

No. 17-024

**IN THE
YUMA INDIAN NATION SUPREME COURT**

YUMA INDIAN NATION,

Plaintiff/Appellee,

v.

Thomas SMITH and Carol SMITH,

Defendants/Appellants

**ON WRIT OF CERTIORARI TO THE
YUMA INDIAN NATION TRIBAL COURT**

BRIEF FOR RESPONDENT

Team No. 181
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QUESTIONS PRESENTED

- I. Whether the Yuma Indian Nation courts have personal and subject matter jurisdiction over Thomas Smith and Carol Smith for claims arising from their contractual relationships with the Tribe. In the alternative, whether the Smiths are required to exhaust their remedies in tribal court before they may seek a ruling in the Arizona federal district court.
- II. Whether the Yuma Indian Nation Supreme Court should uphold the sovereign immunity of the Yuma Indian Nation, the YIN Economic Development Corporation, the EDC CEO, and the EDC accountant, as authorized by federal precedent.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

This case is about the preservation of the tribal sovereignty and sovereign immunity of the Yuma Indian Nation (“YIN”). In 2007, Thomas Smith, a certified financial planner, signed a contract with the YIN, a federally recognized tribe, agreeing to provide the YIN with financial advice regarding the Tribe’s economic development on an as-needed basis. R. at 1. The contract required that Mr. Smith maintain absolute confidentiality regarding any and all tribal communications and economic development plans. *Id.* at 1. The contract also stipulated that any dispute arising from the contract would be litigated in a court of competent jurisdiction. *Id.* at 1. Mr. Smith lives and works in Phoenix, Arizona, and the contract was signed by both parties at his Phoenix office. *Id.* at 1.

From 2007 to 2017, Mr. Smith provided the YIN with financial advice on a wide range of economic development issues. *Id.* at 1. In the course of performing his contractual duties, Mr. Smith frequently visited the YIN reservation to present quarterly reports to the YIN Tribal Council and exchanged near daily emails and telephone calls with various tribal chairs and Tribal Council members. *Id.* at 1. Since 2009, he has also communicated regularly with Fred Captain, the CEO of the YIN’s Economic Development Corporation (“EDC”) and Molly Bluejacket, an EDC accountant. *Id.* at 1.

In order to promote the prosperity of the YIN and its citizens, the Tribal Council created the EDC under tribal commercial code in 2009. *Id.* at 1. The EDC was created via a corporate charter as a wholly owned subsidiary of the YIN and an “arm-of-the-tribe,” and was funded with a one-time \$10 million loan from the YIN’s general fund. *Id.* at 1. The primary purpose of the EDC, as 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.” *Id.* at 1. The commercial code authorizes the YIN, pursuant to its inherent sovereign powers, to create and charter public and private corporations to operate businesses on and off the reservation. *Id.* at 1.

The EDC is required to keep detailed corporate and financial records and submit them on a quarterly basis to the Tribal Council for review and approval. *Id.* at 2. To protect its success, the EDC is authorized to sue and be sued. *Id.* at 2. Debts of the EDC may not encumber or implicate the assets of the YIN. *Id.* at 2. The EDC also does not possess the power to borrow or lend money in the name of, or on behalf of, the YIN or to grant or permit any liens or interests of any kind to attach to the assets of the YIN. *Id.* at 2. Nonetheless, fifty percent of all EDC net profits are paid to the YIN general fund on an annual basis, with a total of \$2 million paid to date. *Id.* at 2.

The EDC is operated by a board of five directors, a majority of whom must be tribal citizens, and all of whom must be experienced in business endeavors. *Id.* at 1. The initial board members were selected by the Tribal Council on staggered terms, so that one director’s term expires each year. *Id.* at 1. Upon the expiration of a director’s term, sitting directors elect or reelect a person for the expiring seat by majority vote. *Id.* at 1. The Tribal Council retained the authority to remove any director for cause, or for no cause, at any time, by a 75% vote. *Id.* at 1.

The EDC is required to apply tribal preference in hiring employees and contracting with outside entities. *Id.* at 2. Since its creation in 2009, the EDC has employed an average of 25 tribal citizens full-time every year. *Id.* at 2. The Tribal Council also expressly mandated in the charter that the EDC, its board, and all employees are protected by tribal sovereign

immunity to the fullest extent of the law. *Id.* at 2. The Council included this provision, as it states in the charter, to protect the entity and the YIN from unconsented litigation and to assist in the success of the EDC's endeavors. *Id.* at 2.

In 2010, Carol Smith, a licensed stockbroker, signed a contract with Thomas Smith to provide Mr. Smith, the EDC, and the YIN with investment advice. *Id.* at 2. This contract is identical to the contract Mr. Smith signed with the YIN in 2007, and was signed with the written permission of the YIN Tribal Council. *Id.* at 2. Ms. Smith's contract requires that she abide by the terms of Mr. Smith's contract with the YIN, including the requirement of absolute confidentiality. *Id.* at 2. Although Ms. Smith lives and works in Portland, Oregon, she has visited the YIN on two occasions. *Id.* at 2. She provides her advice remotely to Mr. Smith, who forwards her guidance on various issues to the Tribal Council and EDC. *Id.* at 2.

The YIN Tribal Council recently enacted a tribal ordinance making marijuana cultivation and use on the reservation legal for any and all purposes. *Id.* at 2. After conferring with Mr. Smith, the EDC began to develop a marijuana operation pursuant to tribal law. *Id.* at 2. The medical use of marijuana is legal in Arizona, but recreational use is prohibited by state law. *Id.* at 2. In spite of the confidentiality requirement of his contract with the Tribe, Mr. Smith reported the EDC's business plans to the Arizona Attorney General, who subsequently wrote the YIN and EDC a cease and desist letter regarding the development of the marijuana operation. *Id.* at 2.

II. STATEMENT OF PROCEEDINGS

The YIN Tribal Council filed suit against Thomas Smith and Carol Smith in Yuma Indian Nation Tribal Court for breach of contract, violation of fiduciary duties, and violation of their duties of confidentiality, seeking to recover damages stipulated in the contracts. R. at

3. Under a special appearance, the Smiths moved to dismiss the suit for lack of personal jurisdiction and lack of subject matter jurisdiction. *Id.* at 3. The Smiths also moved, in the alternative, for the trial court to stay the suit while they pursue a ruling on the tribal court's jurisdiction in Arizona federal district court. *Id.* at 3. The trial court denied both motions. The Smiths then filed answers denying the YIN claims and filed counterclaims against the YIN for breach of contract and for defamation. *Id.* at 3.

The Smiths also impleaded the Economic Development Corporation, as well as the EDC's CEO Fred Captain and accountant Molly Bluejacket in their official and individual capacities, asserting the same claims against the third-party defendants as they had against the YIN. *Id.* at 3. The trial court dismissed all of the Smiths' counterclaims against YIN and claims against the third-party defendants on the basis of sovereign immunity. *Id.* at 3. The Smiths then filed an interlocutory appeal in the Yuma Indian Nation Supreme Court requesting that the Court decide these issues and issue a writ of mandamus ordering the trial court to stay the suit. *Id.* 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. *Id.* at 3.

ARGUMENT

I. Yuma Indian Nation courts have personal jurisdiction over Thomas Smith and Carol Smith.

A. YIN courts have personal jurisdiction over the Smiths based on their established contacts with the YIN.

Personal jurisdiction is required in YIN courts under the Indian Civil Rights Act (ICRA), which states that “no Indian tribe in exercising powers of self-government shall . . . deprive any person of liberty or property without due process of law.” 25 U.S.C. § 1302(a)(8) (2012). In order to protect tribal sovereignty and individual rights, the adjudicating tribe serves as the “final arbiter” of the meaning of ICRA. *See Felix Cohen, Cohen’s Handbook of Federal Indian Law* § 7.02(2) (2012 ed.). In assessing the scope of its personal jurisdiction, the YIN Court may look to United States Supreme Court precedent regarding personal jurisdiction under the Fourteenth Amendment, though these holdings are not binding on tribal courts. *See id.* at § 7.02(2). In order for a state court to exercise specific personal jurisdiction under the Fourteenth Amendment, U. S. Supreme Court precedent requires an examination of the statutory limits of personal jurisdiction, followed by an assessment of the defendant’s minimum contacts with the forum and the fairness of asserting jurisdiction. *See International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

1. YIN Code permits the exercise of personal jurisdiction over the Smiths.

The tribal equivalent of a state long-arm statute permitting the exercise of personal jurisdiction over a non-resident defendant is the Yuma Indian Nation Code, which allows for specific personal jurisdiction over Thomas Smith and Carol Smith under Titles 1 and 2. Title 1 authorizes the YIN to assert jurisdiction over any person “who transacts, conducts, or performs any business or activity within the reservation” as well as “any person who commits a tortious act . . . causing harm within the reservation.” 1 Y.I.N.C. § 104(2) (2005).

Having engaged in business activity within the reservation, the Smiths are subject to personal jurisdiction in YIN courts. Furthermore, because the violation of fiduciary duty and violation of the duty of confidentiality are tort claims, *see* 37 Am. Jur. 2d *Fraud and Deceit* § 36 (2017), the Smiths are also subject to personal jurisdiction under YIN law based on the harm caused by their tortious activity.

Title 2 provides further clarification of the tribal contacts required for the YIN Court to assert jurisdiction over a non-resident defendant, stating that the court may not exercise personal jurisdiction over a defendant who has not acquiesced “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.” 2 Y.I.N.C. § 314 (2005). While not explicitly granting personal jurisdiction to the YIN Court over persons engaged in voluntary contacts with the YIN, Title 2 suggests that such contacts may justify the exercise of jurisdiction and indicate that an analysis of the defendants’ contacts with the forum under federal due process precedent would not be an improper guide for the evaluation of personal jurisdiction in YIN courts.

2. The Smiths have established sufficient minimum contacts with the YIN to permit the exercise of personal jurisdiction.

Specific personal jurisdiction over the Smiths is proper based on the nature of their contractual relationship with the YIN. In assessing forum contacts for personal jurisdiction, the court must look to of the connection between the defendant, the forum and that lawsuit. *See Shaffer v. Heitner*, 433 U.S. 186, 186 (1977). The U.S. Supreme Court has held that parties that contract to “create continuing relationships and obligations” with citizens of another state are subject to personal jurisdiction in that state for claims arising from those

relationships and obligations. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985). In the absence of physical contacts with the forum state, personal jurisdiction may be proper over a defendant who enters a contract with a resident of the forum, so long as the contract creates “a substantial connection” between the defendant and the forum. *See id.* at 475 (quoting *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1957)). Contracts between tribal members establish sufficient minimum contacts for the exercise of personal jurisdiction by tribal courts, even if those contracts are not signed on the tribe’s reservation and the other party to the contract is not a tribal member or reservation resident. *See Allstate Indemnity Co. v. Stump*, 191 F.3d 1071, 1075–1076, as amended by 197 F.3d 1031 (9th Cir.1999).

Although the contract with Thomas Smith was signed in his Phoenix office, he has directly contracted with the YIN, repeatedly travelled to the YIN reservation throughout the course of the contract’s performance, and communicates regularly with tribal members on the reservation via email and phone. Mr. Smith’s breach of the contract and the duties arising from this agreement created foreseeable injury to the YIN, the chief impact of which has been suffered on reservation land. While Carol Smith’s contacts with the Tribe have been more limited, she has nonetheless engaged in sufficient purposeful minimum contacts with the reservation to support the exercise of personal jurisdiction over her for claims arising from those contacts. Ms. Smith signed an agreement binding her to the terms of Mr. Smith’s contract with the YIN and realistically should have contemplated the consequences that a breach of that agreement would inevitably have on the Tribe. She has provided services specifically meant to benefit the YIN and its members, and bills the Tribe directly, creating a sufficiently substantial business relationship with the YIN to permit the YIN courts to exert

personal jurisdiction over claims arising from that relationship.

The YIN Court may also assert specific personal jurisdiction over the Smiths based on their direction of tortious activity within the borders of the reservation. When a defendant's tortious activity is "expressly aimed at" the forum with the knowledge that the "brunt of the injury would be felt" there, minimum contacts have been established to support personal jurisdiction. *Calder v. Jones*, 465 U.S. 783, 789–790 (1984). By breaching their fiduciary duties and duties of confidentiality, the Smiths have engaged in tortious activity expressly aimed at the YIN, knowing that the entirety of the harm caused by their actions would be experienced on the reservation. Personal jurisdiction over these claims is therefore valid.

The motivation behind the minimum contacts analysis is to determine whether the defendant has sufficient contacts with the forum that she could "reasonably anticipate being haled into court there," regardless of the locus of the specific activities giving rise to the suit. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Even if the conduct giving rise to the present action did not explicitly occur on the reservation, the Smiths certainly could have anticipated a suit in YIN Court arising from their ongoing business relationship with the Tribe or their decision to report the Tribe to the Arizona Attorney General. After all, the requirement of minimum contacts "may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed." *Burger King*, 471 U.S. at 474.

3. Traditional notions of fair play and justice support the exercise of personal jurisdiction by the YIN courts over the Smiths.

The exercise of specific personal jurisdiction based on a non-resident's minimum contacts with the forum is only appropriate where it does not offend "traditional notions of

fair play and substantial justice.” See *International Shoe*, 326 U.S. at 316. An assessment of the fairness of asserting jurisdiction must take into account the burden on the defendant’s ability to defend, 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 efficient resolution, and the shared interest of the several states in promoting social policy. See *Asahi Metal Industry Co., Ltd. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102, 113 (1987). An analysis of these fairness factors suggests no reason why jurisdiction over the Smiths should not be exercised by the YIN courts. Although the defendants may experience some inconvenience in travelling to the tribal court, both Mr. and Ms. Smith have previously made trips to the reservation without difficulty. The Smiths have already demonstrated a familiarity and ease in the forum through their willingness to litigate permissive counterclaims at the trial level, indicating that they will not be prejudiced if required to defend themselves in YIN Court. The YIN Court’s interest in adjudicating the dispute is compelling, given the impact of the Smith’s actions on the welfare of the Tribe, and the YIN has a clear interest in obtaining relief without having to travel to a distant forum. Furthermore, because the Smiths will be unable to bring claims against the Tribe in state or federal court, see *Williams v. Lee*, 358 U.S. 217 (1959) (holding that tribal courts have exclusive jurisdiction over claims against tribal members arising from activities on reservation), the interstate judicial system’s interest will also be served by allowing both parties to litigate their claims efficiently in a single forum. Finally, the several states have an interest in promoting the sovereignty and authority of tribal courts as a matter of federal policy. The strength of these considerations weighs so heavily in favor of the YIN that jurisdiction would be proper even if the defendants’ contacts with the forum were

significantly weaker. *See Burger King*, 471 U.S. at 477 (“These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.”).

B. YIN courts have personal jurisdiction in the present action because the Smiths waived this defense by filing a permissive counterclaim.

Personal jurisdiction over the Smiths is also proper because they waived this defense by filing a permissive counterclaim against the YIN. Under Title 2 of the YIN Code, “a defense of lack of jurisdiction over the person . . . is waived . . . if a permissive counterclaim is filed pursuant to Section 2-214(2).” 2 Y.I.N.C. § 212(8)(A) (2005). Section 2-214(2) states that a counterclaim is permissive if it does not arise from the same transaction or occurrence as the opposing party’s claim. 2 Y.I.N.C. § 214(2) (2005). While the terms “transaction” and “occurrence” are not defined in the YIN Code, their widespread use in the Federal Rules of Civil Procedure provides some guidance as to their meaning. In federal court, counterclaims may arise from the same “transaction or occurrence” when the claims share common issues of law and fact, when the same evidence applies to both claims, or when there is a logical relationship between the claims. 6 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1410 (3d ed. 2017).

The Smiths’ counterclaims of breach of contract and defamation are permissive under these guidelines. The YIN’s claims against the Smiths involve issues of fiduciary duty and confidentiality, and revolve around the evidence of their breach of those duties in reporting the YIN business activities to the Arizona Attorney General. On the other hand, the Smiths’ claims primarily involve issues of the YIN’s debts under the contract and the legal standards for defamation. The only logical relationship that exists between the parties’ claims is that they both involve the same contractual document. In spite of that connection, the differences

in the issues of law and fact, as well as the evidence required to adjudicate these claims, is sufficiently different that they cannot be said to arise from the same “transaction or occurrence.” Because the Smiths’ counterclaims do not arise from the same transaction or occurrence as the claims brought against them by the YIN, they must be considered permissive and therefore constitute a waiver of the Smiths’ ability to object to the YIN Court’s exercise of personal jurisdiction.

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

A. The YIN Court’s subject matter jurisdiction extends to the limits of its regulatory jurisdiction in the present action.

A tribal court’s adjudicatory authority over nonmembers does not exceed this regulatory authority. *See Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997). While this outer limit of the court’s subject matter jurisdiction has been well-established, the U.S. Supreme Court has not clearly delineated the where the boundaries of the two authorities differ. In light of the Court’s silence on this issue, federal policies and principles imply that adjudicatory authority extends to the boundaries of regulatory authority in situations where the fundamental sovereign interests of the Tribe have been threatened. *See Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 816 (9th Cir. 2011). It would be challenging to find a situation more demanding of tribal adjudication than a dispute implicating the Tribe’s ability to contract, rely on its commercial partners, and plan for the economic development and future welfare of the tribal government. In the absence of a more limiting precedent, the implication of these fundamental sovereign interests requires the recognition that the YIN’s subject matter jurisdiction extends to the limits of its regulatory authority in the present action.

B. The claims against the Smiths fall within the YIN's authority to regulate nonmember activity on reservation land.

1. The claims against the Smiths arose on the YIN reservation.

The place of wrong for a tort claim is not where the defendant's conduct occurred, but where the injury was suffered. *See* 15A C.J.S. *Conflict of Laws* § 58 (2017). The injury caused by the Smiths' tortious violation of fiduciary duty and violation of the duty of confidentiality was suffered by the YIN on the reservation. While the breach of contract claim against the Smiths does not sound in tort, the claim arises from the same contract, which primarily concerned tribal affairs on the reservation and a substantial portion of which was performed on the reservation. Absent a similar standard for determining the locus of a breach of contract, the tort analysis may logically be expanded to include all of the YIN's claims against the Smiths.

2. The scope of the YIN's authority on reservation land includes the activity giving rise to the claims against the Smiths.

The subject matter jurisdiction of tribal courts is grounded in inherent tribal sovereignty, which allows tribes to regulate nonmember activity in order "set conditions on nonmember entry, preserve tribal self-government, [and] control internal relations." *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*, 554 U.S. 316, 337 (2008). Therefore, the baseline regulatory authority of the YIN over nonmember activity within the reservation extends to all matters necessary to protect these aspects of tribal sovereignty. The U.S. Supreme Court has clarified this standard, stating that the "assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them." *Nevada v. Hicks*, 533 U.S. 353, 361 (2001). The claims against the Smiths arise from tribal contract and tort law regarding business relationships, both of which are fundamental to tribal self-government. Without being able to regulate

transactions and establish the duties contracting parties owe to one another, the YIN would be unable to effectively pursue economic development and tribal welfare.

While “tribes will normally possess regulatory jurisdiction over nonmembers engaging in activities on tribal land,” *see* Cohen, *supra*, § 4.02(3)(c)(i), the narrower limitations on tribal authority developed in *Montana v. United States*, 450 U.S. 544 (1981), may apply to land owned by a tribe or its members if a sufficiently compelling state interest so requires. *See Hicks*, 533 U.S. at 364. No such state interest is present in this case. Although the state of Arizona may have an interest in the development of the Tribe’s marijuana business, this interest is tangential to the claims at hand and does not rise to the level of the considerable state interest present in *Hicks*. *Montana* would therefore not be an applicable legal framework in the present action, and the bounds of tribal regulatory jurisdiction over the YIN’s claims are instead determined by the baseline limits of tribal sovereignty.

3. The YIN has regulatory authority over the activities of nonmembers who enter consensual relationships with the Tribe.

Even under the *Montana* framework, the YIN’s regulatory jurisdiction would extend to the claims brought against the Smiths. *Montana*’s exploration of tribal authority begins with the statement that “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,” *Montana*, 450 U.S. at 564, and cites *Oliphant* for the proposition that “the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.” *Montana*, 450 U.S. at 565 (citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)). The Court goes on to present two exceptions to this general proposition, giving tribes authority to regulate “the activities of nonmembers who enter consensual relationships

with the tribe” through contracts, as well as the conduct of non-Indians on fee land that “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 566.

A consensual relationship with a tribe may be established “expressly or by action.” *Plains Commerce*, 554 U.S. at 337. Mr. Smith’s relationship with the YIN was expressly established through his contract, whereas Ms. Smith’s relationship would more properly be considered established through the actions of agreeing to the terms of Mr. Smith’s contract, providing advice to the YIN, billing the Tribe directly, and receiving payments from the YIN. Although this exception requires that the claim “have a nexus to the consensual relationship itself,” see *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001), the claims against the Smiths arise directly from their contracts with the Tribe and the duties created by them. Because the Smiths have “voluntarily submitted themselves to tribal regulatory jurisdiction by the arrangements that they . . . entered into,” *Hicks*, 533 U.S. at 372, the YIN Court may exercise subject matter jurisdiction over the YIN’s claims arising from their consensual business relationship with the Tribe.

The Smiths’ breach of contract, violation of fiduciary duty, and violation of duty of confidentiality also pose a significant threat to the Tribe’s economic security and welfare, triggering the second *Montana* exception. The ability of the YIN to establish its own laws for the creation of contracts and the duties arising from them is fundamental to the ability of the Tribe to develop economically. Without the ability to enforce those agreements or ensure that the confidentiality of tribal information is protected, the Tribe will be unable to develop economically beneficial relationships necessary to the welfare and integrity of the Tribe. Furthermore, by reporting the YIN to the Arizona Attorney General, the Smiths have

jeopardized a potentially valuable tribal revenue stream and subjected the Tribe to unwarranted scrutiny and interference from the state, threatening the sovereignty and integrity of the tribal government. Because the Smiths' actions have endangered the welfare and economic security of the tribe, the YIN Court may assert subject matter jurisdiction over the YIN's claims arising from those actions.

C. The YIN has regulatory authority over nonmember activity outside of reservation land that threatens tribal self-government.

While "tribes retain considerable control over nonmember conduct on tribal land," *Strate*, 520 U.S. at 454, adjudicatory authority over nonmembers outside of a tribe's reservation is limited to activity that poses a significant threat to tribal self-government or political integrity. *See Atkinson*, 532 U.S. at 657 n. 12. While *Montana* reiterates the general proposition that tribal jurisdiction does not extend to nonmembers, it also states that tribes maintain sovereign authority over "what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes," regardless of location. *Montana*, 450 U.S. at 564. Tribal jurisdiction over the off-reservation activity of nonmembers is therefore appropriate when that activity implicates tribal self-government and internal relations. *See Luckerman v. Narragansett Indian Tribe*, 965 F. Supp. 2d 224, 230 (D.R.I. 2013); *see also John v. Baker*, 982 P.2d 738, 752 (Alaska 1999). The Smiths' actions have prompted the State of Arizona to intervene in tribal affairs, threatening the YIN's ability to be governed by its own laws and maintain sovereignty over its land, thereby requiring the exercise of tribal court jurisdiction over the claims brought in the present action.

The U.S. Supreme Court has also recognized that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory," *United States v. Mazurie*, 419 U.S. 544, 557 (1975), suggesting that tribes may

exercise authority beyond their territorial limits in matters concerning their sovereignty over tribal members. Ultimately, limiting tribal authority to activities occurring within tribal reservation would deprive landless tribes of adjudicatory jurisdiction entirely. Therefore, to determine the extent of tribal authority outside the YIN reservation, the court must “[look] to the character of the power that the tribe seeks to exercise, not merely the location of events.” *John*, 982 P.2d at 752. In *Luckerman*, the Narragansett tribe was found to have “at least a colorable claim of jurisdiction” over a suit arising from contracts with a non-member that were partly performed outside the Narragansett reservation, a situation closely mirroring that of the Smiths’ relationship to the YIN. *Luckerman*, 965 F. Supp. 2d at 230.

As technology rapidly increases nonmembers’ ability to interact with tribes without setting foot on a reservation, a more nuanced application of U.S. Supreme Court precedent regarding tribal jurisdiction is needed. See *Federal Trade Commission v. Payday Financial, LLC*, 935 F. Supp. 2d 926, 939 (D.S.D. 2013) (“[T]reating the nonmember’s physical presence as determinative ignores the realities of our modern world.”); see also *Attorney’s Process and Investigation Services Inc. v. Sac & Fox Tribe of the Mississippi*, 609 F.3d 927, 937 (8th Cir. 2010). Where a nonmembers’ conduct would have the same impact on the Tribe, whether performed on or off the reservation, the physical location of the activity should not determine the scope of tribal jurisdiction. See *FTC*, 935 F. Supp. 2d at 940. The contract signed by Mr. Smith, which was largely performed on the reservation and directly concerns the economic development of the Tribe, should be subject to tribal jurisdiction regardless of where Mr. Smith happened to be at the time it was signed or at the time he violated its terms. Likewise, Ms. Smith, who is subject to the same terms and who conducted regular transactions with the Tribe, should not be shielded from liability in tribal court solely

because her brother served as an intermediary for her advice to the Tribe.

III. The trial court should not stay this suit while the Smiths seek a ruling in Arizona federal district court federal review of tribal jurisdiction is only appropriate after exhaustion of tribal court remedies.

A. Federal review of tribal jurisdiction is only appropriate after exhaustion of tribal court remedies

The federal policy of promoting tribal self-government requires that “the forum whose jurisdiction is being challenged [has] the first opportunity to evaluate the factual and legal bases for the challenge.” *National Farmers Union Insurance v. Crow Tribe*, 471 U.S. 845, 856 (1985). Consequently, the Smiths must first exhaust their available remedies in tribal court before seeking a review of the YIN Court’s jurisdiction in federal court.

B. The Smiths have not exhausted their tribal court remedies.

Exhaustion of tribal court remedies includes not only a determination of jurisdiction by the trial court, but also tribal appellate review. *See Allstate*, 191 F.3d at 1073. Under Title 1 of the YIN Code, the YIN Supreme Court of Appeals acts as the appellate court for the YIN Court. 1 Y.I.N.C. § 202(1) (2005). The trial court denied the Smiths’ motions for dismissal for lack of personal and subject matter jurisdiction, so the YIN Supreme Court must review this determination before the Smiths may seek a ruling on tribal court jurisdiction in the Arizona federal district court. Because the YIN Supreme Court has not yet ruled on the issue of the trial court’s jurisdiction, simply staying the suit in the YIN trial court while the Smiths try the matter in federal court would abrogate the exhaustion requirement completely.

C. No exception to the exhaustion doctrine applies to the present action.

Several exceptions exist in which tribal court remedies need not be exhausted before seeking a review of tribal court jurisdiction in federal court. Exhaustion is not required where tribal jurisdiction “‘is motivated by a desire to harass or is conducted in bad faith,’ or where

the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.” *National Farmers*, 471 U.S. at 856 n. 21 (quoting *Juidice v. Vail*, 430 U.S. 327, 338 (1977)). None of these exceptions applies to the situation at hand, as the Smiths have full opportunity to challenge the court’s jurisdiction at both the trial and appellate levels, no express prohibition of jurisdiction applies, and the tribal court has asserted jurisdiction for the purpose of adjudicating a valid dispute between the tribe and its contractors.

Further exception to the exhaustion doctrine has been recognized “[w]hen . . . it is plain that no federal grant provides for tribal governance of nonmembers' conduct,” so the exhaustion requirement “would serve no purpose other than delay.” *Hicks*, 533 U.S. at 369 (quoting *Strate*, 520 U.S. at 459–460). However, this exception also fails to apply to the action at hand. As discussed at length above, the assertion of tribal court jurisdiction over the Smith is not only plausible, but is clearly appropriate. The Smiths are therefore barred from seeking a ruling in Arizona federal district court before all tribal court remedies have been exhausted.

IV. Sovereign immunity protects the YIN from the Smiths’ counterclaims.

Under current federal precedent, it is “settled law” that Indian nations are entitled to exercise sovereign immunity as “domestic dependent nations.” *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2030–31 (2014). A tribe’s sovereign immunity is not boundless, but is indeed broad – a federally recognized tribe is immune to any suit that has not been authorized by Congress or consented to by the tribe’s waiver of immunity. *See Cohen, supra*, § 7.05(1)(a) (2012 ed.). While there has been some willingness by the U.S. Supreme Court to consider abrogating tribal sovereignty doctrine within the commercial context, the Court has consistently declined to do so and instead deferred the decision to

Congress. In recent years, Congress has considered but declined to enact legislation that would limit tribal sovereign immunity in the context of commercial transactions. *See Bay Mills Indian Community*, 134 S. Ct. at 2038. Accordingly, the Court has unequivocally asserted that “[t]ribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation.” *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 760 (1998). As such, this court should feel comfortable finding that – barring an applicable congressional abrogation or tribal waiver – the YIN has appropriately asserted its sovereign immunity privilege in its case against Thomas and Carol Smith.

A. Congress has passed no legislation that would abrogate sovereign immunity in this context.

As noted above, Congress has the authority to waive sovereign immunity on behalf of Indian tribes through legislation. However, a congressional “waiver of sovereign immunity ‘cannot be implied but must be unequivocally expressed.’” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58–59 (1978) (citation omitted). To date, Congress has abrogated tribal immunity in a number of contexts, but there has been no legislation passed that restricts the YIN’s sovereign immunity privileges in this suit. Indeed, as noted above, Congress has expressly considered and chosen not to enact legislation that would abrogate sovereign immunity for most torts and breaches of contract. *Bay Mills Indian Community*, 134 S. Ct. at 2038. In the face of Congress’ clear policy position, there is little reason for this court to doubt Congress’ support for sovereign immunity in the context of a contract dispute.

There may be some argument that the Indian Civil Rights Act of 1968 (ICRA) implies waiver of a tribe’s sovereign immunity within its own courts. Cohen, *supra*, § 7.05(1)(b). While the U.S. Supreme Court has held that ICRA did not abrogate sovereign

immunity for actions brought under the Act, they concurrently noted that “[t]ribal forums are available to vindicate rights created by the ICRA.” *Santa Clara Pueblo*, 436 U.S. at 65.

However, even if one argues that this is a valid waiver, it would apply only to suits brought under ICRA. The Smiths’ suit for breach of contract and defamation does not. Further, the Yuma Indian Nation Code specifically provides that “the Tribe does not waive its sovereign immunity or consent to suit in any court, federal, tribal, or state.” 11 Y.I.N.C. § 081 (2005).

B. The YIN has not waived their right to invoke sovereign immunity through the provisions in their contract with the Smiths’.

An Indian tribe may also waive their right to sovereign immunity through a variety of means – most relevantly to this case by contracting or initiating litigation. However, “a tribe’s waiver must be ‘clear’” for a court to find that sovereign immunity rights have been relinquished. *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001). Federal courts have considered the question of whether a tribe’s assent to a contract constitutes a waiver of sovereign immunity on many occasions. In *C & L Enterprises*, for example, an Indian tribe entered into a construction contract with C & L that specified in part that any contract dispute would be adjudicated by a binding arbitration process “in accordance with applicable law in any court having jurisdiction thereof.” *C & L Enterprises*, 532 U.S. at 419. The contract further specified that “applicable law” included the American Arbitration Association Rules, which in turn provided that an “arbitration award may be entered in any federal or state court having jurisdiction thereof.” *Id.* Thus, the Court held that the Tribe necessarily waived their immunity in state and federal court by assenting to provisions that specified the application of Oklahoma law. However, other courts have found similar contract agreements insufficient to establish a waiver of sovereign immunity in the absence of clauses that clearly “reference or incorporate procedures that

provide for non-tribal jurisdiction for enforcement,”. *Demontiney v. U.S. ex rel. Dep't of Interior, Bureau of Indian Affairs*, 255 F.3d 801, 813 (9th Cir. 2001). *See also Miller v. Wright*, 705 F.3d 919, 926 (9th Cir. 2013) (holding that the contract in question did not waive a tribe’s sovereign immunity because it “did not contain any of the provisions, including subjecting itself to the jurisdiction of the state, that formed the basis for the waiver in *C & L*”).

The YIN’s contract with the Smiths’ does contain language similar to that considered by the Court in *C & L Enterprises*. It provides in part that any and all disputes arising from the contract be litigated in a court of competent jurisdiction, which the YIN undoubtedly intended to include the tribal court. Nonetheless, this court should remain assured that federal law does support the conclusion that there was no express waiver of immunity in this case. First, as noted above, federal courts do not agree on the extent to which a waiver of sovereign immunity may be implied by contract provisions. Indeed, some courts have noted that decisions like *C & L Enterprises* “[test] the outer limits of [the U.S. Supreme Court]’s admonition against implied waivers.” *Quinault Indian Nation v. Pearson for the Estate of Comenout*, 868 F.3d 1093, 1099 (9th Cir. 2017). Second, despite the contract’s language, the tribal code adopted by the YIN specifies that “unless specifically waived by a resolution adopted by the [Tribe] specifically referring to such, the Tribe shall be immune from suit in any civil actions.” 1 Y.I.N.C. § 919 (2005). No such resolution has been adopted by the Tribe. Thus, the tribal code, which is binding in this court, not only provides clarity as to how this court should rule on this issue, but also introduces an ambiguity as to whether the language in the contract was intended to waive immunity. Federal courts have consistently articulated a “strong presumption against waiver of tribal sovereign immunity,” such that

ambiguities should be read in favor of upholding immunity. *Demontiney*, 255 F.3d at 811.

Thus, this court should hold that sovereign immunity prevents the Smiths' claims from being maintained against the Tribe.

C. The YIN has not waived their sovereign immunity by initiating a suit against the Smiths.

As a general matter, federal precedent is clear that Indian tribes do not waive their sovereign immunity privileges simply because they have initiated a lawsuit. *See Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991). Courts have consistently held that “when a tribe files suit, it submits to jurisdiction only for purposes of adjudicating its claims, but not other matters, even if related.” *White v. University of California*, 765 F.3d 1010, 1026 (9th Cir. 2014). *See also Quinault Indian Nation*, 868 F.3d 1093 at 1097 (noting that “Tribal immunity even extends to compulsory counterclaims in excess of the original claims—despite the fact that compulsory counterclaims by definition arise out of the same transaction or occurrence”). Therefore, the YIN's initiation of this suit does not by itself constitute a waiver of its immunity to any counterclaim.

However, some courts have noted that participation in a suit may waive immunity to counterclaims in specific circumstances. According to federal precedent, counterclaims do not violate sovereign immunity to the extent that they fall within the “issues necessary to decide the action brought by the tribe” *McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989). In response to the YIN's suit for breach of contract, violation of fiduciary duties, and violation of confidentiality duties, the Smiths' have brought counterclaims for payment due under the contract and for defamation. Since settlement of these issues is not required to determine the issues raised by the YIN, the Smiths' counterclaims cannot be maintained on

these grounds. This is true despite the observation that

[A]llowing the Tribe to sue without exposing itself to suit for subsequent related matters is unfair. However, as the Supreme Court has noted, “[t]he perceived inequity of permitting the Tribe to recover from a non-Indian for civil wrongs in instances where a non-Indian allegedly may not recover against the Tribe simply must be accepted in view of the overriding federal and tribal interests in these circumstances.”

Id. at 631.

Counterclaims that state a claim for recoupment may also be properly maintained despite sovereign immunity defenses. *See Quinault Indian Nation*, 868 F.3d at 1099. A valid “recoupment claim ‘must (1) arise from the same transaction or occurrence as the plaintiff’s suit; (2) seek relief of the same kind or nature as the plaintiff’s suit; and (3) seek an amount not in excess of the plaintiff’s claim.’” *Id.* at 1100. However, the Smiths’ counterclaims do not meet this standard because they request “affirmative relief” against the YIN, rather than just an offset of the liquidated damages sought by the Tribe. *Id.*

D. No policy considerations support abrogation of sovereign immunity in this context.

In pursuit of its “‘overriding goal’ of encouraging tribal self-sufficiency and economic development,” Congress has “consistently reiterated its approval” of sovereign immunity protection for Indian nations. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987). Accordingly, current federal law comports with the idea that Indian nations, in part through their exercise of sovereign immunity, are intended to have the powers necessary to govern according to their own laws and to develop sustainable economies. This interest is served by maintaining the YIN’s right to invoke sovereign immunity in their suit against the Smiths, whose actions have threatened YIN self-governance and economic development.

V. Sovereign immunity protects the EDC from the Smiths' impleader.

Tribal sovereign immunity may also extend to entities that operate as an arm of the tribe, without regard to whether the entity is engaged in governance or commercial activity.

See Cohen, supra, § 7.05(1)(a).

To determine whether an entity is entitled to sovereign immunity as an “arm of the tribe,” we examine several factors including: “(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.”

White 765 F.3d at 1025.

The EDC is entitled to sovereign immunity to the extent that the relevant factors suggest that the entity “acts as an arm of the tribe so that its activities are properly deemed to be those of the tribe.” *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006).

Under this standard, this court should hold that the EDC is indeed entitled to sovereign immunity. Following a tribal commercial code, the YIN established the EDC expressly as a wholly-owned subsidiary of the YIN and as an arm of the tribe. The EDC's charter specifies that its central purpose 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.” The EDC's mission supports the overall development of the YIN's economy and therefore “pertains to tribal self-governance notwithstanding the entity's commercial activities.” *People ex rel. Owen v. Miami Nation Enterprises*, 2 Cal. 5th 222, 246 (2016). The Tribal Council maintains significant management authority over the EDC. The Council has specified that at least three of the five directors on EDC's board must be held by tribal citizens, and it retains the ability to remove a director at any time and for any reason. The Council also requires the EDC to submit quarterly financial reports to the Council for its

review and approval. There is no question that the Tribal Council intended the EDC to be entitled to sovereign immunity, as the Council expressly provided such protection in the EDC's charter. The financial relationship between the Tribe and the EDC further demonstrates the EDC's valuable role in the Tribe's economy. The EDC was funded entirely by a loan from the YIN general fund, and the EDC is required to return 50% of its annual profits to the Tribe. The EDC is also required to preference tribal members in hiring and contracting, and has proved to be a valuable source of employment for tribal citizens. Taken in its entirety, the evidence clearly supports the conclusion that the EDC is entitled to sovereign immunity under current federal precedent. *See, e.g., White*, 765 F.3d at 1025; *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 726 (9th Cir. 2008); *Allen*, 464 F.3d at 1046; *People ex rel. Owen*, 2 Cal. 5th at 247.

A. The sue and be sued clause in the EDC's charter does not waive the EDC's sovereign immunity privileges.

The EDC's corporate charter does contain a provision that authorizes the EDC to sue and be sued. However, federal courts have not agreed as to whether such provisions constitute a waiver of the entity's sovereign immunity. *See Cohen, supra*, § 7.05(1)(c). Nonetheless, the tribal code specifies that a corporation wholly owned by the tribe – as the EDC is – may only validly consent to suit if such consent is “(1) explicit, (2) contained in a written contract or commercial document to which the corporation is a party, and (3) specifically approved by the board of directors of the corporation.” 11 Y.I.N.C. § 1003 (2005). No such written consent by the EDC exists, so the EDC has not consented to suit by the Smiths.

VI. Sovereign immunity protects both Fred Captain and Molly Bluejacket from the Smiths' impleader.

Though the privilege is far less broad than that provided to Indian nations, tribal officials and employees may also invoke tribal sovereign immunity in certain circumstances. An Indian tribe's sovereign immunity may extend to tribal officials when they are "acting within the scope of their authority. *See* Cohen, *supra*, § 7.05(1)(a). The Ninth Circuit has also recently held that in addition to tribal officials, "tribal immunity protects tribal employees acting in their official capacity and within the scope of their authority." *Cook*, 548 F.3d at 727. Thus, both Fred Captain and Molly Bluejacket may invoke the tribe's immunity to the extent allowed by current precedent.

A. The Smiths' claims against Fred Captain and Molly Bluejacket in their official capacities are barred by sovereign immunity doctrine.

In *Santa Clara Pueblo*, the U.S. Supreme Court asserted that under *Ex Parte Young* doctrine, suits against tribal officials may be maintained to the extent that they seek declaratory or equitable relief. *Santa Clara Pueblo*, 436 U.S. at 59. Federal courts have further clarified that "*Ex Parte Young* is not limited to claims that officials are violating the federal Constitution or federal statute; it applies to federal common law as well." *Salt River Project Agricultural Improvement & Power District v. Lee*, 672 F.3d 1176, 1182 (9th Cir. 2012). However, suits that seek damages or specific performance of a tribal contract "may not be maintained even against tribal officials in their official capacity, as the relief will run directly against the tribe itself." Cohen, *supra*, § 7.05(1)(a). *See also* *Pistor v. Garcia*, 791 F.3d 1104, 1113 (9th Cir. 2015); *Maxwell v. County of San Diego*, 708 F.3d 1075, 1088 (9th Cir. 2013); *Cook*, 548 F.3d at 727; *Shermoen v. United States*, 982 F.2d 1312, 1320 (9th Cir. 1992). Thus, suits for monetary damages or specific performance may not be maintained against Mr. Captain or Ms. Bluejacket in their official capacity regardless of whether they

were acting within the scope of their authority. This court should therefore hold that the Smiths' claims against Mr. Captain and Ms. Bluejacket in their official capacities for payment due under their contract (specific performance) and defamation (for which damages are the only currently available remedy) are barred by immunity doctrine. Rodney A. Smolla, *Law of Defamation*, § 9:92 (2d ed. 2017).

B. The Smiths have made no valid claims against Fred Captain and Molly Bluejacket in their individual capacities.

Suits against tribal officers and employees in their individual capacity “are barred by qualified immunity unless the alleged actions were not colorably within the authority delegated by the tribe.” *See Cohen, supra*, § 7.05(1)(a). As stated by the Ninth Circuit, it remains “the general rule that individual officers are liable when sued in their individual capacities . . . so long as any remedy will operate against the officers individually, and not against the sovereign” *Pistor*, 791 F.3d at 1113.

However, we need not conduct an analysis as to whether Mr. Captain and Ms. Bluejacket's actions fell within the scope of their authority or whether the Smiths' suit would operate against the YIN. In response to suit from the Tribe, the Smiths' have asserted the same claim against every possible party – the Tribe, the EDC, the EDC's employees in their official capacities, and the EDC's employees in their individual capacities. Further, the Smiths have alleged no specific individual actions taken by either Mr. Captain or Ms. Bluejacket that would justify an action against them in their individual capacity. *See Imperial Granite Company v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991) (holding that because a suit “allege[d] no individual actions by any of the tribal officials named as defendants...it is difficult to view the suit against the officials as anything other than a suit against the Band”). Thus, the Smiths' actions indicate that their claims are in fact

aimed at the YIN, not Mr. Captain and Ms. Bluejacket. The Smiths' cannot circumvent tribal immunity through "a mere pleading device." *Cook* 548 F.3d at 727. Thus, this court should hold that because the Smiths' counterclaims do not allege individual action by Mr. Captain and Ms. Bluejacket, the claims may not be maintained against them in their individual capacity.

CONCLUSION

For the foregoing reasons, the Court should: 1) affirm the YIN Court's denial of the motion to dismiss for lack of personal jurisdiction, 2) affirm the YIN Court's denial of the motion to dismiss for lack of subject matter jurisdiction, 3) deny the petition for writ of mandamus to stay the case in YIN Court, and 4) affirm the YIN Court's dismissal of counterclaims against the YIN and claims against the third party defendants based on sovereign immunity.

January 2018

Respectfully submitted,
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