No. 17-024

IN THE

Yuma Indian Nation Supreme Court

_____

THOMAS SMITH & CAROL SMITH,
Appellants,
v.

YUMA INDIAN NATION
Appellee.

_____

On Interlocutory Appeal to
The Yuma Indian Nation Supreme Court

_____

BRIEF FOR THE APPELLANTS

_____

TEAM 202

Counsel for Appellants

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QUESTIONS PRESENTED

I. Whether the YIN tribal court has jurisdiction over Thomas Smith and Carol Smith given the strict limitations imposed on tribal jurisdiction over nonmembers, or, alternatively, whether the exceptions to the exhaustion doctrine indicate the tribal court should stay the suit while the Smiths seek a ruling in Arizona federal district court.

II. Whether tribal sovereign immunity or qualified immunity shields the Yuma Indian Nation ("YIN"), the YIN Economic Development Corporation ("EDC"), EDC CEO Fred Captain, or EDC employee Molly Bluejacket from the Smiths' claims seeking damages.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

In 2007, the Yuma Indian Nation ("YIN"), entered into a contractual agreement with Thomas Smith, a certified financial planner and accountant residing in and working out of Phoenix, Arizona, for advice on matters related to financial and economic development. R. at 1. The contract, signed by both parties at Thomas' office in Phoenix, stated that litigation of "any and all disputes arising from the contract" take place "in a court of competent jurisdiction." *Id.* The advice Thomas provided was typically given remotely, via emails and telephone calls, with only quarterly visits to the YIN where he would present the Tribal Council with written reports. *Id.*

In 2009 the YIN created the YIN Economic Development Corporation ("EDC"). The EDC was established by the Tribal Council pursuant to the tribe's commercial code through a corporate charter, which states the entity's purpose as "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.* While the tribe created the EDC as a wholly owned subsidiary and arm of the tribe, the EDC maintains its own board of directors, which must be comprised of five people, including two non-tribal citizens at all times. *Id.* The corporate charter also provides that tribal sovereign immunity protects the EDC, its board of directors and its employees to the fullest extent of the law. *Id.* at 2. Among its powers, the EDC is authorized to buy and sell land on and off the reservation and to sue or be sued. *Id.* However, each quarter, the tribal council does review the EDC's corporate and financial records. *Id.* The EDC was initially funded using a $10 million loan from the tribe's general fund. *Id.* at 1. In return, the EDC pays fifty percent of its profits to the general fund every

year. *Id.* at 2. After the EDC's creation, Thomas primarily communicated with the EDC's CEO, Fred Captain, and the EDC's accountant, Molly Bluejacket. *Id.* at 1.

In 2010, with the YIN's Tribal Council's permission, Thomas signed a contract with his sister Carol Smith, a licensed stockbroker living and working out of Portland, Oregon, to provide the tribe and the EDC with advice related to stocks, bonds, and securities. *Id.* at 2. The contract was identical to the one Thomas signed with the YIN in 2007 and contained an additional provision requiring the parties to comply with Thomas's 2007 contract. *Id.* Unlike Thomas, Carol rarely communicated with the EDC or the YIN as a whole. Instead, she would generally send her advice to Thomas who would then relay her advice to the Tribal Council, Fred Captain, and Molly Bluejacket. *Id.* In the eight years Carol was an adviser for the YIN, she visited the reservation on only two occasions, both occurring when she was already visiting Phoenix during a vacation. *Id.*

In 2016, the EDC consulted with Thomas regarding its interest in pursuing the development of a marijuana operation however both Thomas and Carol were personally opposed to being involved in the marijuana business. *Id.* While the EDC was still in the preliminary stages of the marijuana operation, Thomas informed the Arizona Attorney General of the YIN's plans. *Id.* The Attorney General sent the EDC and YIN a cease and desist letter. *Id.*

II. STATEMENT OF PROCEEDINGS

Respondents, the YIN Tribal Council, first brought a claim before the YIN trial court against petitioners Thomas and Carol Smith for breach of contract, violation of fiduciary duties, and violation of confidentiality duties. The YIN sought to recover the liquidated damages amount set forth in the Smiths' contracts. R. at 3. In response, via special appearance, petitioners Thomas and Carol Smith filed identical motions to dismiss the suit for want of personal and subject matter jurisdiction. R. at 3. Additionally, the Smiths requested that in the alternative, the tribal court stay the suit while they pursue a ruling in the U.S. District Court for Arizona with respect to the tribal jurisdiction matters. YIN trial court denied both Carol's and Thomas's motion to dismiss. R. at 3.

Subsequently, petitioners filed answers via special appearance to the claims in the YIN's suit against them. *Id*. Petitioners then filed counterclaims against the YIN and impleaded the EDC, the EDC's CEO Fred Captain, and EDC employee Molly Bluejacket for defamation and for money owed to petitioners pursuant to their contracts. *Id*. Petitioner brought claims against the EDC employees in their official and individual capacities. YIN trial court dismissed petitioners' counterclaims against the tribe along with their claims against the EDC and its employees in accordance with sovereign immunity. *Id*.

In YIN Supreme Court, petitioners filed an interlocutory appeal seeing a decision on the matters dismissed by the trial court. Petitioners also sought a writ of mandamus ordering the YIN trial court to stay the suit. *Id*. The YIN Supreme Court granted the appeal.

ARGUMENT

I. Under *Montana*, Yuma Indian Nation ("YIN") courts do not have jurisdiction over Thomas and Carol Smith. Given the lack of jurisdiction, the exhaustion doctrine does not need to be met before the Smiths seek a ruling in the Arizona federal district court.

The Supreme Court should find that the YIN courts have neither subject matter nor personal jurisdiction over Thomas and Carol Smith. Given both Thomas and Carol Smith are non-members defendants, neither of whom consented to tribal court jurisdiction, jurisdiction over them is highly limited. Such jurisdiction can only be found through the two exceptions of *Montana v. United States*, 450 U.S. 544 (1981): 1) "activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" or 2) when "the conduct of non-Indians on fee lands within its reservation…threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565-566. Even these exceptions are further limited to non-Indians on tribal reservations. *Id.* at 565. Since Thomas and Carol Smith neither reside nor work on the reservation, the tribal court has no subject matter jurisdiction over them.

Personal jurisdiction will also be found lacking over Thomas and Carol Smith. The contract between Thomas Smith and the YIN notes that "any and all disputes arising from the contract [will be] litigated in a court of competent jurisdiction." R. at 1. Given Mr. Smith is not a tribal resident and never consented to tribal jurisdiction, it seems likely that he never expected such a suit to be brought in tribal court. Finding personal jurisdiction in such a case would offend traditional notions of fair play and substantial justice. Additionally, Carol Smith exclusively communicated with the tribe through Thomas Smith and only visited the reservation on two unplanned occasions when already on vacation in the area. As such, Carol

Smith also lacks the necessary purposeful availment for specific jurisdiction to be found over her, even if subject matter jurisdiction did exist.

Finally, the exhaustion doctrine does not need to be satisfied. Though typically one needs to exhaust tribal court remedies before bringing a §1331 challenge to tribal court jurisdiction in federal court, the Supreme Court has found that when tribal jurisdiction is plaining lacking "the tribal exhaustion requirement in such cases 'would serve no purpose other than delay.'" *Nevada v. Hicks*, 533 U.S. 353, 369 (2001). Given the clear lack of either subject matter or personal jurisdiction over the Smiths, exhaustion would only cause delay and therefore should be waived.

A. Subject matter jurisdiction is highly limited for nonmembers on non-tribal land.

As in federal and state court, proper jurisdiction in tribal court requires both subject matter and personal jurisdiction. For a tribal court to have subject matter jurisdiction, it must have both regulatory and adjudicative jurisdiction over the party. *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 809 (9th Cir. 2011). The extent of tribal court jurisdiction varies greatly depending on whether the nonmember parties are plaintiffs or defendants, and whether the activity in question took place on tribal land. Jurisdiction over nonmember defendants is limited because the US Supreme Court is concerned about people having to "'defend [themselves against ordinary claims] in an unfamiliar court.'" *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1131 (9th Cir. 2006) (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997)).

Generally, tribal courts do not have regulatory jurisdiction over nonmembers for activities that take place on non-tribal lands. However, in *Montana* the court stated that in two limited exceptions tribes may have such jurisdiction over nonmembers. Firstly, tribes

have the power "to exercise some form of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands" when the nonmembers "enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 566. Secondly, tribes can also "exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *Id.*

In *Strate*, the US Supreme Court extended the *Montana* exceptions to a tribe's adjudicatory authority. However, the Court made sure to specify that this was not an expansion of tribal jurisdiction by noting that "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Strate*, 520 U.S. at 453. While the question of whether adjudicative jurisdiction equals or is more constrained than legislative jurisdiction has yet to be decided (*Hicks*, 533 U.S. at 358), it is certain that a tribal court where regulatory jurisdiction is found lacking cannot have adjudicatory jurisdiction over that claim.

Thomas Smith and Carol Smith are both nonmember defendants who neither reside nor primarily conducted their business with the tribe on tribal land. Thomas Smith both lives in and operates out of Phoenix, Arizona, while his sister lives and works in Portland, Oregon. R. at 1-2. As such, jurisdiction, if there is any, would have to be found through one of the limited exceptions in *Montana*. It is likely, however, that even *Montana* is inapplicable to the Smiths because the exceptions make clear that it is on non-Indian fee lands where such jurisdiction may be found. In fact, "with one minor exception, [the US Supreme Court has] never upheld, under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land." *Hicks*, 533 U.S. at 360.

Assuming the exceptions in *Montana* are applicable to the Smiths, the first exception, "a consensual relationship with the tribe" (*Montana*, 450 U.S. at 566), seems most likely given a contract is explicitly mentioned as an example of what would constitute such a relationship. *Montana* cites four cases as to what would fall under the first exception. Three of the four – *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980); *Morris v. Hitchcock*, 194 U.S. 384 (1904); *Buster v. Wright*, 135 F. 947 (8th Cir. 1905) – concern taxing nonmembers conducting activities or commerce on land that is part of the reservation. *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 332-333 (2008). The final case, *Williams v. Lee*, 358 U.S. 217 (1959), concerned "a contract dispute arising from the sale of merchandise by a non-Indian to an Indian on the reservation." *Plains Commerce*, 554 U.S. at 332. All of these cases concern property or physical goods that have a direct relationship to the reservation. Here, however, we have nonmembers providing a consultation service wherein almost all of the work is done wholly off of the reservation. This makes the suit against the Smiths readily distinguishable from the cases above.

Additionally, it is highly questionable whether the "consensual" element of *Montana* is met in the YIN's relationship with the Smiths. For a consensual relationship to exist "under *Montana*'s first exception, consent may be established 'expressly or by [the nonmember's] actions.'" *Water Wheel*, 642 F.3d at 818 (quoting *Plains Commerce*, 554 U.S. at 337). In determining this, a consideration of the circumstances "and whether under those circumstances the non-Indian defendant should have reasonably anticipated that his interactions might 'trigger' tribal authority" should be made. *Id.* Nothing in the contracts the Smiths signed nor in the Smiths' actions make it seem as though they should have anticipated

tribal authority. The contracts were not signed on tribal land nor did the contracts ever specify that YIN tribal court would have jurisdiction over conflicts. Instead, they contained a clause "provid[ing] for any and all disputes arising from the contract to be litigated in a court of competent jurisdiction." Given a primary concern behind limiting tribal court jurisdiction over nonmember defendants is not wanting to force people to "'defend [themselves against ordinary claims] in an unfamiliar court'" (*Smith*, 434 F.3d at 1131 (quoting *Strate*, 520 U.S. at 442)), the first exception of *Montana* seems all the more unlikely to fit.

Furthermore, both exceptions of *Montana* are framed by the idea that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana*, 450 U.S. at 545. While a contract exists between the Smiths and the YIN, nothing in the contract nor in Thomas Smith's potential breaking of the contract in any way imperils tribal self-government or threatens tribal control of internal relations. A contract to provide financial advice does not introduce external actors to tribal government nor involves the sort of land purchases which may lead to a shift in tribal land holdings or control. The work the Smiths provided was purely advisory. Tribal control was never altered by this arrangement. Coupling this with the distinguished cases from *Montana*, and the lack of a truly consensual relationship, it is clear that the Smiths' contracts do not fall under the first exception.

Montana's second exception, when nonmember conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," is also inapplicable in this case. *Id.* at 566. Overall, the threshold to meet the second exception is very high. Conduct must not simply "injure the tribe, it must 'imperil the

subsistence' of the tribal community." *Plains Commerce*, 554 U.S. at 341 (quoting *Montana*, 450 U.S. at 566). For example, the "sale of formerly Indian-owned fee land to a third party" while "possibly disappointing to the Tribe…cannot fairly be called 'catastrophic' for tribal self-government" and therefore would not fall under *Montana*'s second exception. *Id.* Here the nonmember conduct – reporting to Arizona's AG about the tribe's plan to potentially start cultivating marijuana – is very far from something one could call catastrophic for tribal self-government. If the cultivation in question was a major component of the YIN's overall revenue, such that this reporting could have caused the tribe significant financial damage or led to bankruptcy, one could then categorize this as imperiling the subsistence of the tribal community. However, the tribe had not even begun cultivation when they received the AG's cease and desist letter. Given that this occurred while the idea was still being developed, it seems highly unlikely the tribe had already shifted major resources or reconfigured its financial strategy. Any loses the tribe suffered were purely theoretical. Still, even if there was some concrete monetary damage from the Smith's action, the level needed to met *Montana's* second exception was certainly not met.

Given that there is no regulatory jurisdiction over the Smiths in tribal court, there will also be no adjudicatory jurisdiction as adjudicatory jurisdiction can never exceed regulatory jurisdiction. As such, subject matter jurisdiction will be found lacking in tribal court and the case should be removed to Arizona Federal District Court.

B. Personal jurisdiction requirements of minimum contacts and notions of fair play and substantial justice show that there is no jurisdiction over Thomas and Carol Smith.

Personal jurisdiction in tribal court is governed by the Indian Civil Rights Act (ICRA). 25 U.S.C. § 1302(a)(8) (2010) states that "[n]o 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." Linguistically, the ICRA's Due Process clause is nearly identical to the Due Process clauses in the 5th and 14th Amendments of the US Constitution, with only the "life" aspect excluded in the ICRA because of the limitations tribal courts have in criminal manners. *See*, *Oliphant v. Suquamish Indian Tribe*, 435 US 191 (1978). Given this is a civil case, the ICRA's Due Process clause functions just as the US Constitution's clauses do.

Typically, personal jurisdiction is a minor component of cases between tribal members and nonmembers as the nonmember is usually on tribal land. Since "one of the most 'firmly established principles of personal jurisdiction' is that…[it] exists over defendants physically present in the forum state" (*Water Wheel*, 642 F.3d at 819 (quoting *Burnham v. Superior Court*, 495 U.S. 604, 610 (1990))), almost all federal cases concerning tribal jurisdiction are primarily focused on subject matter jurisdiction. When personal jurisdiction has come up, courts have generally relied on a standard *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945) minimum contacts analysis. *See*, *Water Wheel*, 642 F.3d 802. Furthermore, the YIN Tribal Code states that "the Courts of the Tribe shall have jurisdiction over…[a]ny person who transacts, conducts, or performs any business or activity within the reservation." Yuma Indian Nation Tribal Code, §1-104. All of this points to tribal and federal courts establishing personal jurisdiction in the same way.

Modern personal jurisdiction analysis starts with the idea that, for defendants situated outside of the forum territory, "due process requires only that in order to subject a defendant to a judgment in personam…he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial

justice.'" *Int'l Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). These minimum contacts cannot come about accidentally, rather "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). When dealing with a business relationship, the contacts must also "result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). Finally, in considering fair play and substantive justice one must consider the reasonableness of requiring the defendant to be tried in the current forum. This involves a balancing test wherein one considers "the burden on the defendant…the forum State's interest in adjudicating the dispute…the plaintiff's interest in obtaining convenient and effective relief…[and] the interstate judicial system's interest in obtaining the most efficient resolution of controversies." *World-Wide Volkswagen Corp v. Woodson*, 444 U.S. 286, 292 (1980).

Considerations of fair play and substantive justice show that there is no personal jurisdiction over Thomas Smith in the YIN tribal court system. While Thomas Smith certainly had contacts with the tribe through his multiyear business relationship with it and its Economic Development Corporation, Mr. Smith's physical contact with the forum consisted solely of quarterly reports that he delivered on tribal land. Additionally, as previously mentioned, the contract was signed not on tribal land but in Phoenix, where Mr. Smith lives and conducts all of his business. Coupling this with the fact that the contract does not specify YIN tribal court in any forum selection clause or choice of law provision but rather states that

disputes shall be "litigated in a court of competent jurisdiction," it is clear that Mr. Smith never envisioned being brought into tribal court.

While generally, the burden on the defendant is considered relative to the distance the party would have to travel to defend in that forum, here no such problem exists as both Mr. Smith and the YIN are located within Arizona. However, the burden of defending in a forum whose laws are foreign is even more of an inconvenience than simply having to travel. While the burden on Mr. Smith is significant, the forum State's interest in adjudicating the dispute seems relatively minor. Given that this is a standard breach of contract case, having this removed to federal court would not affect tribal sovereignty or the power of the YIN court to regulate internal affairs in any way. Similar disputes between members on the reservation would still be under the YIN's jurisdiction. Meanwhile, the plaintiff's interest in obtaining convenient and effective relief will hardly be affected by having to litigate in federal court. While there may be some mild inconvenience in having to travel to a federal court relative to staying on tribal land, there is no doubt that the relief federal court can provide will be equally effective. Lastly, the judicial system's interest in efficiency also points towards federal jurisdiction as anyone attempting to remove the case from tribal court would eventually be able to do so once they had exhausted all available tribal remedies. This would cause the case to go through an entire court system before starting the whole process anew in a second system. Simply beginning in federal court would remove a significant burden off of the defendant, barely harm the forum or the plaintiff, and notably increase overall efficiency.

Personal jurisdiction over Carol Smith is even more questionable than over Thomas Smith. Whereas Mr. Smith had continuous, direct contact with the YIN, Mrs. Smith "provide[d] her advice directly to her brother" who would then forward her communications

to the YIN's Tribal Council and others. R. at 2. The contract Mrs. Smith signed, while identical to the one Mr. Smith signed with the Nation, was between her and her brother, as opposed to directly with the YIN. *Id.* Given the identical language, it is safe to assume that Mrs. Smith's contract also contained a 'court of competent jurisdiction' clause. In the many years Mrs. Smith consulted the YIN she only visited the reservation with her brother twice. Both of these visited occurred while she was already vacationing in Phoenix (*Id.*), indicating that neither had been planned ahead of time. Combined, all of these factors show that Mrs. Smith's relationship with the YIN was significantly more attenuated than her brother's. Additionally, the burden on her of being tried in YIN tribal court is even greater than that on Mr. Smith. While Mr. Smith resides in Phoenix, Mrs. Smith works from and resides in Portland, Oregon. The burden on Mrs. Smith of traveling to the tribal court is very significant (coupled with all of the burdens previously discussed for Mr. Smith). It is also worth noting that the alleged conduct which led to the breach of contract was done solely by Mr. Smith. While Mrs. Smith also had personal opposition to being involved in the cultivation and sale of marijuana, there is no evidence that she had any role in contacting Arizona's attorney general nor that the work she provided the YIN was ever unsatisfactory. All told, the lawsuit against Mrs. Smith should likely be dismissed outright for failure to state a claim but, if the case is to move forward, Mrs. Smith's relationship to the YIN is too removed for there to be personal jurisdiction over her in tribal court.

C. When jurisdiction is clearly lacking, the exhaustion requirement does not need to be met.

The YIN trial court should stay this suit while the Smiths seek a ruling in Arizona federal district court. In most cases, federal courts do not consider tribal jurisdictional questions until "after the Tribal Court has had a full opportunity to determine its own

jurisdiction." *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 857 (1985). Known as the exhaustion doctrine, it requires that "at a minimum…tribal appellate courts…have the opportunity to review the determination of the lower tribal courts." *Iowa Mut. Ins. Co. v. La Plante*, 480 U.S. 9, 18 (1987). This is done to support "tribal self-government and self-determination" by giving the jurisdiction "being challenged the first opportunity to evaluate the factual and legal bases for the challenge." *National Farmers*, 471 U.S. at 856-857.

While exhaustion is considered the standard in such cases, there are a handful of exceptions when it does not apply. Over the years,

> the Supreme Court has recognized four exceptions to the exhaustion requirement: (1) when an assertion of tribal court jurisdiction is 'motivated by a desire to harass or is conducted in bad faith'; (2) when the tribal court action is 'patently violative of express jurisdictional prohibitions'; (3) when 'exhaustion would be futile because of the lack of an adequate opportunity to challenge the tribal court's jurisdiction'; and (4) when it is 'plain' that tribal court jurisdiction is lacking, so that the exhaustion requirement 'would serve no purpose other than delay.'"

Evans v. Shoshone-Bannock Land Use Policy Com'n, 736 F.3d 1298, 1302 (9th Cir. 2013). Given that there is no evidence of bad faith or harassment, the first exception is clearly inapplicable. Similarly, no express jurisdictional prohibitions exist against tribal action as per the second exception, and, given that the Smiths can challenge tribal jurisdiction in the YIN's Supreme Court, the futility referred to in the third exception would also not apply.

However, the fourth exception is applicable in this case. While the courts note that the exception does not apply if jurisdiction is colorable or plausible (*Elliot v. White Mountain Apache Tribal Court*, 566 F.3d 842, 848 (2009)), even that lowered standard is not met here. As discussed in detail above, the YIN's tribal courts lack both subject matter and personal jurisdiction over the Smiths. The purpose behind exhaustion – supporting self-government and self-determination – are not implicated in this case. In *Elliot*, for example, the tribe sough

to enforce regulations that prohibited "trespassing onto tribal lands, setting a fire without a permit on tribal lands, and destroying natural resources on tribal lands" worth millions of dollars. *Elliot*, 566 F.3d at 849-850. In such a case, bypassing tribal court would certainly weaken a tribe's ability to self-govern, for if jurisdiction is not, at the very least, plausible here it may never be plausible over a nonmember. Our case, on the other hand, concerns a standard contract dispute with nonmembers who were almost never on tribal land, let alone caused actual damage on said land. The dispute revolved around a proposed business venture and the theoretical loses the tribe may have sustained if the venture was eventually successful. Nothing in the contract pointed towards tribal jurisdiction and no aspect of tribal self-government would be harmed by resolving the case in federal court. To go through the steps of adjudicating the case in the YIN tribal court, followed by tribal Supreme Court, only to then litigate the jurisdictional question in federal court and, afterwards, start the entire case de novo if jurisdiction was found lacking would truly "serve no purpose other than delay." *Evans*, 736 F.3d, 1302. It is for these reasons that the trial court should stay this suit while the Smiths seek a ruling in Arizona federal district court.

II. The Yuma Indian Nation relinquished tribal sovereign immunity through a valid waiver.

A. Overview of the tribal sovereign immunity legal framework.

It is not uncommon that when questions of subject matter jurisdiction arise, so too do questions of tribal sovereign immunity. Tribal sovereign immunity is a long-standing legal doctrine that American courts have analyzed at virtually all levels. In *Kiowa Tribe v. Mfg. Techs., Inc.*, the U.S. Supreme Court dithered about the legitimacy of the doctrine in light of its applicability in a wide array of contexts involving tribal sovereignty throughout history.

The Court even suggested that its own criticisms of tribal sovereign immunity might indicate a need to abrogate tribal sovereign immunity "at least as an overarching rule" when "inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional customs and activities." *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 757-758 (1998). Nevertheless, in its holding, the Court solidified a key principle of tribal sovereign immunity that an "Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Id.* at 760. The 'only where' rule signifies the broad confines of tribal sovereign immunity. Since *Kiowa*, however, the picture of tribal sovereign immunity has remained fluid as a result of subsequent court decisions. One federal court limited application of tribal sovereign immunity based on the type of relief sought in the case by holding that immunity applied in claims for damages only and did not apply in a claim for equitable relief. *Comstock Oil & Gas, Inc. v. Ala. & Coushatta Indian Tribes*, 261 F.3d 567, 571 (5th Cir. 2001).

B. Under the *Kiowa* framework, Yuma Indian Nation consented to an express waiver of immunity.

In applying the *Kiowa* framework, the court must first evaluate whether Congress abrogates tribal sovereign immunity through a federal law governing the tribe's activities. Here, Congress is silent with respect to authorizing a suit involving tribal immunity where a tribe seeks to develop a marijuana operation in a state where local laws ban such activity. In circumstances where there is no Congressional authorization, the tribe maintains the ability to waive its immunity. *Kiowa* at 760.

The second element of the *Kiowa* rule requires the court to then evaluate whether the tribe waived its immunity. *United States v. State of Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981). A waiver must meet certain requirements in order to be considered valid. The Arizona

District Court, among others, has required that a valid waiver of sovereign immunity must be clear, unequivocal, strictly construed, and not enlarged beyond what the express language requires. *Grand Canyon Skywalk Development, LLC v. Hualapai Indian Tribe of Arizona*, 966 F.Supp. 2d 876 at 883-4 (D. Ariz. 2013) (citing United States v. Nordic Vill., Inc., 503 U.S. 30, 34 (1992)); *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001), (quoting Oklahoma Tax Comm. V. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 509 (1991)); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). One Arizona tribal appellate court maintained that for a valid waiver of immunity to exist, it is not required to contain statements such as "sovereign immunity is hereby waived," or other "magic" words. *Martin, et al. v. Hopi Tribe, et al., No. AP-004-95 (Hopi Ct. App. 1996).*

When YIN signed the 2007 contract with Thomas Smith, the tribe agreed that any disputes related to the contract would be litigated in "a court of competent jurisdiction." *See* R. at 1. In 2010, the tribe authorized Thomas to sign a contract with Carol Smith that was identical to the 2007 contract he signed with YIN, but contained an additional provision requiring the parties to comply with the 2007 contract. R. at 2. Several cases support the reasoning that the "court of competent jurisdiction" language constitutes a waiver of its tribal sovereign immunity. For example, the U.S. Supreme Court held that an agreement containing an arbitration provision designating enforceability in "any" court of competent jurisdiction constitutes an enforceable waiver of immunity because it is clearly and unambiguously expressed. *C & L Enterprises, Inc.*, 532 U.S. at 418. There is no meaningful difference between a clause containing the word "any" and a clause containing the word "a" because the

subsequent language is determinative. Courts enforce these agreements because a tribe's waiver of sovereign immunity is conveyed by the language of "competent jurisdiction."

In addition to court rulings, a plain reading of the clause is not inconsistent with a claim that the Arizona District Court is a court of competent jurisdiction. A statement is "unequivocal" if it is " unambiguous; clear; free from uncertainty." *See* Black's Law Dictionary (10th ed. 2014). The contractual language that YIN agreed to requires only a court of competent jurisdiction. It is clear that the language does not designate a specific court. Consequently, there can be no objection to hear the matter in a competent tribunal outside of tribal court.

C. The applicability of state law diminishes the tribe's claim to sovereign immunity.

The *Kiowa* majority also upheld a rule that in certain circumstances, state substantive laws may apply to tribal activities that occur outside of tribal lands without infringing on tribal sovereign immunity. *Kiowa*, 523 U.S. at 755. The Court's precedent supports tribal compliance with certain state laws, such as tax collection, when it engages in activities with non-Indians. *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okla.*, 498 U.S. 505, 512 (1991). Although *Oklahoma Tax Comm'n* involved applicable state tax collection laws, its rule is relevant to YIN's approval of the EDC's endeavor to legalize marijuana because of the possibility of the tribe dealing with non-Indians off tribal lands. In addition, showing no incongruous treatment of non-members, the Court has held that even tribal members located on non-reservation lands are "subject to nondiscriminatory state law otherwise applicable to all citizens of the State," unless federal law unambiguously provides for the contrary. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973). For the "principle is as relevant to a state's tax laws as it is to state criminal laws." Id at 149. The

record does not indicate that the tribe would limit sales to tribal members only. Since YIN authorized the EDC to obtain property off reservation and conduct activities off reservation, it is foreseeable that future marijuana activities could implicate non-Indian individuals who would ordinarily be subject to state laws banning any use of marijuana. The U.S. Supreme Court does not distinguish tribal immunity as applying to only off reservation lands or reservation lands, however, it does not extend tribal immunity to cover activities involving non-Indian individuals. *Kiowa*, 523 U.S. at 758; *Oklahoma Tax Comm'n*, 498 U.S. at. 509-514. The rationale is based on the possibility of tribal sovereign immunity potentially causing harm to non-Indians participating in an economic activity run by a tribe without possessing knowledge about tribal sovereign immunity. Consistent with the aforementioned cases, there is no valid reason why tribal immunity should protect the tribe from suit regarding its authorization of marijuana sales to non-Indians on the reservation.

III. The YIN Economic Development Corporation is not protected by tribal sovereign immunity.

To determine whether sovereign immunity shields the EDC from suit, there needs to be a separate sovereign immunity analysis for the EDC. An analysis shows that the EDC fails to qualify as a functioning arm of the tribe despite being characterized as one in the record. R. at 1. As a result, tribal sovereign immunity does not protect the EDC from the Smiths' claims.

A. The EDC does not function as an arm of the tribe.

While in some cases a tribe's sovereign immunity may extend to its agencies, an analysis of the agency's relationship to the tribe needs to be evaluated on several factors. An evaluation of the EDC and its relationship to the tribe is especially warranted here because the tribe's immunity is disputed. *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040,

1043 (8th Cir. 2000). Many courts require entities like the EDC to undergo an analysis of whether it is considered an "arm of the tribe" before the entity could argue for safeguarding under tribal immunity. *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006); *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1293 (2d Cir. 2008). Although the factors used to evaluate whether an entity is considered an arm of a tribe vary across jurisdictions, many factors overlap across frameworks and generally no single factor is determinative. Examples of factors that a court might evaluate include: (1) whether the entity was formed under tribal law; (2) whether the tribe owns and operates the entity; and (3) whether the entity's immunity protects the tribe's sovereignty. *Cash Advance v. State ex rel Suthers*, 242 P.3d 1099, 1110 (Colo. 2010); *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1185-1186 (10th Cir. 2010). The facts of this case weigh in favor of answering (1) in the affirmative, (2) in the negative, and (3) in the negative. Collectively, these factors support a claim against sovereign immunity shielding the EDC because the EDC does not function an arm of the tribe.

With respect to the first factor, whether the EDC was formed under tribal law, the record states that YIN created the EDC pursuant to the 2009 tribal commercial code. R. at 1. The record, however, does not indicate under which provision of the tribal commercial code the EDC was formed. Nevertheless, the facts taken as true do not suggest that the EDC was established under law other than tribal law.

With respect to the second factor, whether the tribe owns and operates the EDC, the record clearly states that the EDC is operated by its own board of directors. *Id*. The EDC's board does not even need to consist of a single tribal council member. The only requirements governing the EDC's board are that three of the five directors must be tribal citizens, while

two must be non-tribal citizens. *Id*. The tribe selected the EDC's first board of directors, but every year thereafter the board votes to select new members or reelect an incumbent member. *Id*. The tribe's role, therefore, in operating the EDC is limited. In addition, even though the tribe created the EDC as a wholly owned YIN subsidiary, the EDC functions as a distinct corporate entity, which diminishes the tribe's control in managing it. Facts demonstrating some degree of tribal control over the EDC include that the tribe receives fifty percent of the EDC's net profits annually and that the tribal council reviews the EDC's corporate and financial records each quarter. R. at 1-2. Facts suggesting restricted tribal control of the EDC include that the tribal council must reach a 75% vote in order to remove an individual from the board of the directors, that none of the EDC's debts implicate tribal assets, that the EDC possesses the authority to buy and sell property on or off the reservation while holding any form of ownership over it, and that the EDC may consent to sue or be sued. R. at 2. Notably, the tribal code unambiguously states that a corporate entity's consent to sue or be sued does not necessarily extend to the tribe itself. Yuma Indian Nation Tribal Code, §11-161(26). These facts taken together suggest that the EDC operates independent of the tribe, but perhaps the tribe maintains a substantial degree of ownership over the EDC. The second factor, therefore, cannot be answered in the affirmative because the tribe does not both own and operate the entity.

Regarding the third factor, whether the EDC's immunity protects the tribe's sovereignty, the facts already mentioned that indicate the distinctness of the EDC from the tribe are relevant. Granting the EDC immunity may support tribal self-determination, but only insofar as the tribe and the EDC are treated as entities that implicate one another. The fact that the tribe created the EDC for the purpose of developing economic ventures on and

off the reservation supports a principle of tribal sovereignty related to tribal economic development. R. at 1. However, the facts do not suggest that the strength of the tribe's sovereignty depends on the sovereign immunity of the EDC. Perhaps the facts would weigh more in favor of such a claim if the EDC were more financially successful and repaid more than one-fifth of the start-up loan it received from the tribe nearly 10 years ago. R. at 2. The fact that the EDC may obtain property and have any form of ownership over it further suggests that the tribe may not hold full title to the EDC's property and consequently may not be implicated by the immunity status of the EDC or its property. *Id*.

In considering all three factors, a court should find that the facts do not weigh in support of characterizing the EDC as a functioning arm of the tribe.

B. The EDC expressly waived protection under tribal immunity.

The analysis of determining the presence of a waiver of sovereign immunity for a tribal corporate entity is no different from the analysis for a tribe. Absent Congressional authorization, a tribal corporation may still waive its sovereign immunity. *Kiowa Tribe*, 523 U.S. at 760. The fact that the record states the EDC's authority "to sue and be sued" heavily supports the claim that the EDC may have waived its immunity. R. at 2. In addition, the YIN's tribal code states that "a corporation wholly owned…by the Tribe shall have the power to sue and is authorized to consent to be sued in the Court, and in all other courts of competent jurisdiction." Yuma Indian Nation Tribal Code, §11-1003(3). The phrase "sue and be sued" has been deemed an unequivocal waiver of sovereign immunity. *See Fontenelle v. Omaha Tribe of Nebraska*, 430 F.2d 143 (8th Cir. 1970). However, a tribal corporation's authority to sue and be sued alone is insufficient to constitute a waiver of tribal sovereign immunity unless there is a contract containing an express waiver. *Buchanan v. Sokaogon*

Chippewa Tribe, 40 F. Supp. 2d 1043, 1046 (E.D. Wis. 1999). Nevertheless, the EDC was formed pursuant to the tribe's corporate charter and courts have held that sue and be sued clauses in corporate charters belonging to tribes organized under 25 U.S.C. § 477, like YIN, serve as express waivers of immunity so long as the charter applies to the corporation, which is the case here. R. at 1; *Native Am. Distrib.* at 1072. *Parker Drilling Company v. Metlakatal Indian Community*, 451 F. Supp. 1127, 1136-37 (D. Alas. 1978). Courts have also held that a tribal corporate charter containing language authorizing a corporation to consent to sue and be sued "in courts of competent jurisdiction" is sufficient to constitute the tribe's consent to a suit against it. *Fontenelle* at 147 (8th Cir. 1970). Furthermore, courts have interpreted a clause in documents granting a tribal entity the power to sue and a clause containing the "competent jurisdiction" language as constituting express waivers of sovereign immunity. *Rosebud Sioux Tribe v. A & P Steel Inc.*, 874 F.2d 550, 552 (8th Cir. 1989); *Wells v. Fort Berthold Community College*, No. 96 C-0320 (Ft. Berthold Tr. Ct. 1997). The "all other courts of competent jurisdiction" language governing the formation of the EDC also demonstrates that the tribe's intent was not to restrict cases to tribal court only. Overall, the record and the tribe's corporate charter contain express language that conveys the EDC's waiver of tribal sovereign immunity. The EDC, therefore, does not enjoy tribal sovereign immunity.

IV. Immunity does not shield the EDC employees from suit in their official or personal capacities.

The Smiths have brought claims against the EDC's CEO Fred Captain and the EDC's accountant Molly Bluejacket in both their official and personal capacities. As the U.S. Supreme Court explained recently, official-capacity claims differ from personal-capacity claims because the former are against the official's office and ultimately the tribe while the

latter are against the named official as an individual. *Lewis v. Clarke*, 137 U.S. 1286, 1292 (2017). Put differently, suits against tribal officials in their official capacity are barred only in the absence of a waiver by the tribe or abrogation by Congress. So, the analysis demonstrating why the EDC and YIN do not enjoy sovereign immunity apply to the EDC's employees in their official capacities as well. Despite the record claiming that tribal immunity extends to the EDC and its employees, it has been shown that the EDC waived its sovereign immunity and is amenable to suit. This amenability extends to employees being sued in their official capacities. Fred Captain and Molly Bluejacket, therefore, are not shielded by sovereign immunity. In the event the court finds that the characterization of the EDC as an arm of the tribe is applicable and that it, along with its employees, shall be entitled to tribal immunity, the Smiths may nevertheless seek recovery from the individual administrators of the EDC.

The tribe's sovereign immunity is not implicated, however, when a tribal employee is sued in his individual capacity even if he was acting within the scope of his employment during the event from which the disputed matter arises. *Lewis* at 1295. In addition, the damages that the Smiths seek from the tribal employees in their personal capacities do not impact tribal self-governance. *Id*. The record is unclear as to what activities the employees conducted that led the Smiths to file defamation claims against them. It is settled that when a non-Indian enters into a commercial contract with the tribe, as is the case here, the tribe maintains power to exercise civil authority over the non-Indian's conduct only within the boundaries of its reservation. *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985). The facts of the case do not indicate that Thomas discussed plans of the tribe with the Arizona Attorney General on the reservation, nor do the facts indicate that the

conversation took place during working hours. The fact that the Smiths are seeking money damages, not equitable relief, is relevant because courts have found that tribal employees are not immune from liability when sued in their individual capacities where the plaintiffs seek damages. *Pistor v. Garcia*, 791 F.3d 1104, 1114 (9th Cir. 2015). An additional consideration is whether a judgment for damages against the employees in their individual capacity would be paid from the tribal treasury.

Tribal officials also benefit from qualified immunity when their conduct is related to the performance of their official duties. *Frazier v. Turning Stone Casino*, 254 F.Supp.2d 295, 307 (N.D.N.Y. 2003). The facts, however, are silent with respect to the specific conduct for which Fred and Molly are being sued, so there is no basis to contend that the officials enjoy or do not enjoy qualified immunity.

In sum, neither Fred Captain nor Molly Bluejacket should be immune from the Smiths' claims against their individual and official capacities.

CONCLUSION

For the forgoing reasons the Court should: 1) find jurisdiction over the Smiths lacking in tribal court, or, alternatively, stay the suit while the Smiths seek a ruling in Arizona federal district court and 2) find that the YIN, the YIN Economic Development Corporation, and the EDC CEO and accountants are not protected by sovereign immunity from the Smiths' claims.

Respectfully submitted,

January 2018 *Counsel for the Appellants*