Nation and its citizens. R. at 1. Although the EDC was created through the tribe, it was to be operated by a separate board of directors consisting of five members, three of whom were to be tribal members. When a term ended, a member would be elected or reelected by majority vote, and the Tribal

Council retained the right to remove a member for any reason, by a 75% vote. R. at 1. The EDC received a one-time \$10 million loan from the Tribe's general fund, to begin operations. In order to repay the loan, the YIN would receive fifty percent of the EDC's yearly net profits. In addition, the EDC was to keep and submit quarterly reports regarding their finances to the Tribal Council. \$2 million of the \$10 million-dollar loan has been repaid to the tribe's general fund. The EDC is authorized to buy and sell property, but its debts are not to implicate the Tribe's funds or property. Among other provisions in the charter, the tribe mandated that the EDC, its board, and all employees be protected by sovereign immunity to the fullest extent of the law. R. at 2.

Thomas obtained permission from the Tribal Council to sign a contract with his sister, Carol Smith, a citizen of Oregon and a stockbroker, in 2010. R. at 2. The contract she and Thomas signed is identical to the one Thomas signed with the Nation in 2007 and, in fact, it includes a term that both parties are required to comply with the YIN-Thomas contract. R. at 2. Unlike Thomas, Carol provides her advice directly to her brother via email, telephone, and postal and delivery services instead of to the tribe. R. at 2. However, she still communicates with the tribe by both mail and e-mail—she submits monthly bills via email to the Captain and the EDC mails her payments to her address in Portland, Oregon. R. at 2.

When the EDC began investigating the possibility of engaging in marijuana cultivation and sales in 2016, it conferred with Thomas Smith on this issue several times. R. at 3. In violation of the confidentiality clause of his contract with the Tribe, Thomas informed his acquaintance, the Arizona Attorney General, of the plans of the YIN to begin the development of a marijuana operation. R. at 2. This lead to the A.G. writing the Nation and

the EDC a cease and desist letter with regards to the development of their recreational marijuana operations. R. at 3.

II. STATEMENT OF PROCEEDINGS

The Tribal Council brought suit against the Smiths in Tribal Court. R. at 3. They alleged breach of contract, violation of fiduciary duties, and violation of their duties of confidentiality. R. at 3. The Smiths, in turn, filed special appearances to file motions for dismissal as they contended that the court did not have personal or subject matter jurisdiction to hear the case. R. at 3.

The Smiths also filed answers denying the YIN claims and counterclaimed against the Nation for monies due under their contracts and for defamation for impugning their professional skills. R. at 3. Additionally, they impleaded on the same claims the EDC, and the EDC's CEO Fred Captain and accountant Molly Bluejacket in their official and individual capacities. R. at 3. These actions, they claim, are sought in continuance with their special appearance as they deny the court has jurisdiction over them. R. at 3.

Ultimately, the trial court denied their motions as well as their counterclaims against YIN and claims against the third-party defendants due to sovereign immunity. R. at 3.

The Smiths filed an interlocutory appeal in the YIN Supreme Court requesting that the Court decide these issues and issue a writ of mandamus ordering the trial court to stay the suit. R. at 3. The Supreme Court granted the interlocutory appeal on two issues: 1) Whether the Yuma Indian Nation courts have personal and subject matter jurisdiction over Thomas Smith and Carol Smith, or in the alternative, whether the trial court should stay this suit while the Smiths seek a ruling in the Arizona federal district court; and 2) Whether sovereign

immunity, or any other form of immunity, protects the Yuma Indian Nation, the YIN Economic Development Corporation, and/or the EDC CEO and accountant from the Smiths' claims. R. at 3.

SUMMARY OF ARGUMENT

This case surrounds preserving the sovereignty of the Yuma Indian Nation ("YIN"), by permitting the Nation to enforce civil liability when contracts that non-Indians consensually entered into are broken. It is essential that the Nation is able to enforce this liability, and in order for this to happen, the YIN first must have the jurisdictional grounds to do so.

The YIN Tribal Court does have proper jurisdiction over both Smiths. The trial court has fairly exercised personal jurisdiction over the Smiths by comporting with the due process clause in the Indian Civil Rights Act (IRCA), as well as the YIN court's own rules for civil procedure. These rules require a minimum contacts analysis grounded in federal jurisprudence. In light of both of the Smiths' extensive contacts with the Nation which they consensually and knowingly entered into, and principles of fairness, the YIN courts can be said to have personal jurisdiction over the Smiths. The Smiths may themselves also have waived their right to dismiss the case for lack of personal jurisdiction by filing what may be permissive counterclaims against Fred Captain and Molly Bluejacket per the YIN procedural rules.

Further, the YIN Tribal Court also has subject matter jurisdiction over the Smiths due to their consensual entrance into a contract with the YIN Indian Nation, which falls into one of the two exceptions for jurisdiction over nonmembers. *Montana v. U.S.*, 450 U.S. 544 (1981).

Additionally, the suit has been properly appealed in Tribal Court and should remain there pending a decision before being appealed in a federal court. Regardless of whether it is ultimately determined that there is jurisdiction here, the appellants are required, per the principle of exhausting all tribal remedies, to appeal in the YIN Supreme Court and exhaust all remedies. *See National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845 (1985).

Furthermore, the YIN, the EDC, and the EDC's CEO and accountant are all immune from *National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845 (1985) suit because of sovereign immunity. The courts have historically held that Indian tribes are inherently sovereign nations, and that as a result, State law cannot be imposed upon them unless Congress authorizes it. *Worcester v. Georgia*, 31 U.S. 515, 549 (1832). As an Indian tribe, the YIN is entitled to sovereign immunity. The EDC is considered an "arm of the tribe," and it was created with the purpose of benefiting the tribe. As such, it too is entitled to an extension of the sovereign immunity of the YIN.

The EDC's CEO and accountant, Fred Captain and Molly Bluejacket, are also immune from the Smiths' claims in both their individual and official capacities, because of sovereign immunity. Mr. Captain and Ms. Bluejacket were both acting in the course of their employment, and not as individual actors. This means that sovereign immunity is properly extended to them as well. In addition, the real party of interest in this suit is not either Mr. Captain or Ms. Bluejacket, but rather, the YIN and the EDC, both of whom are entitled to sovereign immunity. This means that the CEO and accountant are also immune from suit in their individual capacities.

The principles and policies of sovereign immunity are served by an extension of sovereign immunity to the YIN, the EDC, and the EDC's CEO and accountant. Without immunity, the YIN and the EDC and its employees could be subject to numerous suits, possibly without merit, that would limit their self-determination, as well as their ability to self-govern. It is in the interest of both the YIN and the federal government to uphold these long-standing principles. Since the YIN, the EDC, and the EDC's CEO and accountant are all entitled to sovereign immunity, the Smiths' are unable to bring their claims against them.

ARGUMENT

I. YIN Tribal Court has both personal and subject matter jurisdiction and the suit should not be stayed

The YIN Tribal Court has proper jurisdiction over both Smiths. Comporting with the due process clause in the Indian Civil Rights Act (IRCA), as well as the YIN court's own rules for civil procedure which require a minimum contacts analysis, the trial court has fairly exercised personal jurisdiction over the Smiths. Further, the YIN Tribal Court also has subject matter jurisdiction over the Smiths due to their consensual entrance into a contract with the YIN Indian Nation, which falls into one of the two exceptions for jurisdiction over nonmembers. *Montana v. U.S.*, 450 U.S. 544 (1981).

Further, the suit has been properly appealed in Tribal Court and should remain there pending a decision before being appealed in a federal court. Regardless of whether it is ultimately determined that there is jurisdiction here, the appellants are required, per the principle of exhausting all tribal remedies, to appeal in the YIN Supreme Court and exhaust all remedies. *See National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845 (1985).

A. Personal Jurisdiction analysis based on federal analysis per the IRCA's Due Process Clause

Indian tribes are beholden to the same due process concerns inherent to personal jurisdiction as are states and the federal government. Since the passing of the IRCA of 1968, Tribal Courts have had to consider due process concerns that are nearly analogous to those considered by state and federal courts under the 5th and 14th Amendments and are fundamental to determining personal jurisdiction. In order for a court to have personal jurisdiction over a person or entity, particularly one not physically present within the

territorial jurisdiction of the court and served by notice, it must not offend due process. *Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 316 (1945). Prior to the passage of the IRCA, Indian tribes were not subject to the Constitution's due process clauses. Now though, in determining personal jurisdiction, Indian tribes are held to much the same standard as both the federal and state courts as the IRCA contains a due process clause. Now codified statutorily the statute states that "no Indian tribe in exercising powers of self-government shall deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(8) (2000). While there are some differences between this clause and that of the due process clauses contained in the Constitution, the legislative history and text itself indicate that the ICRA's due process clause should be interpreted analogously to the Fourteenth Amendment. David A. Castleman, *Personal Jurisdiction in Tribal Courts*, 154 U. PA. L. Rev. 1253, 1225 (2006). In addition, both indicate that personal jurisdiction should be understood in accordance with the modern conception of personal jurisdiction that began to take shape with landmark cases like *International Shoe Co.. Id.*

While federal law is not binding in Tribal Courts, historically tribal courts have read the U.S. Supreme Court's opinion in *National Farmers Union Insurance Cos. v. Crow Tribe* as defining the extent of tribal court jurisdiction to be a matter of federal common law. *Nat'l Farmers Union Ins. Companies*, 471 U.S. at 857. In light of this, the same due process standard that a state court may apply to a citizen of another state, is applicable for Tribal Courts to apply to nonmembers. *See Application of DeFender*, 435 N.W.2d 717, 720 n.2 (S.D. 1989).

1. Long Arm Statutes of YIN Required Minimum Contacts Analysis to Comport with Due Process

In addition to due process concerns, determinations surrounding personal jurisdiction rely on the rules of procedure of the Tribal Court and here, the rules surround a minimum contacts analysis. In 2005, the YIN Tribal Council enacted an ordinance adopting Titles 1, 2, and 11 of the Winnebago Tribe of Nebraska code, which includes jurisdictional provisions. R. at 3. A few sections are particularly key here. One clarifies that jurisdiction over a person must be consistent with both the Constitution of the Tribe and the IRCA, codifying the Nation's adoption of the due process clause. YIN CT. T.C.R. 2-102.

In order for a court to comport with due process, courts necessitate a long-arm statute to reach defendants outside of their territorial jurisdiction. The YIN's long arm statute, holds that "All process...may be served anywhere within the reservation boundaries, or any Indian country, as defined by 18 U.S.C. 1151, which is subject to the jurisdiction of the Tribe and, when authorized by an ordinance or statute of the Tribe or by this Act, beyond these territorial limits." YIN CT. T.C.R. 2-314. The Tribal Code has authorized jurisdiction outside of the territorial limits when the minimum contacts "required for effective long arm service" are met. *Id.* The statute elaborates that "service outside of the Tribal jurisdiction does not give the Court in persona jurisdiction over a defendant who is not subject to the jurisdiction of the Courts of this Tribe, or who has not, either in person or through an agent, submitted him/herself to the jurisdiction of the Courts of this Tribe either by appearance, written consent, or having voluntarily entered into sufficient contacts with the Tribe, its members, or its territory to justify Tribal jurisdiction over him/her in accordance with the principals of due process of law and federal Indian law." *Id.*

Therefore, to determine if the tribal court has jurisdiction here, the court must look to whether the YIN has established that the Smiths have the requisite “minimum contacts” to assert jurisdiction over them that accord with due process.

2. YIN Tribal Courts Have Jurisdiction Over Smiths Applying Minimum Contacts Analysis that Comports with Due Process

To exercise personal jurisdiction over a non-resident defendant then in accordance with due process, the Court must find that the defendant has sufficient “minimum contacts” with the forum state and that “the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” *Int'l Shoe Co.*, 326 U.S. at 316.

The test for sufficiency of contacts has evolved over the years. *See Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, 137 S. Ct. 1773 (2017); *Asahi Metal Indus. Co. v. Superior Court of California, Solano Cty.*, 480 U.S. 102 (1987). Generally, however, the contacts are sufficient if the defendant has knowledge that he can be reasonably hauled into court as he has personally availed himself of the benefits of the forum state. In the recent years the Supreme Court’s analysis has looked to three points of concerns: the defendant must have purposefully availed themselves of the privilege of conducting activities within the forum State or have purposefully directed its conduct into the forum State, the plaintiff’s claim must arise out of or relate to the defendant’s forum conduct, and the exercise of jurisdiction must be reasonable under the circumstances. *See Bristol-Myers Squibb Co.*, 137 S. Ct. 1773; *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011). Particularly relevant to the first point here is the “effects” test. *E.g., Calder v. Jones*, 465 U.S. 783 (1984). The test articulates that a defendant’s acts must have been intentional, aimed at the forum, and the defendant knowingly caused the bulk of the harm in the forum. *Id.*

Applying this analysis, Thomas Smith has minimum contacts here. Under T.C.R. 2-314, he has “voluntarily entered into sufficient contacts with the Tribe, its members, or its territory to justify Tribal jurisdiction over him/her in accordance with the principals of due process of law and federal Indian law.” YIN CT. T.C.R. 2-314. Thomas has extensive contacts with the Nation—most crucial being that he signed a contract, knowingly entering into a relationship with the Nation. While he lives and works primarily in Phoenix, Arizona, Thomas exchanged emails with various tribal chairs and Tribal Council members on a “near daily basis” for ten years, and traveled to the reservation four times a year over that same period to present quarterly reports. R. at 1. Importantly, by agreeing to render services for payment, he also derived financial benefit from this work, personally availing himself of the jurisdiction. R. at 1. Additionally, as he had access to the financial information of the tribe, he also knew or should have known that his decision to intentionally alert the Attorney General would have substantial, harmful effects on the tribe. R. at 2. This meets the effects test of *Calder*. The claims brought against him also relate to his connection to the forum, i.e. the contract. It is clear that he meets the threshold for minimum contacts and that the YIN tribal court does have personal jurisdiction over him.

Carol Smith should also be subject to the personal jurisdiction of the YIN tribal court via minimum contacts. While her contacts are fewer than Thomas’ as she signed a contract with him rather than with the Nation directly, she still both personally availed herself of the tribe and her behavior had definitive effects on the tribe. Further, the contract she signed did include a term that both parties are required to comply with the YIN-Thomas contract. R. at 2. In return for her services, she received payment from the EDC, not Thomas, and she submits her bills to the EDC. R. at 2. The EDC is “an arm-of-the tribe,” and thus Carol did

have business contacts with the YIN by extension over a duration of seven years. R. at 3.

While appellants may argue that Carol's contacts with the Nation did not meet a minimum threshold, her contacts with the "arm-of-the-tribe" and her entrance into a contract with the Nation are sufficient. She had appropriate knowledge and was paid for these services. R. at 3. Appellants may argue that it does not appear that she necessarily violated her duties of confidentiality or fiduciary duties and so the effects test of *Calder* would not apply to her. While this may be true, this is a question of fact that will need to be determined at the trial court level.

3. Fair for YIN Tribal Court to have personal jurisdiction over Smiths

Further, for both Smiths, the fairness factors are met for both Smiths. *E.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). The factors relevant include "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, (1980). (citing *Burger King Corp.*, 471 U.S. 462, 476–77). While the factors specifically reference States, here it is the interests of the Nation at play. By resolving the controversy in the Tribal Courts, the burden on the defendants is lessened, the tribe's interests are served, the plaintiff can receive more convenient relief than suing yet again, and the controversy will be resolved speedily with respect to the sovereignty of the tribe. While the appellants may suggest that their best interests are not being served here or implicate the neutrality of the court, this is a balancing test and many of their needs are being met here especially in terms of the desire for a speedy and efficient trial.

B. The Smiths May Have Waived Objection to Personal Jurisdiction

While the Smiths made a special appearance to contest personal jurisdiction and subject matter jurisdiction under Rule 2-212 A and B, they also consented to appear by continuing their special appearance. Title 2 Article 2 Section 212 8(A) says that “a defense of lack of jurisdiction over the person...is waived...(iii) if a permissive counterclaim is filed pursuant to Section 2-214(2).” YIN CT. T.C.R. 2-212 8(A). The permissive counterclaims are here defined as, “any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party’s claim.” *Id*, 2-214(2).

The Smiths counterclaims could fall into the realm of a permissive one. The defamation for impugning their professional skills claim may or may not fall under the same transaction or occurrence. If it does not, then the Smiths have consented to personal jurisdiction here by filing a permissive counterclaim. Likely, the claims brought against Molly Bluejacket and Fred Captain in their individual capacities would be permissive counterclaims. This would be the case as they were not parties to the contract and especially if one of them was not a member of the Nation. The claims against Bluejacket and Captain would not have arisen from the same transaction or occurrence (the breaching of the contract). If personal jurisdiction was found to be waived it would not impinge on subject matter jurisdiction as subject matter jurisdiction is not waivable. YIN CT. T.C.R. 2-212 8(C).

C. Case Meets Montana Exception Against Presumption of No Tribal Civil Jurisdiction

There is a general presumption against tribal civil jurisdiction over non-members absent express statutory authorization as a tribe’s inherent sovereign powers have been held to have been divested over relations between Indians and nonmembers. *U.S. v. Wheeler*, 435 U.S. 313 (1978). As *Montana* explains in terms of tribes regulating non-Indians, “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, and so cannot survive without express congressional delegation.” *Montana*, 450 U.S. at 545–46. As there is no federal statute or treaty that grants the tribal court jurisdiction over the claims here, jurisdiction over the nonmembers could only come from the “retained or inherent sovereignty.” *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 649–50 (2001). However, while this sovereignty has been constrained as in *Wheeler*, in *Montana* the court found that the presumption of no jurisdiction over nonmembers may be overcome in two circumstances. First framed here and developed in later cases, the court held that a tribal court will have jurisdiction over nonmembers only if it is shown that either (1) the conduct arises out of a consensual relationship with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements, or (2) the conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. *Montana*, 450 U.S. at 565.

With regards to the Smiths, the first exception clearly applies. The conduct is arising out of a consensual relationship with the tribe that the Smiths voluntarily entered via a contract. As the Smiths signed a contract, and the action here is for breach of the same contract and the provisions contained within, then the tribal jurisdiction is warranted. There is precedent for upholding jurisdiction over nonmembers based on contracts. In *First Specialty Insurance v. Confederated Tribes of the Grand Ronde Community of Oregon*, the District Court upheld the Tribal Court’s jurisdiction over a claim based on a contract between the tribes and the insured nonmember investment company. *First Specialty Insurance v. Confederated Tribes*

of the Grand Ronde Community of Oregon, 75 F.Supp.3d 387 (D.D.C. 2014), aff'd, 830 F.3d 552 (D.C. Cir. 2016).

With *Plains Commerce Bank*, there was an attempt to narrow the consensual relationship exception, “even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.” *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008) (citing *Montana*, 450 U.S. at 564). While the Smiths would likely reach this threshold, the court in *Dolgencorp* refused to extend this to “require an additional showing that one specific relationship, in itself, “intrude[s] on the internal relations of the tribe or threaten[s] self-rule.” *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 175 (5th Cir. 2014). The court further dismissed this narrowing, noting that no other court has held declined jurisdiction for a failure to implicate of tribal relations or governance. *Id.*

1. Smith’s Relationship Is Related to Nexus

However, while the general rule from *Montana* was to allow for jurisdiction for the exceptions enumerated in it, the exceptions have been further narrowed by more recent case law. For the first exception to hold, the litigation must be related to the consensual relationship created. In *Atkinson Trading Co.*, in considering a tribal tax, the Court wrote, “Montana’s consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself.” *Atkinson Trading Co.*, 532 U.S. at 656. Similarly, a court’s adjudicative jurisdiction must have some nexus to the consensual relationship. In *Strate v. A-1 Contractors*, the defendant, a nonmember, had a contract, for landscaping, but the court held that there was no jurisdiction as the claim, about

an automobile accident, did not relate to the contract. *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). It is therefore not enough that the nonmember has a consensual relationship with a tribe or a tribal member. The conduct over which the tribe is exercising jurisdiction must be related to that consensual relationship. “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.” *Dolgencorp*, 746 F.3d at 175 (citing *Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 941). Here, the Smith’s conduct was reasonably related—the contract was the relationship and the breach surrounded the contract that created the relationship. *Nevada v. Hicks* additionally clarified that the relationship must be a private one, not one between a tribe and federal officials—this was a private business relationship. *Nevada v. Hicks*, 533 U.S. 353 (2001).).

2. Action Can Have Arisen Outside of Tribal Land If Arising out of Contract Which Relates to Activities on Tribal Land

Although the Supreme Court of the United States has never explicitly held that Indian tribes lack inherent authority to regulate nonmember conduct that takes place outside their reservations, this is at least strongly implied. *Dolgencorp*, 746 F.3d at 167. There is no binding precedent on this issue as in *Dolgencorp*, the Courts did not reach the merits on the issue as the appellants had neglected to argue the issue in the district court, against the rule of the Fifth Circuit. *Id.* However, the Court in *Dolgencorp* considered that “neither *Montana* nor subsequent case law seem to allow for tribal jurisdiction over the activities or conduct of non-Indians occurring outside their reservations.” *Id.*

However, while this is the traditional stance, more recent case law has suggested this may not be determinative, especially in the internet age. In *DISH Network Service L.L.C. v.*

Laducer the conduct did not occur on tribal lands—there was a contract between a tribe member and the company for television services. *DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d 877, 884 (8th Cir. 2013). The court there held that even if “the alleged abuse of process tort occurred off tribal lands, jurisdiction would not clearly be lacking in the tribal court because the tort claim arises out of and is intimately related to DISH’s contract with Brian and that contract relates to activities on tribal land.” *Id.*, at 884. The same can be said of the Smiths. While their alleged breach of contract and violation of their fiduciary duties likely did not occur on tribal lands, the claim arises out of and is intimately related to their contract with the tribe and that contract does relate to activities on the tribal lands.

The appellants will likely try to argue that despite this requirement not being determinative in precedent, that it should be. Instead, focusing on the policy rationale behind tribal sovereignty relied on in *Montana* will support allowing the exceptions to be extended to claims that arise out of and are intimately related to nonmember conduct with the tribe outside of tribal lands.

3. Case May Also Meet Second Montana Exception

While the Tribal Court can find subject matter jurisdiction over the Smiths per the first exception under *Montana*, the Tribal Court can also determine it under the second exception. Montana’s second provision has generally been read narrowly by courts, including the U.S. Supreme Court. “The second exception is only triggered by non-member conduct that threatens the Indian tribe, it does not broadly permit the exercise of civil authority wherever it might be considered “necessary” to self-government. Thus, unless the drain of the non-member’s conduct upon tribal services and resources is so severe that it actually “imperils” the political integrity of the Indian tribe, there can be no assertion of civil authority beyond

tribal lands.” Jane M. Smith, *Tribal Jurisdiction over Nonmembers: A Legal Overview*, Congressional Research Service Report, 9 (November 26, 2013), <https://fas.org/sgp/crs/misc/R43324.pdf>. (citing *Atkinson Trading Co.* 532 U.S. at 657 n. 12). This is a highly elevated and narrow threshold. In *Plains Commerce Bank v. Long Family Land and Cattle Co.*, the Court restated the limitations of the exception that the actions of the nonmember have to rise beyond merely causing some injury to the tribe to actions that actually jeopardize the continuation of the tribe. *Id.*

However, this is a very high bar, it is not an impossible one to meet—and it is a threshold that can be open to interpretation of what actually counts as endangering the existence of the tribe. *Attorney’s Process and Investigation Services v. Sac & Fox Tribe of the Mississippi in Iowa* was one such case where the second exception of *Montana* was held to apply. *Attorney’s Process and Investigation Services v. Sac & Fox Tribe of the Mississippi in Iowa*, 609 F.3d 927 (8th Cir. 2010). There, the Eighth Circuit upheld the tribal court’s jurisdictional claim over a nonmember who seized tribal financial documents, and breached trade secrets, among other offenses. Jane M. Smith, *Tribal Jurisdiction over Nonmembers: A Legal Overview*, 9. While the Smiths’ case is distinguished in some ways from *Attorney’s Process*, their conduct s can be analogized. The Smiths allegedly took secrets communicated to them in confidence—about plans for a recreational marijuana operation—against their confidentiality clauses, and relayed them to the Attorney General. R. at 2. This is behavior that could imperil the tribe’s continuation as of now, the EDC has not been able to pay off even a ¼ of the investment of the YIN. R. at 2. Coupled with this costly law suit, financially the Smiths’ decision could prove ruinous to a Nation that is already struggling. The facts on this would have to be determined in a trial court.

**D. The Suit Cannot Be Stayed by Trial Court as Per the Exhaustion
Principle Jurisdictional Appeals Must Exhaust Tribal Court**

Even if jurisdictional grounds were not met, the Supreme Court cannot and should not stay this suit for the Smiths to seek a ruling in the Arizona federal district court unless the Supreme Court finds for the appellants. For policy reasons, particularly concerning the federal government's longstanding policy of deference to tribal sovereignty and self-governance, tribal courts must have the first opportunity to determine if they have jurisdiction. "As *National Farmers Union* indicates, proper respect for tribal legal institutions requires that they be given a "full opportunity" to consider the issues before them and "to rectify any errors." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987) (citing *Nat'l Farmers Union Ins. Companies*, 471 U.S. at 857.) This means both the opportunity for Tribal Courts to determine the issue at first instance as well as on appeal to an appellate court in the tribal system. Prior to a federal court's review on appeal then, the defendants or appellants must fully exhaust tribal resources including on jurisdictional questions. Federal courts will dismiss an action challenging the jurisdiction of a tribal court if the tribal court defendant has not challenged tribal court jurisdiction through the tribal court appellate process. *Id.* There are four exceptions where a defendant may bring an action to federal court prior to completing the appeals process.

These exceptions were first enumerated in *National Farmers Union* and state that exhaustion would not be required when an assertion of tribal jurisdiction is (1) motivated by a desire to harass, (2) is conducted in bad faith, (3) is patently in violation of express jurisdictional prohibitions, or (4) where exhaustion would be useless because of the lack of sufficient chance to challenge the court's jurisdiction. *Nat'l Farmers Union Ins. Companies*, 471 U.S. at 857 n21. None of these exceptions would apply here—the action is not motivated

by an attempt to harass or in bad faith, there is opportunity to challenge, and there are not jurisdictional prohibitions it plainly violates. The appeal must proceed and be heard by the appellate court here—it cannot be stayed until they make a determination on jurisdictional grounds. Only after a determination is made can the Smiths appeal to the federal courts.

Accordingly, the judgment of the Tribal Court on this question should be sustained.

II. The YIN, the EDC, and the EDC's CEO and accountant are immune from the Smiths' claims because of sovereign immunity.

A. The YIN is immune from suit by the Smiths' claims because of sovereign immunity.

The courts have long held that tribes are inherently sovereign nations, entitled to create and enforce their own laws, and are immune from the imposition of state law, unless congress so requires it and authorizes it. *Worcester v. Georgia*, 31 U.S. 515, 540 (1832). However, the limits of this immunity are left open, and the courts have often been asked to determine the extent to which immunity should be imposed, as well as who is entitled to benefit from it. In determining whether tribal sovereign immunity protects a tribe or an entity affiliated with the tribe, the court must ask whether there is an abrogation of an inherent right to sovereignty, but generally, there has been a consistent support of the right of Indian nations to tribal sovereignty, and the powers that this accords them. *Williams v. Lee*, 358 U.S. 217, 219 (1959).

1. The extension of sovereign immunity should be determined by Congress.

Whether or not a state has the power to implement its laws on tribal land is an issue of federal law rather than state law. *Fort Belknap Indian Cmty. Of Fort Belknap Indian Reservation v. Mazurek*, 43 F.3d 428, 431-32 (9th Cir. 1994). *Kiowa* differentiates tribal immunity from state immunity in that, because tribes were not originally present at the

constitutional convention, they are not subject to surrender their immunity to states in the same way that one state would be to another *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751, 756 (1998). As a result, the question of whether or not to apply state law to a tribal matter or dispute should be determined by congress, through federal law, and should not be altered or modified by state law. *Id.* Federal law states that tribes are subject to suit only when congress authorizes, where the interests of the state law or federal law outweigh the interests of the tribes, or where a tribe has explicitly waived its immunity. *Id.* at 752. In the case of the Smiths' claims against the YIN, the EDC, and the EDC CEO and accountant, none of these has taken place.

Tribal sovereignty allows tribes to create and apply laws to their tribal nations. It is crucial to a tribe's rights and powers to be able to prescribe their laws, and to be free from the imposition of state laws, when those do not coincide with their own. Similarly, tribal sovereign immunity affords tribal nations immunity from suits brought on by both States and individuals, and it applies to activities that are both governmental in nature, as well as commercial. *Michigan v. Bay Mills Indian Cmty*, 134 S. Ct. 2024, 2031 (2014); *Kiowa Tribe*, 523 U.S. 751, 760 (1998). Tribes have an inherent interest in sovereign immunity, and in the ability to adopt their own laws to issues that occur, involving at least one tribal member, both on and off reservations. Courts have also recognized the need to limit tribal sovereign immunity, in certain respects, by virtue of their status as dependent nations. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). This means that courts, in very limited circumstances, would have the power to assert their authority over the activities that take place on tribal land. *Id.* However, this is the exception to the rule. Courts have more often

held that “absent governing Acts of Congress,” the rights of tribal nations should not be infringed upon. *Id.*

Generally, there are two circumstances under which sovereign immunity can be disregarded and state laws should be imposed, “As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit of the tribe has waived its immunity.” *Kiowa Tribe*, 523 U.S. 751, 754 (1998). Congress would authorize the use of state law in tribal matters if the state or federal interest outweighed the tribes interest in retained sovereign immunity. In *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort*, the court held that a clause which agreed to arbitrate disputes “could constitute a waiver of sovereign immunity when (1) there is an agreement to submit disputes to a body for adjudication, as well as (2) an agreement as to what particular body will hear such disputes.” *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1178 (10th Cir. 2010). In this case, the interest of the tribe in maintaining its immunity outweighs the state’s interest in imposing state law. In addition, the tribe did not waive its immunity. Rather, the YIN explicitly stated in its contracts with the Smiths that they retained their sovereign immunity in any and all disputes, and that this should extend to the EDC and the EDC’s employees. R. at 2. The YIN and the Smiths did not agree on a body for adjudication, nor did they agree which body would hear the dispute, only that it would be heard by one with competent jurisdiction. R. at 1.

2. The YIN has a significant interest in retaining its sovereign immunity.

The Yuma Indian Nation should have the rights and privileges of a sovereign nation. The YIN funded the creation of the EDC with a one-time \$10 million-dollar loan, and created it as an “arm of the tribe” to be operated by a separate board of directors, with the initial

board selected by the YIN. R. at 1. In addition, the EDC's debts were not to implicate the funds or assets of the YIN. R. at 2. In this case, the investment that the YIN has made in the EDC, as well as the function it serves, to "create and assist in the development of successful economic endeavors, of any legal type or business, on the reservation and in southwestern Arizona" creates a significant interest in maintaining sovereign immunity. R. at 1.

Furthermore, the YIN has a significant interest in retaining sovereign immunity for all contractual disputes, similar to this one. In general, Indian tribes inherently possess tribal sovereign immunity, which protects them from being sued without their explicit waiver of immunity, or without the consent of congress. *Kiowa Tribe of Okla.*, 523 U.S. 751, 754 (1998). Courts have held time and time again that this immunity is imperative to a tribe's ability to self-govern, and that to impose state law would abridge those rights. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g. P.C.*, 476 U.S. 877, 890 (1986).

3. The YIN has not waived their right to sovereign immunity.

Opposing counsel may argue two points. First, that the YIN has waived their right to sovereign immunity by agreeing to have future disputes heard by a court with competent jurisdiction. However, in order for a clause within a contract to be considered a waiver of immunity, it must explicitly state an agreement by both sides to have a dispute heard by a specific court. *Breakthrough*, 629 F.3d 1173, 1178 (10th Cir. 2010). In this case, this has not happened. The parties only agreed to have the dispute heard by a court with proper jurisdiction, and "A waiver of sovereign immunity may not be implied, but must be unequivocally expressed by either the Tribe or Congress." *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1244 (8th Cir. 1995).

Second, that since the dispute in question is concerning both tribal and non-tribal members, and part of the events took place off tribal land, sovereign immunity would not apply. Although the contract was signed off tribal land, and they communicated primarily via email and telephone, in *Michigan v. Bay Mills*, the court held that immunity extends to activity both on and off the reservation. *Michigan v. Bay Mills*, 134 S. Ct. 2024, 2027 (2014). Similarly, in *New Mexico v. Mescalero Apache Tribe*, the court found that “The exercise of concurrent jurisdiction by the State would effectively nullify the Tribe's unquestioned authority to regulate the use of its resources by members and nonmembers, interfere with the comprehensive tribal regulatory scheme, and threaten Congress' firm commitment to the encouragement of tribal self-sufficiency and economic development.” *Mescalero*, 462 U.S. 324, 343-44 (1983). As a result, the YIN would still be immune through sovereign immunity, regardless of whether or not all the members of the suit were members of the tribe.

B. The YIN's sovereign immunity should extend to the EDC because it is an arm of the tribe, and was developed for the purpose of benefiting the economic development of the YIN and southwest Arizona, and it has a close relationship with the YIN.

In order to determine whether an entity is immune from suit, the court must first determine if the tribe's sovereign immunity extends to the entity. To make this determination, courts have applied several different tests, considering a range of factors. In *Breakthrough Management*, the court considered the following factors when determining if sovereign immunity should extend from the tribe to an economic entity, “(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” as well as a sixth factor that examines “the policies underlying sovereign immunity and its connection to tribal economic development, and whether those policies are served by granting immunity to the economic entities.”

Breakthrough, 629 F.3d 1173, 1187 (10th Cir. 2010). Courts have also narrowed their analysis to factors such as the closeness of the relationship between the tribe and the entity, as well as its intended purpose. *Gavle v. Little Six*, 555 N.W. 2d 284, 293 (Minn. 1996); *White Mountain Apache Tribe v. Shelley*, 480 P.2d 654, 657 (Ariz. 1971).

By and large, courts have held that entities established under tribes are also entitled to sovereign immunity from suits. Most recently, courts have gone on to extend immunity to several different types of organizations and corporations, 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, 629 F.3d 1173, 1183 (10th Cir. 2010). In order to preserve and promote tribal self-determination, economic development, and cultural autonomy, courts have consistently held that sovereign immunity can be an affirmative defense by some tribal entities. *Id.* at 1188.

1. The EDC is an arm of the tribe and was developed for the benefit of the YIN.

The EDC should be immune from suit because it is an arm of the tribe, it was developed for the purpose of furthering and benefiting the YIN, and its relationship is sufficiently close to the YIN to benefit from sovereign immunity. In order to determine the status of this particular entity, the court should can to the factors considered by the Tenth Circuit, in *Breakthrough*. The first factor to considered is the entity’s method of creation. *Id.*

at 1187. The EDC was created under a 2009 tribal commercial code, as a subsidiary of the YIN, pursuant to its inherent sovereign powers, and as an arm of the tribe. R. at 1. This supports the idea that the EDC's creation took place through the YIN, and not independently of the tribe.

Second, the court should consider the entity's purpose. *Id.* Although the EDC serves multiple purposes, its primary purpose, which is stated in the corporate charter, is "to create and assist in the development of successful economic endeavors, of any legal type or business, on the reservation and in southwestern Arizona," as well as to "promote the prosperity of the Nation and its citizens." R. at 1. It is clear from the YIN's description that the purpose of the EDC is, in large part, to benefit the tribe's economic endeavors.

The third factor considers, "structure, ownership, and management, including the amount of control the tribe has over the entities." *Id.* The EDC is operated by a separate board of directors, and three of five of the directors are to be tribal citizens at all times. R. at 1. The EDC is also required to give tribal preference when hiring employees, and on average, 25 tribal citizens have been employed full-time since the EDC's creation in 2009. R. at 2. In addition, the Tribal Council retains the authority to remove a board of director, through a 75% vote, for any reason. R. at 1. The EDC is required to submit quarterly financial records to the Tribal Council for review and approval. R. at 2. The YIN has a great deal of control over the management and structure of the board of directors of the EDC. Moreover, the fact that three fifths of the board must be composed of tribal citizens at all times further supports the tribe's interest and control over the EDC.

Fourth, "the tribe's intent with respect to the sharing of its sovereign immunity" *Id.* In the contract signed by the EDC, the YIN, and the Smiths, the Tribal Council explicitly

mandates that the EDC, its board, and all employees be protected by the tribe's sovereign immunity. R. at 2. It is clear that the tribe's intent was to share its sovereign immunity with the EDC and its members. Like in *Breakthrough*, the tribe clearly and unambiguously expresses its intent and belief that the EDC is entitled to benefit from its sovereign immunity. *Id.* at 1193-94.

The fifth factor considers the "financial relationship between the tribe and its entities." *Id.* at 1187. In this case, the Tribal Council provided the EDC with a one-time \$10 million-dollar loan, from the Nation's general fund, to begin its operations. R. at 1. Again, the EDC is required to keep and report quarterly financial records to the Tribal Council for their review and approval. Finally, fifty percent of the YIN's profits are paid to the general fund every year to repay its loan. R. at 2. Although the YIN does not rely on the income of the EDC as its own income, it does rely on the repayment of the loan that was made to the EDC. The YIN is personally invested and dependent on the financial status and well-being of the EDC, which further supports the extension of sovereign immunity from suit.

Finally, the sixth factor considers "the policies underlying sovereign immunity and its connection to tribal economic development, and whether those policies are served by granting immunity to the economic entities." *Id.* The policies underlying sovereign immunity reiterate a "commitment to the encouragement of tribal self-sufficiency and economic development" *Mescalero*, 462 U.S. 324, 343-44 (1983). Under this view, the EDC directly serves the underlying policies of self-sufficiency and economic development, by allowing the tribe to create an entity that serves an economic purpose, prescribe its own set of standards and rules to it, and generate diverse sources of revenue for the tribe and its people. Taken together, these factors lead to the conclusion that the EDC and the YIN are extremely closely

related, and the EDC functions as an arm of the tribe. As a result, it is proper that tribal sovereign immunity should be extended to the EDC as an economic entity.

2. The YIN is dependent on its financial relationship with the EDC, however this relationship is not dispositive.

The opposing side will likely argue that the financial relationship between the EDC and the YIN does not indicate that the tribe would suffer if sovereign immunity were not extended to the EDC. However, as stated previously, the EDC was created with the purpose of furthering economic endeavors, both on and off the reservation, and the EDC has employed 25 tribal citizens, full-time, since its creation. R. at 1 and 2. It is arguable that many citizens of the YIN rely on the existence and prosperity of the EDC, and that denying the extension of sovereign immunity to the EDC could jeopardize their financial status, and as a result, the financial status of the Tribe. In addition, the EDC was given a one-time loan from the YIN, and to date, this loan has not been fully repaid. R. at 1 and 2. The YIN could potentially lose millions of dollars if the EDC were not immune from the Smiths' claims, and were held liable for the claims they have brought forward. Even if the opposing side were able to prove that perhaps the financial relationship between the EDC and the YIN weighs against extending sovereign immunity, this does not mean that this element should be dispositive on the matter. In *Breakthrough*, the Tenth Circuit found that the District Court erred when it concluded as a dispositive factor that a judgment against the entity in question would not endanger the tribe's financial status. *Breakthrough*, 629 F.3d 1173, 1186 (10th Cir. 2010).

C. Sovereign immunity extends to the EDC's CEO and accountant, in their official capacities because they were acting in the course of their employment.

The EDC's CEO and accountant are immune from suit by the Smith's claims through extension of sovereign immunity to the EDC, because they were acting in their official capacities, in the course of their employment. In *Breakthrough*, the court found that an employee "acting in the course and scope of his employment" would also be immune from suit by sovereign immunity, in the event that the entity for which they were working was immune. *Breakthrough*, 629 F.3d 1173, 1180 n.6 (10th Cir. 2010). In general, courts have held that sovereign immunity extends to individuals when those individuals are acting in the course of their employment, "in their official capacity". *Dry v. United States*, 235 F. 3d, 1249, 1253 (10th Cir. 2000). In addition, "lawsuits brought against employees in their official capacity 'represent only another way of pleading an action against an entity of which an office is an agent,' and they may also be barred by sovereign immunity" *Lewis v. Clarke*, 137 S. Ct. 1285, 1290-91 (2017). In this case, both Molly Bluejacket and Fred Captain interacted with the Smiths because of their employment with the EDC, rather than through an individual or separate capacity. Furthermore, the Tribal Council also expressed an intent to extend sovereign immunity to the EDC's employees and board of directors. As a result, sovereign immunity would extend to Ms. Bluejacket and Mr. Captain.

D. Sovereign immunity extends to the EDC CEO and accountant, in their individual capacities due to sovereign immunity, because the CEO and accountant are not the real parties of interest in this case.

The EDC's CEO and accountant are immune from suit in their individual capacities because they were not the parties of interest in this dispute. Generally, "courts look to whether the sovereign is the real party of interest to determine whether sovereign immunity bars the suit" and, "a defendant in an official-capacity actions – where the relief sought is

only nominally against the official and in fact is against the official's office and thus the sovereign itself-may assert sovereign immunity.” *Id.* at 1286-87. In *Lewis v. Clarke*, the court focused their analysis of sovereign immunity on the remedy sought by the plaintiffs in order to find that an employee sued in their individual capacity was the party in interest, and that therefore, sovereign immunity should not be extended to him. *Id.* at 1289. This case can be differentiated from *Lewis v. Clarke*, in that, the real party of interest in this case is the EDC. Although Molly Bluejacket and Fred Captain interacted and exchanged correspondence with the Smiths on a regular basis, it was done in the course of regularly conducted business, and for purposes of business being done with the EDC, rather than Ms. Bluejacket and Mr. Captain as individuals. As a result, the party in interest in this case is the EDC, not the EDC's employees, who were conducting business on behalf of the entity and the Tribe.

Opposing counsel may argue that the EDC CEO and accountant could still be sued in their individual capacity, and that as a result, sovereign immunity would not extend to them. They will likely turn to an alternative analysis of *Lewis v. Clarke*, wherein, the court held that an individual sued in their individual capacity is not subject to the Tribe's sovereign immunity. However, in *Lewis v. Clarke*, the defendant had committed a tort against the plaintiffs, and although he was acting in the course of business when this occurred, he was individually responsible for the tort, and was the party of interest in the dispute.

Accordingly, the YIN, the EDC and the EDC's CEO and accountant, Fred Captain and Molly Bluejacket, are immune from the Smiths' suits because of sovereign immunity. The YIN's interest in preserving sovereign immunity outweighs the state's potential interest in implementing its laws, and the Congress' interest in preserving the rights of all tribe's to self-government and self-determination far outweighs the interest of the State, or of the

Smiths. The YIN and the EDC are closely related, and share in both their composition of YIN tribal members and directors, but the YIN also has a personal interest in the EDC's economic prosperity, which could be at risk with a lawsuit. As a result, in order to protect the interests of the tribe, sovereign immunity should extend from the YIN to the EDC and the EDC's CEO and accountant.

Accordingly, the judgment of the Tribal Court on this question should be sustained.

CONCLUSION

For all of the foregoing reasons, the judgment of the Trial Court should be affirmed and the matter remanded for further proceedings.

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Respectfully submitted,

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