No. 17-024

IN THE YUMA INDIAN NATION SUPREME COURT

MARCH TERM, 2018

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THOMAS SMITH

and

CAROL SMITH,

Appellants – Defendants

v.

YUMA INDIAN NATION

Appellee – Plaintiff

_____

ON INTERLOCUTORY APPEAL
TO THE YUMA INDIAN NATION SUPREME COURT
FOR THE YUMA INDIAN NATION TRIAL COURT

_____

BRIEF FOR APPELLEE

Team ID: 171

Counsel for Appellee

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1. Whether the Yuma Indian Nation courts can exercise jurisdiction over parties that entered into consensual contracts with the Tribe, and whether those parties have exhausted their tribal court remedies such that they can seek a ruling in the Arizona federal district court?
2. As Indian tribes, arms-of-the-tribe, and tribal officials are protected by tribal sovereign immunity and official immunity; are the Yuma Indian Nation, its wholly-owned subsidiary business, and its employees shielded from a suit arising out of the course of the Nation's official business?

STATEMENT OF THE CASE

A. Statement of Proceedings

The Yuma Indian Nation (hereinafter "YIN" or "Nation") originally brought this action against Defendant/Appellants Thomas and Carol Smith (hereinafter "Appellants") in Tribal Court for breach of contract, violation of fiduciary duties, and violation of their duty of confidentiality pursuant to the YIN Tribal Code § 2-201.[1] Appellants filed special appearances and motions to dismiss the suit based on lack of personal and subject matter jurisdiction. The trial court denied both motions. Appellants subsequently answered the complaint, counterclaimed against the Nation for monies owed, and impleaded the Yuma Indian Nation Economic Development Corporation (hereinafter "EDC") and two of its employees. The trial court dismissed all counterclaims and impleaded parties from the suit.

[1] The YIN Tribal Council adopted Titles I, II, and X of the Winnebago Tribe of Nebraska code. R. at 3.

This Court, incorporated as the Yuma Indian Nation Supreme Court pursuant to Article X of the Yuma Indian Nation Constitution and Bylaws, granted an interlocutory appeal on two issues. There has not yet been a final ruling on the merits of the case in the lower trial court.

B. Statement of Facts

The Nation is a federally recognized Indian tribe located in southwest Arizona. R. at 1. The Nation created the EDC in 2009. R. at 1. The EDC was funded with a one-time, $10 million loan from the Nation's general fund. R. at 1.

The YIN Tribal Council incorporated the EDC as a wholly subsidiary of the Nation and as an "arm-of-the-tribe." R. at 1. The Nation's commercial code authorizes the EDC to operate businesses on and off the reservation. R. at 1. The EDC'S charter extends the Nation's tribal sovereign immunity to the EDC, its board of directors, and all employees. R. at 2. The Nation did this to help the EDC flourish and to protect the Nation from unconsented litigation. R. at 2.

The EDC's charter requires tribal preference in hiring and contracting. R. at 2. Since 2009 the EDC has provided full-time employment to an average of 25 of the Nation's citizens on an annual base. R. at 2. The board of directors consist of five individuals, three of whom must be citizens of the Nation. R. at 1. Fifty percent of the EDC's annual profits are paid into the Nation's general fund, but to this date only $2 million has been repaid.

The Nation entered into a consensual contractual relationship with Thomas Smith for financial advice on an as-needed basis in 2007. R. at 1. The parties signed the contract at Thomas' Phoenix, Arizona office. As part of the contract Thomas agreed to keep all communications and economic development plans of the Nation confidential. R. at 1.

Following the creation of the EDC, Thomas primarily communicated with EDC CEO Fred Captain and accountant Molly Bluejacket. R. at 1.

Thomas signed a contract with his sister, Carol Smith, with the Nation's approval in 2010. R. at 2. Carol, who lives in Portland, Oregon, was contracted to advise Thomas, the Nation, and the EDC regarding stocks, bonds, and securities matters. R. at 2. Carol's contract was identical to Thomas'. R. at 2. Carol's contract specifically includes a term that both parties are required to comply with the Nation-Thomas contract. R at 2. Carol provides her advice to Thomas who forwards it to various persons at the Nation and EDC. R. at 2. Carol submits her monthly billing to Fred Captain and the EDC mails her payments. R. at 2. Carol has visited the Nation's reservation on two occasions. R. at 2.

Marijuana is legal for medicinal use in Arizona, but it remains illegal for recreational use. R. at 2. The Nation legalized marijuana cultivation and use for all purposes on the reservation in 2016. R. at 2. The EDC privately started planning a marijuana operation. R. at 2. The EDC consulted Thomas multiple times regarding their plans. R. at 2.

Thomas and Carol morally oppose the marijuana business. R. at 2. Thomas eventually alerted the Arizona Attorney General of the Nation's plans. R. at 2. The Nation and EDC received a cease and desist letter from the A.G regarding their marijuana operation plans. R. at 2. Consequently, the YIN Tribal Council filed suit against Appellants in tribal court seeking recovery of the liquidated damages amount set out in the contracts between the Nation and Appellants.

ARGUMENT

I. The Yuma Indian Nation courts have personal and subject matter jurisdiction over Appellants under Supreme Court jurisprudence, and these courts must be allowed to fully exhaust their judicial proceedings before a federal court determination is made.

Carol and Thomas Smith ("Appellants") entered into a contractual relationship with the Yuma Indian Nation ("Nation") in order to provide economic advice in the hopes of furthering the Nation's growth. In so doing, Appellants have availed themselves to the Nation's tribal courts in such a manner that the Due Process Clause, incorporated against federally recognized tribes in the Indian Civil Rights Act, 25 U.S.C. § 1302, is not violated. This consensual relationship also illustrates the valid exercise of subject matter jurisdiction under the so-called first *Montana* exception, where a tribal court may hear a case involving a non-Indian if the case involves the "activities of nonmembers who enter consensual relationships with the tribe . . . through commercial dealings, contracts, leases, or other arrangements. *Montana v. U.S.*, 450 U.S. 544, 565 (1981).

Further, in *Iowa Mut. Ins. Co. v. LaPlante*, the Supreme Court held that tribal appellate courts with jurisdiction to hear a civil case must be allowed to review the rulings of its lower court and fully exhaust its remedies before a federal court may intervene. 480 U.S. 9, 17 (1987). As the appeal filed by Appellants would specifically preclude the trial court from hearing this case and making a determination over an issue that they have the right to hear, the interlocutory appeal would go against the jurisprudence of the Supreme Court and further strip the inherent sovereignty of the Nation. Therefore, as the Nation's tribal courts can exercise both personal and subject matter jurisdiction over Appellants, and these courts have not yet had the chance to adjudicate the issue and review it through their appellate process, the interlocutory appeal should be denied.

a. The Yuma Indian Nation courts have personal and subject matter jurisdiction over Appellants as they availed themselves to contracts with the Tribe and do business with the tribe on tribal lands.

Whether a tribal court may exercise jurisdiction over non-Indians is a question that must be determined under federal law, as Congress has plenary authority over Indian affairs under the Indian Commerce Clause. *See United States v. Kagama*, 118 U.S. 375 (1886). Legislation has been enacted over the years that has vested tribal courts with jurisdiction in some cases, and deprives them of it in others. The Indian Civil Rights Act was intended to ensure that, even when tribal courts are entitled to hear a case, those courts would still abide by some of the fundamental principles underlying the United States. Further, the Supreme Court has held that there are certain situations where the issues are so important to the survival of a tribe that the exercise of jurisdiction must be granted. The Supreme Court held in *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, that federal law governs tribal court jurisdiction. 471 U.S. 845, 852 (1985). Therefore any action, such as this interlocutory appeal, challenging the jurisdiction of a tribal court is a federal question.

In the course of the consensual business relationship between Appellants and the Nation, Appellants visited and conducted business on Nation reservation land while additionally being in regular and systematic communication with the Economic Development Corporation that the Nation established. However, according to Appellants, this continuous and ongoing contractual relationship fails to rise to the level of contacts with the Nation that would be "sufficient to satisfy the demands of due process." *Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 317 (1945). However, under the five-part test promulgated in *World-wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980)

it is clear that the minimum contacts necessary for a forum to exercise personal jurisdiction are present.

Under an analysis of federal law regarding subject matter jurisdiction it is clear that the Nation's tribal court is entitled to hear this case. In *Strate v. A-1 Contractors*, the Supreme Court ruled that tribal courts could exercise subject matter jurisdiction only when the dispute involves an issue that a tribe can regulate under federal law. 520 U.S. 438, 449 (1997). This rule comes from the *Montana* case, which had two exceptions to the general rule that there may not be an exercise of civil jurisdiction over non-Indian members. However, the first exception specifically mentions that tribes have the power to regulate contracts they enter into themselves, such as the one between the Nation and Appellants. *Montana*, 450 U.S. at 565. Thus, the tribal court has the right to hear this case based on not only personal jurisdiction, but on subject matter jurisdiction as well.

i. Appellants have maintained sufficient minimum contacts with the forum sufficient to comply with the federal due process standard.

As the Supreme Court determined that a challenge to a tribal court's jurisdiction is truly a question of federal law, this Court should look to the current iteration of personal jurisdiction jurisprudence. Beginning with *Pennoyer v. Neff*, 95 U.S. 714 (1877), the Supreme Court has regularly addressed what is sufficient to constitute "personal jurisdiction," in a manner that will not violate a person's constitutionally protected rights. *Pennoyer* dealt with territorial jurisdiction primarily, but the seminal *International Shoe* ruling built the foundation of the modern definition of personal jurisdiction. *International Shoe* held that a forum may only exert personal jurisdiction over a party if that party has the minimum contacts necessary so that the exercise would not "offend that traditional notions of fair play and justice." *Int'l Shoe*, 326 U.S. at 316. If there were no minimum contacts whatsoever, the Due Process Clause of

the Fourteenth Amendment would prohibit a forum from taking the case and making adjudication.

Unilateral activity on the part of one party but not the other cannot force a court to exercise personal jurisdiction, as per *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). The Court stated that "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." *Id.* In requiring there be some kind of purpose in the actions of the defendant, the United States Supreme Court was ensuring that only in situations like that of Appellants who would be subjected to personal jurisdiction of a forum. Knowingly entering into a contract with the Nation was a "purposeful" act on the part of Appellants. This requirement of "'purposeful availment' ensures that a defendant will not be hauled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the unilateral activity of another party or a third person." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). Despite these protections for defendants, Appellants in this case would still clearly be subject to the jurisdiction of the Nation's tribal court due to their consensual contractual relationship.

There is now a five-part test that is used to determine whether the exercise of specific personal jurisdiction is reasonable. The test, found in *World-Wide Volkswagen*, considers the burden on the defendant from litigating in the forum; the interest of the forum in having the case adjudicated there; the interests of the plaintiff in adjudicating in the forum; the interests of the judiciary as a whole; and the interests in preserving the judicial integrity of the states. *World-Wide Volkswagen*, 444 U.S. at 288. The latter two rules are intended to ensure that the exercise of jurisdiction by the forum will not harm the sovereignty of another court, and will not violate the Due Process Clause.

Applying the *World-Wide Volkswagen* test to the facts of the case before this Court, it is clear that the tribal court can and should exercise personal jurisdiction over Appellants. First, defendant Thomas Smith regularly visits the Nation, meaning the burden is low on him to litigate in this forum. Defendant Carol Smith lives further away than her brother, but she herself has visited the Nation on more than occasion according to the record. Further, arguing that it is significantly easier for someone from Oregon to appear in the United States District Court for the District of Arizona as opposed to another court in Arizona is a specious argument at best. Defendant Carol Smith purposefully availed herself to the forum when she entered into a contract with the Nation, and the Supreme Court has precedent wherein the due process requirements for personal jurisdiction were met when the defendant had never once personally entered the forum state. In *Quill Corp v. North Dakota*, 504 U.S. 298 (1992), the Quill Corporation was found to satisfy the due process personal jurisdictional requirements because it had purposefully directed its economic activities to the forum state. The corporation ultimately prevailed in the case on other grounds, but the Supreme Court recognized that even without a physical presence, due process could still be satisfied. Therefore, both Appellants satisfy the first prong of the *World-Wide Volkswagen* test.

The forum clearly has a strong interest in having the case litigated within its courts, as the forum is both the plaintiff and the administrator of the forum itself. The Nation's case has to do explicitly with economic development on its lands, meaning that it would have an extremely persuasive argument to show that their own tribal court would have the strongest interest in hearing the case. By having the case heard within its own courts, the plaintiff Nation is showing that they are able to enter into contracts as a strong partner, and one that would be unwise to cross. The plaintiff Nation further has the understandable desire to litigate a case

that deals almost exclusively with economic activities on its own land in its own court. It flows logically that the tribal court is the most convenient forum for the much larger party of the Nation, but it is also the place where most of the alleged wrong occurred. This kind of a case would show that there is a strong and legitimate judiciary to deal with violations of some of the most basic underpinnings of modern society: contractual obligations. Therefore the second and third prongs of the *World-Wide Volkswagen* test are met.

The final two prongs of the test deal with ensuring that the exercise of jurisdiction by the tribal court will not offend any other judiciary when considering cases that involve out-of-state parties. Here, there is not a concern that the State of Arizona or Oregon wants to hear this case, and there are more than enough minimum contacts such that the Due Process Clause of the Fourteenth Amendment has not been violated. Therefore all five prongs of the *World-Wide Volkswagen* personal jurisdiction test have been satisfied. The Nation's tribal court can be shown to be a competent forum to exercise personal jurisdiction over all parties to the case before the Court under federal jurisprudence. Therefore, this Court should deny the interlocutory appeal and find that the Nation's tribal court can exercise personal jurisdiction over this case.

ii. Under the Supreme Court's first *Montana* exception, the tribal court has subject matter jurisdiction over Appellants.

The Supreme Court has established a presumption against allowing tribal courts to exercise civil jurisdiction over non-members. Under the *Montana* line of cases, the Court established a framework where, absent express authorization by law or treaty, a tribal court is presumed not to have jurisdiction over a non-member. There are two exceptions to this generally accepted rule: first, if the conduct arises out of a consensual relationship with the tribe or its members, through commercial dealing, contracts, leases or other arrangements; or

second, if the conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. *Montana*, 450 U.S. at 565.

The Court has severely limited the second exception in subsequent cases, specifically in the *Strate v. A-1 Contractors* case. There, the Court held that exception to mean that it concerned only "the right of reservation Indians to make their own laws and be ruled by them." *Strate*, 520 U.S. at 452 citing *Fisher v. Dist. Court of Sixteenth Judicial Dist. of Montana, in & for Rosebud Cty.*, 424 U.S. 382, 386 (1976). The Court felt that this exception was only to go so far as to do what was necessary to "protect tribal self-government or to control internal relations." *Id.* at 457 citing *Montana*, 450 U.S. at 564. The *Strate* case dealt with two parties that were non-members of the Nation upon whose land an accident occurred. Unlike in the present case before the Court, the Nation itself was not a party to the suit. Thus, though *Strate* provides some guidance, the first exception should be looked to when determining whether the Nation's tribal court has subject matter jurisdiction over this particular case.

Appellants clearly entered into a consensual relationship with the Nation when their contracts were signed to do work with the EDC and the Nation as a whole. The EDC, whether located on reservation land or non-fee Indian land, would likely be in Indian country under 18 U.S.C. § 1151. In *Solem v. Bartlett*, 465 U.S. 463 (1984), the Supreme Court gave three factors to help determine whether a portion of land that was originally Indian Country had subsequently been diminished or disestablished. Subsequently, the Supreme Court created a test in *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998) to determine whether a set parcel of land was considered Indian Country, which asked whether the government had set apart the parcel for the use of the Indians. However, the information given in the record makes such a determination difficult under either factor test. However, it is clear from the record that

the Nation itself occupies its own tribal land, and Appellants had personally visited the area. Further, the work they were doing was explicitly to help benefit the prosperity of the Nation and its citizens.

The first *Montana* exception clearly states that non-Indians who consensually enter into a contract with a particular Nation can be subject to the jurisdiction of a tribal court. *Montana*, 450 U.S. at 564. The contract was governed by the Nation's own commercial code, meaning that the Nation was not just borrowing federal or state law when entering into these contracts. Even if a tribal court is not a court of general jurisdiction, this case specifically involves not only an entire Nation as the plaintiff, but it further has to do with questions of tribal law. The Nation would presumably have standing to bring a breach of contract claim against a party that knowing entered into a contract governed by an Indian commerce code.

The Supreme Court in *Montana* clearly did not want tribal courts exercising much jurisdiction over non-members, but they did leave tribes some room to protect themselves against unscrupulous dealings by incorporating these exceptions. In 2016 the Supreme Court had the chance to further clarify this jurisprudence in the *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) by more specifically defining how big the scope of tribal jurisdiction over non-members conducting business on tribal land truly is, but the below ruling of the Fifth Circuit was upheld by an equally divided court. However, even without more clarification, the plain language that the Supreme Court used in *Montana* makes it clear that by entering into a consensual relationship with the Nation, Appellants have found themselves agreeing to be subject to the jurisdiction of the Nation's tribal Court. Appellants conducted business both on and off the Nation's tribal reservation land, and in doing so were clearly allowing themselves to be regulated by whatever means the Nation saw fit.

The Supreme Court has severely limited the authority of tribal courts to exercise jurisdiction over non-members, even if their conduct occurred on and directly affected tribal lands. However, the Court preserved an explicit exception for those who enter consensual relationships with the tribe through contracts. Appellants here clearly conducted business both on and off tribal land, or both in and out of Indian Country. In doing so, under a valid and binding contract signed by all parties, Appellants have allowed themselves to be subject to the subject matter jurisdiction of the Nation's tribal court. Because this exception has been met, and because the tribal court can properly exercise both personal and subject matter jurisdiction over Appellants, this Court should deny their appeal and remand the case for further proceedings consistent with this ruling in the below court.

b. As the Yuma Indian Nation court has jurisdiction over Appellants, this proceeding should not be stayed, as all tribal court remedies have not yet been exhausted.

In *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985), the Supreme Court ruled that federal courts should only address the question of whether tribal courts have jurisdiction to hear a case after the tribal courts themselves have addressed the question. Thus, a stay of this case so the United States District Court for the District of Arizona can make a determination regarding jurisdiction would be a deviation from the judicially prescribed order in which it should happen. By ruling that this determination should first be made by a tribal court, the Supreme Court created the tribal exhaustion doctrine. This doctrine was further explained in the subsequent *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), where the Court stated "[r]egardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a full opportunity to determine its own jurisdiction."

The Supreme Court made the point in *National Farmers Union* that the requirement of the exhaustion of tribal remedies mandates that tribal courts will more fully develop the record before a federal court ever has to address the issue. *National Farmers*, 471 U.S. at 853. It is a further recognition of tribal sovereignty and self-government, as well as involving the experts on federal Indian law jurisdiction from the beginning. Federal courts are not the natural arbiters of this area of law. By giving tribal courts the first chance to make a determination in their far more experienced eyes, the Supreme Court was acknowledging that the right answer is far more likely to be found much more efficiently by requiring the tribal courts to make a determination before a federal court has to consider the question. If a defendant were able to constantly opt out of a tribal court forum so they could seek out a friendlier forum, there would be little point in having civil jurisdiction for tribal courts over non-Indians. However, as was seen in the *Montana* case, there is now and continues to be room for tribal courts to exercise power over those who have entered into a relationship with a Nation, or who threaten the welfare or security of a Nation.

There are some exceptions to this rule, such as where an assertion of tribal jurisdiction is clearly motivated by an animus by a given Nation against the defendant, or where exhaustion could not occur because there would not be an opportunity to challenge the jurisdiction in the first place. *Id.* at 856 n.21. Where it can be shown that there is a clear and distinct bias against a tribal court forum it was made obvious by the Supreme Court that the cases would not have to be litigated in front of such hostilities. However, there is nothing in the present case before the Court showing that there is some bias against the defendants. While it is true that the Nation itself is the one bringing suit, the contract that Appellants entered into clearly stated that any court of "competent jurisdiction" could adjudicate the case. The record shows that

there are genuine grievances that the Nation has against Appellants, and as this current matter is an interlocutory appeal, there is obviously a higher court in which to challenge a finding of jurisdiction.

There are no grounds to excuse the normal order of tribal exhaustion and require a stay of this case so that a federal court might rule on the jurisdictional grounds of the case. The *National Farmers* and *Iowa Mutual* Courts made it clear that the expertise that tribal courts have in adjudicating these very issues should be deferred to before a federal court ever considers the matter. Were this Court to go against this clearly established precedent and determine that the federal court should determine jurisdiction, it would be tantamount to an admission that the Nation and its tribal court lack the self-determination necessary and ability to self-govern. Instead, this Court should recognize that the tribal courts of the Nation are far better equipped to make determinations regarding jurisdiction in questions of federal Indian law, and deny the request for a stay of the below case so the federal court can rule on the jurisdictional issues.

Appellants have failed to exhaust their tribal remedies as prescribed by the Supreme Court in *Iowa Mutual* and *National Farmers*. By attempting to stay a proceeding of the Nation's tribal court that has both personal and subject matter jurisdiction, Appellants are simply attempting to forum shop in the hopes of a more favorable ruling. Generally, "a federal court should stay its hand until after the tribal court has had a full opportunity to determine its own jurisdiction." *Strate*, 520 at 449. Until all judgments of the Nation's tribal courts are final, there is no role for the federal courts to play in this adjudication. Therefore Appellants request for a stay of the below proceeding should be denied.

II. The trial court properly dismissed Appellants' claims against the Nation, the EDC, Fred Captain, and Molly Bluejacket because tribal sovereign immunity protects Indian tribes from lawsuits arising from their commercial dealings.

The doctrine of tribal sovereign immunity bars Appellants' suit against the Nation, its economic arm, and its employees. Congress has not abrogated Indian tribes' immunity for commercial dealings. *Mich. v. Bay Mills Indian Cnty.*, 134 S. Ct. 2024, 2038-39 (2014). The Nation's contract with Appellants did not contain an express waiver of immunity. The Nation's immunity extends to the EDC, and under Supreme Court jurisprudence it should extend to both Captain and Bluejacket as well.

Appellants' suits against Captain and Bluejacket in their personal capacities may survive despite tribal immunity. *Lewis v. Clarke*, 137 S. Ct. 1285, 1295 (2017). Even if this Court determines those claims may proceed, both Captain and Bluejacket are still shielded from suit by official immunity.

For these reasons, we request this Court affirm the decision of the tribal district court and deny Appellants' motion for a writ of mandamus.

a. Tribal sovereign immunity protects the Nation because they have not waived their immunity and Congress has not abrogated it.

Federal Indian law has long classified Indian tribes as "domestic dependent nations" exercising sovereign authority over their citizens and territories. *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). Indian tribes, like other sovereign powers, are immune from suit. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Congress, as a function of its plenary power, may abrogate or limit Indian tribes' immunity. *Santa Clara Pueblo*, 436 U.S. at 58. If not abrogated by Congress, an Indian tribe may waive

its immunity. *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 754 (1998). Here, the Nation has not waived its immunity from suit in its commercial dealings, and Congress has not abrogated it.

Tribal sovereign immunity in commercial dealings has not been abrogated by Congress. The U.S. Supreme Court first recognized tribal immunity from suit in 1919 when they held the Creek Nation was not liable for the destruction of a landowner's fence. *Turner v. U.S.*, 248 U.S. 354, 357-58 (1919). The Court held this immunity included a tribe's commercial activities in 1940. *U.S. v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512-13 (1940) (holding the Choctaw and Chickasaw Indian Nations could not be liable for a debt from a coal mining lease). This immunity applies to commercial activities on and off a tribe's reservation. *Kiowa*, 523 U.S. at 755. During and since this span of time Congress has left tribal immunity in commercial dealings intact.

Congress' unwillingness to alter tribal immunity from suit is a clear indication of their intent to leave it intact. Justice Stevens essentially implored Congress to consider and address this issue in *Kiowa's* majority opinion. *Kiowa*, 523 U.S. at 759. In *Bay Mills*, Justice Kagan noted Congress was presented with multiple bills addressing tribal immunity in commercial dealings after the *Kiowa* decision, yet it still left the doctrine intact. 134 S. Ct. at 2038-39. Instead of abrogating tribal immunity, Congress embraces its power to promote tribal self-sufficiency and economic growth. *Citizen Band Potawatomi*, 498 U.S. at 510.

Appellants may argue *Lewis v. Clarke* has reopened the door for suits arising from a tribe's off-reservation commercial activities. *Lewis v. Clarke* did not limit tribal sovereign immunity, rather it created a narrow exception for suits brought against tribal employees in their individual capacities. 137 S. Ct. at 1295 (2017). The majority's opinion did not question the Mohegan Tribes' immunity from suit, and the fact the suit against Clarke did not implicate

the Mohegan Tribe's immunity was a key reason the Court reversed the Connecticut Supreme Court. *Id.* at 1289.[2] *Lewis v. Clarke* cannot be read as limiting or abrogating a tribe's immunity in its commercial dealings.

The Nation has not waived its tribal immunity. A "waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58 (internal quotations omitted). In reality, the Nation has done the exact opposite of waiving their immunity by expressly preserving such immunity in its tribal code. YIN Tribal Code § 11-081 (Dec. 2015). Appellants' contracts with the Nation call for all disputes arising from the contracts to be litigated in a court of competent jurisdiction, as the Nation's tribal courts can clearly exercise both subject matter and personal jurisdiction and adjudicate this suit. However, the record provides no indication of the contracts containing any kind of waiver of immunity. A waiver of immunity cannot be implied, and inferring one to exist in the case before this Court would be counter to the express ruling of the Supreme Court in *Santa Clara Pueblo*.

The Nation is shielded from Appellants' suit by tribal sovereign immunity. Congress has not authorized the suit, and the Nation has not waived its immunity. For these reasons, the trial court properly dismissed Appellants claims against the Nation.

b. Tribal sovereign immunity protects the EDC because it is an "arm-of-the-tribe" and is necessary to the Nation's self-governance.

The EDC is an instrumentality of the tribal government and entitled to the same immunity as the Nation. There is long standing precedent that a suit against an instrumentality

[2] Justices Ginsburg and Thomas drafted concurrences in which they both disapproved of tribal sovereign immunity extending to tribal commercial dealings. Justice Gorsuch took no part in the consideration or decision of the case.

of the state is a suit against the state itself. *Lewis*, 137 S. Ct. at 1294. This principle applies equally to entities determined to be an arm-of-the-tribe. *Strickland v. Decoteau*, 2005 Turtle Mt. App. LEXIS 10, *5-6 (holding a tribal casino was entitled to the tribe's sovereign immunity as an arm-of-the-tribe). Factors weighed by courts in determining if an entity is an arm-of-the-tribe include: the method of the entity's creation; the entity's purpose; the entity's structure, ownership, and management; whether the tribe intended for the entity to have immunity; the financial relationship between the tribe and the entity; and whether the purpose of tribal sovereign immunity is served by granting them immunity. *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F. 3d 1173, 1191 (10th Cir. 2010). These factors indicate the EDC is an arm-of-the Nation.

The EDC's creation and purpose evidences it is an arm-of-the-tribe. The EDC was incorporated as a wholly owned subsidiary of the Nation and as an arm-of-the-tribe. The EDC was created to "promote the prosperity of the Nation and its citizens." The court in *Chukchansi* held an entity being "wholly owned" by the tribe was a strong indication of a close relationship between the entity and the tribe. 629 F. 3d at 1192. The court also held the purpose of financial benefit to the tribe weighed in favor of extending immunity to the entity as an arm-of-the-tribe. *Id.* The remaining factors weigh heavily in the EDC's favor as well.

The Nation's intent to extend its immunity to the EDC is clear. The EDC's charter requires the board of directors to consist of five individuals, three of whom must be members of the Nation. On average, 25 of the EDC's full-time employees are members of the Nation. While the record is unclear as to what positions these employees hold, the composition of the board of directors itself is a strong indication of the Nation's intent for the EDC to be an arm-of-the-tribe. Furthermore, the Nation explicitly mandated in the EDC's charter and its tribal

code that the Nation's sovereign immunity protects the EDC to the fullest extent possible. *See* YIN Tribal Code § 11-1003(3) (Dec. 2015). The financial relationship between the Nation and EDC is equally persuasive.

The EDC's finances are inextricably tied to those of the Nation. The EDC was started with a $10 million loan from the Nation's general fund, and to date only $2 million has been repaid. The EDC's charter requires 50% of the annual profits be paid to the Nation's general fund. In practical effect, any reduction in the EDC's revenue is a reduction in the Nation's revenue. This close financial relationship between the Nation and the EDC weigh in favor granting sovereign immunity. *Chukchansi*, 629 F. 3d at 1194-95.

The final factor – whether the purpose of sovereign immunity is served by granting the EDC immunity – can be a contentious determination to make. Justices Ginsburg and Thomas are of the view that tribes should not have sovereign immunity in their commercial activities. *Bay Mills*, 134 S. Ct. at 2045 (Thomas, J., dissenting). Justice Thomas rejects the argument that sovereign immunity in commercial activities promotes tribal self-sufficiency and self-governance because tribes have developed lucrative commercial enterprises. *Id.* at 2049. Justice Sotomayor correctly counters this argument by noting not all tribes engage in highly lucrative activities and for some tribes these commercial activities are the sole means of generating revenue for the tribe. *Bay Mills*, 134 S. Ct. at 2043 (Sotomayor, J., concurring). Neither Justice Thomas' nor Justice Ginsburg's arguments against sovereign immunity have been adopted by a majority of their colleagues on the Supreme Court, however. The purpose of tribal sovereign immunity would be best served by granting the EDC immunity because the EDC is essential to the economic prosperity of the Nation, and such a determination would recognize the Nation's sovereignty as a domestic dependent nation.

The EDC is an arm-of-the-tribe. The EDC was created as a wholly owned subsidiary of the Nation to promote the economic prosperity of the Nation. The managerial structure and financial relationship between the EDC and the Nation clearly demonstrate the Nation intended for the EDC to be protected by the Nation's sovereign immunity. For these reasons, the trial court properly dismissed Appellants claims against the EDC.

c. Tribal sovereign immunity protects Fred Captain and Molly Bluejacket; but in the alternative, official immunity protects them from suit.

Captain and Bluejacket, as tribal officials, are immune from Appellants' suit. The suit against them in their official capacity is barred by tribal immunity because the real party in interest is the Nation, and Appellants are simply attempting to find away around the long-standing, Supreme Court recognized doctrine of tribal sovereign immunity. The suit against these employees in their individual capacities is barred by official immunity because they were acting in their official capacities.

i. Captain and Bluejacket are protected by tribal sovereign immunity because Appellants sued them in their official capacities.

Appellants' suit is truly against the Nation, not Captain and Bluejacket. A suit against an individual in their official capacity is truly against their office and therefore the sovereign. *Lewis*, 137 S. Ct. at 1292 (2017). The immunities available to a party in an official-capacity action are those available to the governmental entity. *Hafer v. Melo*, 502 U.S. 21, 25 (1991). Because the governmental entity is the "real party in interest." *Hafer*, 502 U.S. at 25 (1991). The Nation is the real party in interest, as the Nation has the deep pockets required to pay the remainder of the contract for which Appellants countersued.

Lewis v. Clarke affirmed tribal officials' right to assert tribal sovereign immunity when sued in their official capacities. 137 S. Ct. at 1292. The Court's holding still requires courts to look beyond the face of the complaint and determine if the sovereign is the real party in interest. *Id.* at 1291. Appellant has already answered this question by naming Captain and Bluejacket in their official capacities. Appellants claims against Captain and Bluejacket in their individual capacities should not be allowed to survive tribal immunity because Appellants have demonstrated the real party in interest is the Nation.

Appellant will argue tribal sovereign immunity does not apply to suits brought against tribal employees in their individual capacities. *Id.* at 1292-93. Following *Lewis*, Appellee does not refute that contention. However, this case is distinct from *Lewis*. In Lewis, the plaintiff's sued Clarke in *only* his individual capacity, meaning at no point was the tribe implicated as the real party in interest. *Id.* Appellants sued Captain and Bluejacket in both their official and individual capacity. Clarke was a low-level employee for the tribe's casino whereas Captain and Bluejacket are high ranking officials whose positions are essential to the Nation's function. *Id*. The Lewises' claim was for negligence, an unintentional tort. *Id*. Appellants claim is for breach of contract and defamation, an intentional tort. Appellants are positioned much differently than the plaintiff in *Lewis*.

As employees of the Nation, Appellants had the capacity to bargain for a waiver of the Nation's sovereign immunity. Appellant-Thomas held an important position with the Nation for almost decade, and had many opportunities to review his contract with the Nation. Further, Appellant-Thomas was the one who hired, with the Nation's permission, Appellant-Carol. He arranged for her contract with the Nation to be identical to his, and again he did not negotiate for a waiver of tribal sovereign immunity. Those who oppose tribal immunity extending to a

tribe's commercial activities have pointed to its unfairness to tort victims who do not have the opportunity to negotiate for a waiver. *Kiowa*, 523 U.S. at 766 (Stevens, J., dissenting). In Appellants' case this concern is moot.

Tribal immunity should necessarily bar Appellants' suit against Captain and Bluejacket in the individual capacity. Further, even if this Court does not extend the Nation's tribal sovereign immunity to them, Captain and Bluejacket are shielded from suit by official immunity.

ii. Official immunity protects Captain and Bluejacket because they were acting in good faith, in their official capacities, and they did not exceed the scope of their authority.

Captain and Bluejacket are shielded from suit by official immunity. The Lewis v. Clarke Court did not address whether Clarke was entitled to official immunity because Clarke's motion to dismiss was based solely on tribal sovereign immunity. 137 S. Ct. at 1293, n. 2. Therefore, the Lewis ruling does not preclude this Court from finding Captain and Bluejacket entitled to protection from suit by official immunity.

The doctrine of official immunity is essential to the proper functioning of government. Prior to 1988 federal officials enjoyed absolute immunity for actions taken within the scope of their official duties. However, the U.S. Supreme Court limited the doctrine's applicability to only discretionary actions in *Westfall v. Erwin*. 484 U.S. 292, 297-98 (1988). Congress quickly responded by passing the Westfall Act and removing the discretionary function requirement. *Gutierrez De Martinez v. Lamagno*, 515 U.S. 417, 426 (1995); see 28 U.S.C. § 2679 (approved Dec. 22, 2017). According to the Supreme Court, Tribal officials are entitled to this same immunity as are officials of the federal government.

Tribal courts have long recognized the affirmative defense of immunity for tribal officials and employees performing their official duties. *Stone v. Somday*, 1984 Colville App. LEXIS 1, *6-7 (holding Colville Tribal officials enjoy qualified immunity for actions taken in their official capacities). Official immunity for tribal officials allows them to fulfill their duties free from intimidation, harassment, and the threat of lawsuit. *Satiacum v. Sterud*, 1982 Puyallup Trib. LEXIS 1, *17. "Quite simply, tribal employees maintain official immunity from suit unless the plaintiff establishes that the individuals have acted beyond the scope of their duties or authority." *Cleveland v. Garvin*, 2009 Ho-Chunk Trial Lexis 3, *35 (internal quotations omitted). Employees and officials of the Yuma Indian Nation are entitled to the same official immunity as other tribal and federal officials.

This Court should adopt the Puyallup Tribes' standard for determining when a tribal official is entitled to official immunity. The Puyallup's standards for official immunity are: the officer was acting in their official capacity at the time of the act alleged; they must have acted in good faith; and the official is liable for acts a reasonable person would know exceeds the official's lawful authority. *Satiacum*, 1982 Puyallup Trib. LEXIS at *17. Applying these standards, Captain and Bluejacket are entitled to official immunity. Captain was acting in his capacity as CEO and Bluejacket in her capacity as accountant for the EDC at the time of the alleged acts. The record is unclear regarding what role Captain and Bluejacket played in the Nation terminating their contractual relationship, but there is no indication either official acted in bad faith. Terminating contractual relationships with employees is not an activity a reasonable person would consider outside the scope of a CEO's authority, especially when said employee clearly breached their duty of confidentiality.

Tribal and federal precedents provide ample grounds for this Court to find Captain and Bluejacket are shielded by not just tribal sovereign immunity but by official immunity as well. For these reasons, the trial court properly dismissed Appellants' claims against Captain and Bluejacket.

CONCLUSION

For the foregoing reasons, Appellee respectfully requests this Court affirm the trial court's ruling that it had personal and subject matter jurisdiction, affirm the dismissal of the counterclaims, and remand the remainder of the case to the trial court for resolution on the merits.

Respectfully submitted,

Team 171

Counsel for Appellee

Dated: January 8, 2018

APPENDIX A

YIN Tribal Code § 11-081

Sovereign immunity of the Tribe not waived. By the adoption of this Code, the Tribe does not waive its sovereign immunity or consent to suit in any court, federal, tribal or state, and neither the adoption of this Code, nor the incorporation of any corporation hereunder, shall be construed to be a waiver of the sovereign immunity of the Tribe or a consent to suit against the Tribe in any such court.

APPENDIX B

YIN Tribal Code § 11-1003(3) Sovereign immunity.

The sovereign immunity of the Tribe is hereby conferred on all Tribal corporations wholly owned, directly or indirectly, by the Tribe. A corporation wholly owned, directly or indirectly, by the Tribe shall have the power to sue and is authorized to consent to be sued in the Court, and in all other courts of competent jurisdiction, provided, however, that:

a. no such consent to suit shall be effective against the corporation unless 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, and

b. any recovery against such corporation shall be limited to the assets of the corporation. Any consent to suit may be limited to the Court or courts in which suit may be brought, to the matters that may be made the subject of the suit and to the assets or revenues of the corporation against which any judgment may be executed.