No. 17-024.

In The
SUPREME COURT OF THE YUMA INDIAN NATION

YUMA INDIAN NATION,

Appellee,

v.

THOMAS SMITH & CAROL SMITH,

Appellants.

ON INTERLOCUTORY APPEAL
TO THE SUPREME COURT OF THE YUMA INDIAN NATION

BRIEF FOR THE APPELLEE

Team No. 209

Counsel for Appellee

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QUESTIONS PRESENTED

1. Whether the Yuma Indian Nation courts have personal and subject matter jurisdiction over Thomas Smith and Carol Smith, or in the alternative, whether the trial court should stay this suit while the Smiths seek a ruling in the Arizona federal district court.

2. Whether sovereign immunity, or any other form of immunity, protects the Yuma Indian Nation, the YIN Economic Development Corporation, and/or the EDC CEO Fred Captain and EDC Employee/Accountant Molly Bluejacket from the Smiths' claims.

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

The Yuma Indian Nation ("YIN") is a federally recognized Indian tribe located in southwest Arizona. Record of Appeal ("ROA") at 1. In 2007, The YIN signed a contract with appellant Thomas Smith in which Mr. Smith agreed to provide the Nation with financial advice regarding economic development issues. ROA at 1. The contract was signed in the appellant's office in Phoenix, Arizona, where he lives and works. Id. The Contract between YIN and the Appellant "provided for any and all disputes arising from the contract to be litigated in a court of competent jurisdiction" and required Mr. Smith to "maintain absolute confidentiality regarding any and all tribal communications and economic development plans." Id. Appellant Smith continued his service to the YIN for ten years, and communicated directly with tribal chairs and council members primarily via email and telephone. Id.

In 2009, The Yuma Indian Nation created the YIN Economic Development Corporation or "EDC" under the tribal commercial code to "promote the prosperity of the Nation and its citizens." Id. The EDC was funded with a $10 million dollar loan from the YIN general fund and was authorized to pursue, create, and charter public and private corporations to operate businesses in order "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. The Tribal Council created the EDC as a wholly owned subsidiary of the Nation and treated it as "an arm-of-the-tribe." Record of Appeal ("ROA") at 1. The EDC would be operated by a five person board of directors with experience in business and who would be comprised of two non-Indians or citizens of other tribes and three

tribal citizens of the YIN. ROA at 1. The EDC was also given the power to buy and sell property, on or off the reserservation, and to sue and be sued. ROA at 2.

The Tribal Council also created a series of rules and guidelines for the EDC to follow. The EDC is banned from encumbering debt on behalf of the Nation and does not possess the power to borrow or lend money in the name of the Nation. Id. The EDC must give tribal preference to hiring employees and contracting with outside entities. Id. The Tribal Council retained the authority to dismiss any director for cause, or for no cause, with a 75% vote. Id. The EDC must also provide the Tribal Council with detailed financial records and distribute fifty percent of all EDC net profits to the YIN general fund every year. Id. EDC board members, employees and the company itself are also to be protected by tribal sovereign immunity to the fullest extent allowed by law. Id.

In 2010, Appellant Thomas Smith signed a contract with his sister Appellant Carol Smith who lives and works in Portland, Oregon. ROA at 2. Carol Smith is a licensed stockbroker and was retained to give YIN and the EDC advice on stocks, bonds, and security issues. Id. The contract was authorized with the written permission of the Tribal Council and is identical to the one Appellant Thomas Smith signed in 2007, with the exception of an additional stipulation that Appellant Carol is also obligated to comply with the YIN-Thomas contract. Id.

Appellant Carol Smith billed the EDC directly, sending monthly bills to the CEO of the EDC Fred Captain. Id. She visited the YIN reservation multiple times and had her communications and advice forwarded by Mr. Smith in Phoenix, to the Tribal Council, Fred Captain, and accountants for the EDC "many times." Id. Appellant Carol Smith provided that communication and advice to her brother directly via email, telephone, and post. Id.

The EDC, in consultation with YIN Tribal Council began investigating the possibility of engaging in marijuana cultivation and sales through the EDC in 2016. ROA at 2. Because marijuana is only legal for medical use in Arizona, the EDC worked in conjunction with the Tribal Council to enact a tribal ordinance making marijuana cultivation and use legal on reservation land for both medical and recreational purposes pursuant to their rights as a sovereign entity. Id.

After the ordinance, the EDC began pursuing development operations and conferred with their accountant Appellant Thomas Smith. Id. Upon becoming aware of the EDC's plans to pursue marijuana cultivation Mr. Smith, who like his sister is morally opposed to marijuana, notified the Arizona Attorney General of his client's intentions. Id. This prompted the Arizona Attorney General to send a cease and desist letter to the EDC regarding their marijuana operations. Id.

II. STATEMENT OF THE PROCEEDINGS

Upon discovering that Appellant Thomas Smith had informed the Arizona Attorney General of the EDC's plans to cultivate marijuana, the Tribal Council filed suit against Thomas and Carol Smith in tribal court. ROA at 3. The Tribal Council claimed that the Appellants had breached their contract, violated their fiduciary duties, and violated their duty of confidentiality. Id. The Yuma Indian Nation sought recovery of the liquidated damages from Thomas and Carol Smith. Id.

Thomas and Carol Smith filed special appearances as well as identical motions to dismiss the suit on the grounds that they lack personal and subject matter jurisdiction. Id. The Smiths also pled that as an alternative, the tribal court stay the suit while the Smiths seek a ruling in Arizona federal district court as to whether the tribal court held jurisdiction over

them. Id. The tribal court denied both motions from both Smiths. Id. The Smiths then filed answers and counterclaims denying the YIN claims and asserting that YIN had defamed them for impugning their professional skills. ROA at 3.

The tribal trial court dismissed all of the Smith's counterclaims due to Sovereign immunity. Id. In Response, Appellant Smiths filed an interlocutory appeal with the Yuma Indian Nation Supreme Court. Id. The Supreme Court granted the appeal on the issues of whether the YIN have personal and subject matter jurisdiction and whether sovereign immunity, or any other form of immunity, protect the YIN, EDC, and EDC employees from Appellant's claims. Id.

ARGUMENT

I. THE YUMA INDIAN NATION COURTS HAVE BOTH PERSONAL AND SUBJECT MATTER JURISDICTION OVER APPELLANTS AND THE COURT SHOULD DENY THEIR MOTION TO STAY.

The Yuma Indian Nation ("YIN") has personal and subject matter jurisdiction over the Appellants because Thomas and Carol Smith entered into a consensual relationship with the YIN, voluntarily signed contracts with the Nation to do business, and then violated their express terms. The Appellants engaged in private activities consistent with the civil jurisdictional exceptions laid out by the United States Supreme Court in Montana v. United States and should be held accountable as such. Montana v. United States, 450 U.S. 544 (1981); Nevada v. Hicks, 533 U.S. 353, 361 (2001). These exceptions, commonly known as the "Montana Exceptions" hold that while quasi-sovereign entities such as Indian tribes do not generally have civil or criminal jurisdiction over non-members, they "retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." Montana, 450 U.S. at 465.

Originally, the Court precluded Indian tribes such as the Yuma Indian Nation from having any jurisdiction over non-members in Oliphant v. Suquamish Indian Tribe (holding that Indian tribal courts do not have criminal jurisdiction over non-Indians unless expressly granted jurisdiction by Congress). Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). The U.S. Supreme Court later expanded the rights of tribal Indians to police their interactions with non-Indians by carving out limited jurisdiction exceptions in civil litigation. The Supreme Court held that,

> A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, *through commercial dealing, contracts, leases, or other*

> *arrangements*. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee land within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana v. United States, 450 U.S. 544 (1981) at 465 (emphasis added). These two exceptions require that the conduct of the non-members, in this case the Appellants Thomas and Carol Smith, in some way harms the ability of the Indian tribe to govern itself and its citizenry. See Nevada v. Hicks, 533 U.S., 353 (2001). And while there is no bright line rule for Indian civil jurisdiction over non-members, the unique facts of this case land squarely on the side of granting jurisdiction to the YIN Courts. See Montana v. United States, 450 U.S. 544 (1981) at 465.

A. APPELLANT'S ACTIONS FALL WITHIN THE MEANING OF COMMERCIAL DEALING AND CONTRACTS.

Tribes such as the Yuma Indian Nation may exercise their jurisdiction over non-members when non-members enter into commercial dealings with the tribe or tribal members. Montana, 450 U.S. at 465. Consent to enter into such dealings may be shown "expressly" or by the actions of the non-member. Plains Commercial Bank v. Long Family Land and Cattle Co., 554 U.S. 316 (2008) at 337. And the consensual relationship must be related to the conduct of the non-Indian that is currently at issue. Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001). Meaning that there must be a substantial "nexus" between the consensual relationship (in this case the contract) and the actual reason for litigation. See Atkinson Trading Co., 532 U.S. at 656. The Court sought to avoid non-members from becoming subject to tribal jurisdiction for things unrelated to the activity they assented to or, as the Court put it become, "in for a penny, in for a Pound." Id. at 657. Tribal Indian courts should also be granted the first opportunity to determine their own jurisdiction, and rulings

should only be reviewed upon a finding that the jurisdiction was exceeded. See AT&T Corp. v. Coeur D'Alene Tribe, 295 F.3d 899, 904 (9th Cir. 2002); Wilson v. Marchington, 127 F.3d 805, 807 (9th Cir. 1997).

The conduct of Thomas Smith and the YIN created a consensual relationship that obligates him to the jurisdiction of the tribal courts. Mr. Smith originally signed a contract with the YIN in 2007 to provide financial advice regarding economic development. Record of Appeal ("ROA") at 1. The contract contained express provisions providing for "all disputes arising from the contract to be litigated in a court of competent jurisdiction" and required Mr. Smith to "maintain absolute confidentiality regarding any and all tribal communications and economic development plans." ROA at 1. Mr. Smith continued this relationship with the YIN for ten years, wherein he communicated with multiple high ranking members of the tribe, including the Tribal Council members, on a daily basis. He assisted the CEO of the Economic Development Corporation ("EDC") started by the YIN, and prepared written financial quarterly reports which he presented on the reservation. ROA at 1. Mr. Smith also recruited the assistance of his sister, who signed a near identical contract and used her brother Appellant Thomas Smith as an intermediary to channel her work to the YIN. ROA at 2.

Mr. Smith's contract with YIN is a clear assent to a consensual contractual relationship with the YIN and the YIN Tribal Court qualifies as a "competent jurisdiction". See Montana v. United States, 450 U.S. 544 (1981). Mr. Smith's actions align closely with another case decided in Federal District Court finding that a consensual relationship existed, creating jurisdiction. In First Speciality Insurance v. Confederated Tribes of the Grand Ronde Community of Oregon, an Indian tribe filed suit in tribal court to vacate an arbitration award

granted to the plaintiff First Specialty Insurance Corporation ("FSIC"). First Speciality Insurance v. Confederated Tribes of the Grand Ronde Community of Oregon, No. O7-05-KI, 2007 WL 3283699 (D.O.R. 2007). FSCI was the successor to investment company Strategic Wealth Management Inc. ("SWM"), which signed a contract with the federally recognized Indian Tribe to provide financial advice. First Specialty Insurance, WL 3283699 (2007) at 2. In 2001 the Tribe sued, claiming breach of contract, eventually leading to an unfavorable arbitration award for FSIC. Id. at 3. The Tribe sought to have the arbitration vacated in tribal court, which they granted, prompting the FSIC to substitute for SWM and file in Federal District Court on the grounds that the tribal court lacked jurisdiction. Id. at 4.

The district court held that the actions taken by SWM and its CEO Mr. Seizmore, which included participating in "hundreds of meetings with the Tribal Council on the reservation" and the existence of a contract were sufficient to find that "SWM and Sizemore were nonmembers who entered into a consensual relationship with the Tribe" and "provides the Tribal Court with jurisdiction." Id. at 8.

Similarly to First Specialty Insurance, the relationship between the Appellant Mr. Smith and the YIN was memorialized in the 2007 agreement to provide financial services and economic development advice. See Id at 8. Having, signed an employment contract, attended at least forty different meetings on the reservation, and participating in what is likely thousands of calls and emails since 2007, Mr. Smith conducted himself in much the same way Mr. Seizmore did. Id. at 7; ROA at 1. The contract signed by Mr. Smith illustrate an express assent to form a consensual relationship with the Tribe as required by Plains Commercial Bank. Plains Commercial Bank v. Long Family Land and Cattle Co., 554 U.S. 316 (2008) at 337. And because without the contract, there would be no dispute over breach

and no reason to adjudicate this caim, Mr. Smith's contract with YIN creates a sufficiently substantial nexus between the consensual relationship and the cause of the litigation. See Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001).

All of these factors taken together clearly show that Mr. Smith is well within the Personal and Subject Matter jurisdiction of the Yuma Indian Nation courts and should be subject to their judgment. See Montana v. United States, 450 U.S. 544 (1981); See National Farmers Union Ins. Companies v. Crow Tribe of Indians, 471 U.S. 845 (1985).

B. CAROL SMITH ASSENTED TO A CONTRACT WITH THE YUMA INDIAN NATION AND IS SUBJECT TO THEIR JURISDICTION.

Carol Smith is rightfully under the jurisdiction of the Yuma Indian Nation courts. As with Thomas Smith, Appellant Carol Smith entered into a consensual contractual relationship with the Yuma Indian Nation in 2010. Record Of Appeal ("ROA") at 2. Ms. Smith signed a legal document identical to the one signed by her brother, with the exception of an additional term that she be required to comply with the YIN-Thomas contract. ROA at 2. In exchange for payment, Ms. Smith provided the YIN with advice regarding stocks, bonds and securities issues, visited the reservation multiple times, and frequently used her brother as an intermediary between herself, the YIN, and the EDC. Id. She submitted monthly bills directly the the CEO of the EDC, which is treated as an "arm-of-the-tribe" and provided advice through forwarded communications by Thomas. Id. Ms. Smith's contract with the YIN and her extensive work history with the EDC and its CEO aligns closely with Thomas Smith's own conduct. Ms. Smith's actions clearly illustrate an express consensual relationship with the YIN and create a clear nexus between the contract and the litigation to warrant jurisdiction by the YIN tribal courts. See Plains Commercial Bank v. Long Family Land and

Cattle Co., 554 U.S. 316 (2008); Montana v. United States, 450 U.S. 544 (1981); Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001).

These actions also satisfy the requirements of minimum contacts for the effective use of long arm service under the Winnebago Tribe of Nebraska Code ("WTC") which the YIN adopted in 2005. ROA at 3, footnote 1. Under the WTC,

> Service outside of the Tribal jurisdiction does not give the Court in persona jurisdiction over a defendant who is not subject to the jurisdiction of the Courts of this Tribe, or who has not, either in person or through an agent, submitted him/herself to the jurisdiction of the Courts of this Tribe either by appearance, written consent, or having voluntarily entered into sufficient contacts with the Tribe, its members, or its territory to justify Tribal jurisdiction over him/her in accordance with the principals of due process of law and federal Indian law.

2 W.T.C. Art. 3 § 2-314. Ms. Smith, a resident of Portland, Oregon, "voluntarily entered into sufficient contacts with the Tribe" via her contract with the YIN, as well as her multiple visits and near daily communications forwarded to the CEO of the EDC. Taken together, these contacts are more than sufficient to meet the minimum contacts required for personal jurisdiction under tribal law.

Ms. Smith may seek to escape the jurisdiction of the tribal courts by seeking to have her case removed to U.S. Federal District Court. She may attempt to claim she has a right to remove to federal court for diversity of citizenship under the Federal Rules of Civil Procedure ("FRCP") and the Yuma Indian Nation Rules of Civil Procedure ("YINRCP") which hews closely to their U.S. and Winnebago counterparts. 28 U.S.C. § 1132; ROA at 3. However, The U.S. Supreme Court has clearly held that in unique circumstances such as these, where tribes are engaged in civil litigation with non members, the proper course of action is to allow the tribal court "the full opportunity to establish its own jurisdiction."

National Farmers Union Ins. Companies v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985). U.S. courts have long adhered to a policy of supporting tribal sovereignty and self determination and have taken the view that the tribal courts should be allowed to determine jurisdiction and adjudicate the issues within their own system before the U.S. federal courts become involved. National Farmers Union Ins. Co., 471 U.S. 845 at 856.

Under the principles of the Exhaustion Doctrine laid out in National Farmers Union Ins. Co., tribal courts must at least have the opportunity to review the findings of the lower courts and adjudicate as they see fit. National Farmers Union Ins. Co., 471 U.S. 845 at 856. The Appellants have not even bothered to take their case to the tribal appellate courts, as was seen as being the bare minimum required in Iowa Mutual Insurance Co. (holding that "[a]t a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts.") Iowa Mutual Insurance co. v. LaPlante, 480 U.S. 9, 10 (1987). The proper order in this case would be to have the Appellants move through the tribal appeals courts and up to the YIN Supreme Court before proceeding to U.S. Federal District Court if necessary. See National Farmers Union Ins. Companies v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985).

The Principle of the Exhaustion Doctrine was to support "tribal self-government and self-determination" allow "a full record to be developed in the Tribal Court" and "encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction." National Farmers Union Ins. Co., 471 U.S. 845 at 856. To subvert this process and allow Appellants to summarily withdraw from tribal jurisdiction would be to subvert the principles of self-government that underpin the legal relationship between tribal and U.S. courts. Regardless of the eventual basis for jurisdiction, the federal policy supporting tribal sovereignty requires

the court to "stay its hand" and allow the tribal court to determine jurisdiction. Iowa Mutual Insurance co. v. LaPlante, 480 U.S. 9, 996 (1987). The U.S Supreme Court has sought to avoid the very premature removal Ms. Smith is seeking because, "in diversity cases, as well as federal-question cases, unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs." Iowa Mutual Insurance co., 480 U.S. 9 at 976.

C. THE COURT SHOULD DENY THE APPELLANT'S MOTION TO STAY WHILE THEY SEEK INTERVENTION BY THE U.S. DISTRICT COURT.

The consensual relationship that exists between the Appellants and the Yuma Indian Nation precludes this court from issuing a stay so that Appellants may seek intervention in U.S. Federal District Court. The YIN courts have deemed that they have proper jurisdiction over both Thomas Smith and Carol Smith, and are in the process of adjudicating those claims in accordance with the law. ROA at 3. And because they have not exhausted all tribal remedies as required under National Farmers Union Ins. Co., this Court is under no obligation to grant their motion for a stay. See National Farmers Union Ins. Companies v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985).

The only remaining rationale to grant the Appellant's motion is under the principles of comity. See Wilson v. Marchington, 127 F.3d 805, 810 (9th Cir. 1997); See AT&T Corp. v. Coeur D'Alene Tribe, 295 F.3d 899, 904 (9th Cir. 2002). Comity is defined in Wilson as,

> At its core, comity involves a balancing of interests. "[I]t is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws."

Wilson v. Marchington, 127 F.3d 805, 810 (9th Cir. 1997) (quoting Hilton v. Guyot, 159 U.S. 113, 143 (1895). Generally, federal courts must recognize and enforce tribal court judgments under principles of comity unless one of the two circumstances precluding recognition applies: 1. The tribal court did not have personal or subject matter jurisdiction; or 2. The losing party was not afforded due process of law. Wilson, 127 F.3d 805 at 809. Neither of those mandatory circumstances apply in this case.

The Appellants are both viewed to be within the personal and subject matter jurisdiction of the YIN by the tribal court. See Supra Section I.A.; I.B. And "[F]ederal courts may not readjudicate questions–whether of federal, state or tribal law–already resolved in tribal court absent a finding that the tribal court lacked jurisdiction or that its judgment be denied comity for some other valid reason." AT&T Corp. v. Coeur D'Alene Tribe, 295 F.3d 899, 904 (9th Cir. 2002). They have express consensual relationships with the YIN within a sufficient nexus of the litigation. See Plains Commercial Bank v. Long Family Land and Cattle Co., 554 U.S. 316 (2008); Montana v. United States, 450 U.S. 544 (1981).

Ms. Smith has yet to properly adjudicate her case through the tribal appellate courts and has failed to meet the standards of the Exhaustion Doctrine. National Farmers Union Ins. Companies v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985). The record is also devoid of any indication that they have suffered a violation of their due process rights. Because they lack any of the mandatory circumstances precluding recognition of tribal court rulings, and because the tribal court has already deemed them within their jurisdiction, the Appellants fail to show a valid reason to grant their motion.

II. SOVEREIGN IMMUNITY SHALL PROTECT THE YUMA INDIAN NATION, THE YIN ECONOMIC DEVELOPMENT CORPORATION, AND UNDER QUALIFIED IMMUNITY, TO INDIVIDUALLY PROTECT YIN

EDC CEO MR. FRED CAPTAIN, AND EMPLOYEE/ACCOUNTANT MS. MOLLY BLUEJACKET.

The Marshall Trilogy, also referred to as the Cherokee Cases, originally established the ward-to-guardian relationship between the United States and the Indian tribes. See generally Johnson v. McIntosh, 21 U.S. 543 (1823); Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Worcester v. Georgia, 31 U.S. 515 (1832). But it was in the latter case, Worcester v. Georgia, that Chief Justice John Marshall iterated the general idea that tribes are a:

> distinct community, occupying its own territory… The whole intercourse between the United States and this [Cherokee] nation, is, by our laws, vested in the government of the United States… [T]he acts of Georgia are repugnant to the Constitution, laws, and treaties of the United States. They interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our Constitution, are committed exclusively to the government of the Union.

Worcester v. Georgia, 31 U.S. 515, 561-62 (1832).

The decision in Worcester was essentially based on two principles:

1. That the Constitution delegated broad legislative authority over Indian matters to the federal government; and
2. That the Cherokee treaties reserved tribal self-government within Cherokee territory free of interference from the state.

See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.01[2], at 493 (Nell Jessup Newton ed., 2012); Worcester, 31 U.S. 515 (1832).

Subsequent cases have upheld these principles that tribes were afforded the right to govern themselves and their people in Indian country; a foreshadowing of self-determination and present-day nation-building. In the landmark case, Williams v. Lee, the Supreme Court essentially recognized the right of reservation Indians to make their own laws and to be ruled by them. Williams v. Lee, 358 U.S. 217, 220 (1959). The United States Supreme Court

reversed the Arizona Supreme Court, holding that exclusive jurisdiction was vested in the Navajo Tribe and that the Arizona state court had no subject matter jurisdiction in a civil case for non-payment by two Navajo tribal members on a contracted sale of goods by a non-Indian trader. Id. at 217-18. The Court clarified its holding, stating:

> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them… There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it.

Id. at 220, 223.

While the Court expressly states that it is under the purview of the Congress to give or take away the inherent right of sovereign immunity, the legislative branch has not elected to do so. This is exceptionally important in the instant case.

A. TRIBAL SOVEREIGN IMMUNITY HAS LONG BEEN ESTABLISHED FOR THE YUMA INDIAN NATION ("YIN") AND OTHER INDIAN TRIBES SIMILARLY SITUATED.

Following the holding in Williams, a line of six opinions, issued by the United States Supreme Court dating back to 1977, substantially shaped what is acknowledged as the doctrine of tribal sovereign immunity and is most pertinent to the instant issue. Williams, 358 U.S. 217 (1959). See C & L Enters. v. Citizen Band of Potawatomi Indian Tribe, 532 U.S. 411 (2001) (abrogating sovereign immunity due to the Indian tribe's immunity waiver by insertion of arbitration clause to the governing contract); Kiowa Tribe of Okla. v. Mfg.

Techs., Inc., 523 U.S. 751 (1998) (expanding tribal immunity to commercial activities taking place outside the bounds of the tribal reservation); Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe, 498 U.S. 505 (1991) (allowing for collection of sales tax on cigarette sales to nonmember purchasers, but not from tribal members thereby upholding tribal sovereign immunity); Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C., 476 U.S. 877 (1986) (maintaining tribal immunity from suit even from counterclaims); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (requiring individuals that seek enforcement of substantive rights pursuant to the ICRA exhaust remedies within the tribal court system before attempting to remove the case to state or federal courts thereby reinforcing tribal power); Puyallup Tribe v. Dep't of Game of Washington, 433 U.S. 165 (1977) (acknowledging sovereign immunity but not distinguishing between on- and off-reservation activities). Indeed, through these cases and common law precedents, tribal sovereign immunity is acknowledged as a "necessary corollary to Indian sovereignty and self-governance." Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C., 476 U.S. 877, 890 (1986).

Ultimately, the aforementioned line of cases fortified and built-up the inherent sovereignty of the tribe, with specific resonance to civil cases, as did other cases in the subsequent years. Furthermore, the Court expressly held that tribal immunity was well-documented in prior case precedents, and substantially strengthened in the seminal case, Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998). In this case, Justice Kennedy, writing for the majority, noted, "[l]ike foreign sovereign immunity, tribal immunity is a matter of federal law. Although the Court has taken the lead in drawing

the bounds of tribal immunity, Congress, subject to constitutional limitations, can alter its limits through explicit legislation." Id. at 759. He goes on, writing,

> In light of these concerns, we decline to revisit our case law and choose to defer to Congress. Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. Congress has not abrogated this immunity, nor has petitioner waived it, so the immunity governs this case.

Id. at 760.

Similarly, in Michigan v. Bay Mills Indian Community, Justice Kagan reiterates and fortifies Kiowa, once again stating that it is under the purview of Congress whether the Indian tribes should or should not have varying levels of tribal immunity: "Beyond upending 'long-established principle[s] of tribal sovereign immunity,' that action would replace Congress's considered judgment with our contrary opinion." Michigan v. Bay Mills Indian Community, 134 S. Ct. 2024, 2039 (2014); Kiowa, 523 U.S. 751 (1998). This has been an important opinion as it firmly supports the notion of tribal immunity and thereby overall sovereignty of Indian tribes.

Clearly, the tribal sovereign immunity of the YIN must therefore be upheld in the instant case. Furthermore, the charter that created the EDC protected the corporation, its board, and all employees by tribal sovereign immunity to the fullest extent of the law. ROA at 2. "The Council included this provision, as it states in the charter, to protect the entity and the Nation from unconsented litigation and to assist in the success of the EDC's endeavors." Id. This blanket of tribal sovereign immunity expressly prevents frivolous litigation such as the Smiths' from touching the YIN, the EDC and those that work for the tribe.

B. AS AN INCORPORATED "ARM-OF-THE-TRIBE" AND WHOLLY-OWNED SUBSIDIARY OF THE NATION, THE YUMA INDIAN NATION

ECONOMIC DEVELOPMENT CORPORATION MUST ALSO BE AFFORDED PROTECTION BY TRIBAL SOVEREIGN IMMUNITY.

Created in 2009, the Yuma Indian Nation ("YIN") Economic Development Corporation ("EDC") was funded to "promote the prosperity of the Nation and its citizens." ROA at 1. Funded by the Tribal Council with a one-time $10 million loan from the Nation's general fund, the primary purpose was expressly delineated in the charter that created it: "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. The EDC was further authorized to buy and sell real property in fee simple title on or off reservation, to buy any other types of property in whatever form of ownership, and to sue and be sued. Id. at 2.

Overarching the charter that created the EDC, the WTC also expressly addresses tribal sovereign immunity in Subdivision 3, of Title 11, Article 10:

> 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 subject of the suit and to the assets or revenues of the corporation against which any judgment may be executed. [TCR 94-124].

11 W.T.C. Art. 10 § 11-1003. Special powers, privileges and immunities of corporations wholly owned by the Tribe.

Thus, as stated, sovereign immunity protects the EDC as explicitly outlined in the ordinances of the YIN, and also as mentioned previously, established by the charter that created the entity. The ordinance explicitly states that there is no waiver of sovereign immunity unless specific conditions are met, and that no consent shall be effective against the corporation. See id. And if, by any stretch of the imagination, said conditions may be met, the consent to lawsuit would be substantially limited and the recovery to be limited as well. By these means, the EDC must also be shielded from the Smiths' counterclaims, which therefore, must be extinguished.

C. TRIBAL SOVEREIGN IMMUNITY AND QUALIFIED IMMUNITY MUST LASTLY BE EXTENDED TO MR. CAPTAIN AND MS. BLUEJACKET, NAMED BY THE SMITHS' IN THEIR OFFICIAL ROLES AS EDC CEO AND EMPLOYEE/ACCOUNTANT RESPECTIVELY, BUT ALSO IN THEIR INDIVIDUAL CAPACITIES.

Most recently, in Lewis v. Clarke, the Supreme Court declined to upend the entirety of the doctrine of tribal sovereign immunity. Lewis v. Clarke, 137 S. Ct. 1285 (2017). In this ordinary negligence action, Justice Sotomayor, writing for the Court, clarifies this coverage of sovereign immunity. While Mr. Clarke, the driver of the limousine was an employee of the Mohegan Tribe of Indians of Connecticut, he was not entitled to the protection of sovereign immunity because he was named in his individual capacity, and not as an employee of the tribe. Id. at 1295. This case does not affect the instant issue because Mr. Captain and Ms. Bluejacket were acting in their official capacities as EDC CEO and Employee/Accountant, and therefore must be shielded by the sovereign immunity afforded the YIN. Indeed, these protections have historically been extended to tribal officials acting within the scope of their

authority, but also to tribal employees. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 7.05[1][a], at 638, n. 14, 15 (Nell Jessup Newton ed., 2012); Fletcher v. United States, 116 F.3d 1315, 1324 (10th Cir. 1997); Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 479 (9th Cir. 1985); Kizis v. Morse Diesel Int'l, Inc., 794 A.2d 498 (Conn. 2002). As an arm of the YIN, the EDC would therefore be covered by the tribal sovereign immunity that has been well-settled by the various levels of the judiciary.

However, the individual capacity claims against Mr. Captain and Ms. Bluejacket should also not stand in the instant case, and the tribal sovereign immunity should be extended to both official tribal employees, and likely YIN members. Contrary to Lewis, the Smiths' claims are a frivolous attempt to name any and all individuals that are somehow attached to the YIN and the EDC. Lewis, 137 S. Ct. 1285 (2017). While Mr. Captain is the CEO, and Ms. Bluejacket an Employee/Accountant of the wholly owned subsidiary, their actions are solidly connected to their roles within the EDC, and therefore, the instant litigation on behalf of the Smiths' should be barred by qualified immunity. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 7.05[1][b], at 639, n. 20 (Nell Jessup Newton ed., 2012); specifically, Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 479-80 (9th Cir. 1985) ("dismissing individual capacity action against tribal officials where they acted within their delegated authority… "); Frazier v. Turning Stone Casino, 254 F.Supp.2d 295, 307 (N.D.N.Y. 2003) (holding that "tribal officials have qualified immunity unless their challenged actions were not related to the performance of their official duties"). While the latter case is persuasive at best, it is notable that a range of judicial forums have upheld qualified immunity as a legitimate extension of tribal sovereign immunity. Therefore, the

cover of tribal sovereign immunity should shield not only the YIN, but also the EDC, the EDC CEO Mr. Captain, and the Employee/Accountant Ms. Bluejacket.

CONCLUSION

The motion to stay should be denied and Appellant's claims against the Yuma Indian Nation, The Economic Development Corporation, EDC CEO Mr. Fred Captain, and Employee/Accountant Ms. Molly Bluejacket should be dismissed with prejudice.

Respectfully Submitted.

Counsel for Appellees

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