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Winner, Best Appellate Brief in the 2018 Native American Law Student Association Moot Court Competition

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SPECIAL FEATURE

WINNER, BEST APPELLATE BRIEF IN THE 2018 NATIVE AMERICAN LAW STUDENT ASSOCIATION MOOT COURT COMPETITION*

*Lianne T. Chung** & Nicholas Ernst****

Questions Presented

I. Whether the Yuma Indian Nation (the “Nation” or “YIN”) courts have jurisdiction over Thomas Smith and Carol Smith (collectively, “the Smiths”), non-members of the Nation, where such jurisdiction is beyond protecting the Nation’s self-government and control over internal relations, or in the alternative, whether the trial court should stay the suit to let the Arizona federal district court decide the issue.

II. Whether the Nation waived its sovereign immunity from suit when its contracts with the Smiths expressly provide for “any and all disputes arising from the contract to be litigated in a court of competent jurisdiction,” and

* This brief has been edited from its original form for ease of reading. The record for this brief comes from the 2018 National Native American Law Students Association Moot Court Competition problem, which can be found at http://docs.wixstatic.com/ugd/c50703_769b68a0cd514a12858027746690fd41.pdf.

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thus, waived the sovereign immunity of the Nation Economic Development Corporation (the “EDC”) and the EDC Chief Executive Officer (“CEO”) and Accountant.

Statement of the Case

I. Statement of the Facts

This appeal arises out of the Yuma Indian Nation’s improper assertion of jurisdiction over Thomas Smith and Carol Smith (collectively, “the Smiths”), non-members of the Yuma Indian Nation (the “Nation” or “YIN”). The Nation, the YIN Economic Development Corporation (the “EDC”), and EDC Chief Executive Officer (“CEO”) and Accountant expressly waived their sovereign immunity when they entered into a contract with Thomas Smith.

The Nation is a tribal corporation organized under Section 17 of the Indian Reorganization Act (“IRA”), former 25 U.S.C. § 477. In 2007, the Nation entered into a contract with Thomas Smith (the “Thomas Contract”) that expressly provided that “any and all disputes arising from the contract [are] to be litigated in a court of competent jurisdiction.” Record on Appeal (“ROA”) at ¶ 1. The Thomas Contract provided for Thomas’s advice with financial matters on an as-needed basis regarding economic development issues. *Id.* In his work, Thomas exchanged emails and telephone calls with members of the Tribal Council, EDC CEO Fred Captain (“Captain”), and EDC employee and Accountant Molly Bluejacket (“Bluejacket”). *Id.* at ¶ 2. Thomas additionally prepared and submitted written quarterly reports to the Nation Tribal Council and presented his reports in person at Council meetings on the reservation. *Id.*

In 2010, with written permission from the Tribal Council, Thomas entered into a contract with his sister, Carol Smith (“Carol”), who lives and works in Portland, Oregon. *Id.* at ¶ 6. The contract between Thomas and Carol provides for compliance with the Thomas Contract. *Id.* Carol was retained by Thomas to give her brother, the EDC, and the Nation advice regarding stocks, bonds, and securities issues. *Id.* Carol has only visited the Nation reservation on two occasions, while on vacation in Phoenix. *Id.* at ¶ 7. Carol provides direct advice to Thomas exclusively via email, telephone, and postal and delivery services. *Id.* Thomas sometimes forwards Carol’s emails to both Captain and Bluejacket. *Id.*

The EDC was created by the Nation under the authority of a 2009 tribal corporations code as a wholly-owned subsidiary. ROA at ¶ 3. In the corporate charter, the Nation mandated that the EDC, its board, and all

employees be protected by tribal sovereign immunity to the fullest extent of the law. *Id.* at ¶ 5. The purpose of such protection for the EDC is to shield it from unconsented litigation and to assist in the success of the EDC's endeavors. *Id.* at ¶ 5. The EDC's primary purpose is "to create and assist in the development of *successful* economic endeavors, of any *legal type or business*, on the reservation and in southwestern Arizona." *Id.* at ¶ 3 (emphasis added). Unfortunately, the EDC has not had much economic success. Since its formation in 2009, the EDC has employed an average of 25 employees each year. *Id.* at ¶ 5. Further, the EDC has only generated enough revenue in almost nine years to repay \$2 million of the \$10 million loan from the Nation to fund the EDC, despite a mandate that the EDC must pay 50% of its profits to the Nation general fund on an annual basis. *Id.* at ¶ 4. The EDC has also, contrary to its stated purpose, sought to make marijuana cultivation and use on the reservation legal for any and all purposes, contrary to Arizona state law. *Id.* at ¶ 8. Although Arizona state law allows marijuana use for medical purposes, a state-wide referendum to permit marijuana for recreational use failed. *Id.*

The board of directors of the EDC must consist of five individuals, all of whom are experienced in business. ROA at ¶ 3. The inaugural board of directors was selected by the Tribal Council, but directors thereafter are either reelected or replaced by a majority of the directors. *Id.* At all times, three of the directors must be tribal citizens and two may be non-Indians or citizens of other tribes. *Id.* At this time, it is unknown what the makeup of the directors is. *See generally* ROA. The Tribal Council retains the authority to remove any director for cause, or no cause, by a 75% vote. *Id.* at ¶ 3.

Thomas, disagreeing with the Nation and EDC's endeavor to pursue the illegal cultivation of marijuana for any and all purposes, informed his acquaintance, the Arizona Attorney General, of the Nation's plans. *Id.* at ¶ 8. As a result, the Arizona Attorney General wrote the Nation and EDC a cease and desist letter regarding the development of its recreational marijuana operations. *Id.*

II. Statement of the Proceedings

The Nation Tribal Council filed suit against the Smiths in the Nation's tribal court for breach of contract and violation of fiduciary duties and confidentiality. ROA at ¶ 9. The Nation sought recovery of liquidated damages set out in the Smiths' contracts. *Id.* The Smiths filed special appearances and identical Motions to Dismiss based on the tribal court's lack of subject matter and personal jurisdiction over them and the suit, or in

the alternative, for the trial court to stay the suit while the Smiths pursue a ruling from the Arizona United States District Court as to whether the tribal court has jurisdiction over the Smiths. *Id.* at ¶ 10. The trial court denied both Motions. *Id.*

The Smiths, continuing their special appearances, then filed answers denying the Nation's claims and filed counterclaims against the Nation for breach of contract and defamation. *Id.* at ¶ 11. Additionally, and in accordance with the Code of Civil Procedure adopted in 2005 by the Tribal Council, the Smiths impleaded the EDC and the EDC's CEO and Accountant in their official and individual capacities, for breach of contract and defamation. *Id.* at ¶ 12. The trial court dismissed the Smiths' counterclaims against the Nation and third-party claims against the EDC, Captain, and Bluejacket alleging sovereign immunity. *Id.* at ¶ 13. The Smiths subsequently sought this interlocutory appeal requesting that this Court decide the questions presented and issue a writ of mandamus ordering the trial court to stay the suit. *Id.* at ¶ 14.

Summary of Argument

The trial court erred in dismissing for lack of personal and subject matter jurisdiction because tribal courts may only exercise jurisdiction over members of their tribe for the purpose of protecting the tribe's self-government and control over internal relations. Further, the Smiths did not create a consensual agreement or arrangement, nor has the Smiths' conduct been such that the political integrity or economic security of the tribe has been threatened.

Alternatively, this Court should stay the suit while the Smiths seek a ruling in Arizona federal district court because the federal court retains the ability to determine a tribal court's jurisdictional power since the Smiths' have exhausted any and all tribal remedies in deference to the tribal court's ability to create laws and self-govern.

The trial court erred in dismissing the Smiths' counterclaims against the Nation because the Nation expressly waived sovereign immunity from suit in its contracts with the Smiths. The clear and unequivocal waiver contained in the Thomas Contract constitutes a waiver of sovereign immunity under well-established precedent. Further, public policy requires that sovereign immunity cannot extend to contracts like the Thomas Contract, off-reservation commercial contracts.

Additionally, the trial court erred in dismissing the Smiths' third-party claims against the EDC and Captain and Bluejacket. First, the Nation

waived its sovereign immunity, effectively waiving the EDC's sovereign immunity. Second, the EDC is not an arm of the tribe, but rather a separate business entity. The sovereign immunity doctrine as it relates to arms-of-the-tribe is a doctrine of substance rather than form. Under a factorial test that considers creation of the EDC, intent of sovereign immunity extending to the EDC, the purpose of the EDC, control of the Nation over the EDC, and the financial relationship between the Nation and the EDC, this Court must hold that the EDC is not an arm of the tribe. Further, because the EDC is not an arm of the tribe, Captain and Bluejacket, as EDC board members and employees, are not afforded protection by sovereign immunity.

Argument

I. The Nation Courts Do Not Have Jurisdiction over the Smiths Because Such Jurisdiction Is Beyond Protecting the Tribe's Self-Government and Control over Internal Relations.

The general rule is that tribes lack civil jurisdiction over non-members. *See Cohen's Handbook of Federal Indian Law* § 7.03 (2017). Tribal jurisdiction confers power to tribes for the purpose of protecting tribal self-government or to control internal relations. *Montana v. United States*, 450 U.S. 544, 564 (1981). To exercise that jurisdiction beyond those two functions is contrary to the recognized sovereign dependent status of tribes on the federal government, and therefore is only permitted with express congressional delegation. *Id.* Therefore, exercising jurisdiction over the Smiths, non-members of the Nation, would exceed the tribe's power because their relationship with the Smiths does not pertain to protecting tribal self-government, nor does it pertain to internal relations control.

Before ceding their lands to the United States, Indian tribes exercised complete sovereignty over their territory regardless of the citizenship of people within their territory. *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985); *see Duro v. Reina*, 495 U.S. 676, 685 (1990) (A basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens. *Oliphant [v. Suquamish Indian Tribe]* recognized that tribes can no longer be described as sovereigns in this sense.). Tribes ceded "their lands to the United States and announc[ed] their dependence on the Federal Government that much of their sovereign authority was abdicated." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978). Specifically, "[t]he areas in which such implicit divestiture of sovereignty

has been held to have occurred are those involving the relations between an Indian tribe and non-members of the tribe.” *United States v. Wheeler*, 435 U.S. 313, 326 (1978).

Montana established the general proposition for tribal civil jurisdiction that “inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe.” *Montana*, 450 U.S. at 565. This alone should suffice as to why the Smiths are outside the jurisdiction of the tribal court as non-members of the Nation. However, the Supreme Court does acknowledge two exceptions to *Montana*: “(1) when non-members ‘enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements’ or (2) when a non-member’s ‘conduct ‘threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.’”” *A-I Contractors v. Strate*, 520 U.S. 438, 441 (1997) (citing *Montana*, 450 U.S. at 566).

A. The Relationship Between the Smiths and the Nation Lacks a Sufficient Nexus to Be Considered a Consensual Relationship Upon Which the Tribe Can Exercise Jurisdiction.

The first *Montana* exception grants tribal jurisdiction over non-members when non-members “enter consensual relationships with the tribe or its member, through commercial dealing, contracts, leases, or other arrangements.” 450 U.S. at 565. Relying on the principles in *Oliphant*, the Supreme Court in *Montana* stressed that Indian tribes can only exercise power consistent with their diminished status as sovereigns and “that the Indian tribes have lost any ‘right of governing every person within their limits except themselves,’” thereby defining and justifying the exception. *Id.* (citing *Fletcher v. Peck*, 10 U.S. 87, 147 (1810)). However, Indian tribes do possess some civil jurisdiction over non-members in the form of this exception. *Id.*

In *Atkinson Trading Co. v. Shirley*, the Court found hotel guests could not be subject to a tax imposed by the Tribe, holding that “*Montana*’s consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself,” meaning that “a non-member’s consensual relationship in one area does not trigger tribal civil authority in another—it is not in for a penny, in for a Pound.” 532 U.S. 645, 656 (2001) (quotation marks and citation omitted). Additionally, in *Strate v. A-I Contractors*, a defendant contractor sought a declaratory judgment that a tribal court lacked jurisdiction to adjudicate claims of a non-Indian driver for injuries arising out of an

automobile accident on a state highway that ran through reservation land. 520 U.S. at 443. The Supreme Court found the consensual relationship the defendant contractor possessed did not relate to the conduct over which the tribe was exercising jurisdiction, and therefore was insufficient to demonstrate a consensual nexus. *Id.* at 440.

In this case, the Smiths' contracts were created to provide financial advice regarding the economic development of the Nation. The EDC's pursuit of developing marijuana operations cannot be considered a consensual agreement of the Thomas Contract because that contract predates the existence of the EDC. While the contract between Carol and Thomas was created well within the establishment of the EDC, it was Thomas's actions, not Carol's, which could be seen to have violated the contract's confidentiality agreement. Therefore, the tribe cannot establish that Carol violated her contract's confidentiality agreement.

In contrast, in *First Specialty Ins. Corp. v. Confederated Tribes of Grand Ronde Community of Oregon*, the district court found that the tribal court possessed jurisdiction over a claim based on a contract between the Tribes and a non-member investment corporation providing financial and investment advice. No. CIV. 07-05-K1, 2007 WL 3283699, at *1 (D. Or. Nov. 2, 2007). The district court found that a consensual agreement had occurred between the non-member investment corporation and the Tribes based on a contract agreement signed at the Tribes' headquarters and the hundreds of meetings to the Tribal Council where the corporation's President and CEO provided investment services. *Id.* at *4.

This case stands in stark contrast to *First Specialty Ins. Corp.* in that, unlike the non-member investment corporation, the Smiths never signed an agreement on the Nation's land. The Thomas Contract was signed in Thomas's office in Phoenix and Carol's contract was signed presumably in Portland or Phoenix. Thomas also visited the Nation Tribal Council once a quarter for ten years, for approximately 40 times to present his quarterly reports, unlike the non-member investment corporation executive officer in *First Specialty Ins. Corp.* who visited hundreds of times in the same time span. *Id.* at *1.

B. The Smiths' Conduct Does Not Adequately Threaten or Have a Direct Effect on the Political Integrity, the Economic Security, nor the Health or Welfare of the Nation as to Imperil Their Subsistence.

The second *Montana* exception grants tribal jurisdiction over non-members when a non-member's conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or

welfare of the tribe.” 450 U.S. at 566. This allows tribes to “retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands.” *Id.* at 565.

However, the Supreme Court has limited this exception with subsequent cases. In *Atkinson Trading Co.*, a non-Indian proprietor of a hotel located within the boundaries of the Navajo Reservation brought an action in tribal court challenging the Navajo Tribe's authority to impose a tax. 532 U.S. at 648-49. After the challenge was rejected by the Navajo Tax Commission and the Navajo Supreme Court, the proprietor sought a declaratory judgment that the Tribe had no jurisdiction to impose a tax on the non-Indian proprietor's guests. *Id.* The Supreme Court articulated that the *Montana* exception:

[I]s only triggered by *nonmember conduct* that threatens the Indian tribe; it does not broadly permit the exercise of civil authority wherever it might be considered “necessary” to self-government. Thus, unless the drain of the nonmember's conduct upon tribal services and resources is so severe that it actually “imperil[s]” the political integrity of the Indian tribe, there can be no assertion of civil authority beyond tribal lands.

Id. at 1834 (emphasis in original). In *Plains Commerce Bank v. Long Family Land and Cattle Co.*, a non-Indian bank had sold land it owned on a tribal reservation to non-Indians, and the tribal court upheld a jury verdict against the bank on a claim of discriminatory lending practices as asserted by Indian lessees and their family farming/ranching corporation that the bank sought to declare null and void. 554 U.S. 316, 320 (2008). The Supreme Court reversed the tribal court and reiterated the limitation to the *Montana* exception: “The conduct must do more than injure the tribe, it must ‘imperil the subsistence’ of the tribal community. One commentator has noted that ‘th[e] elevated threshold for application of the second Montana exception suggests that tribal power must be necessary to avert catastrophic consequences.’” 554 U.S. at 341 (citing *Cohen's Handbook of Federal Indian Law* § 4.02 (2017)).

The Nation must demonstrate that the cultivation of marijuana is so essential to the Nation that the Arizona Attorney General's cease and desist letter regarding the development of recreational marijuana operations was catastrophic for tribal self-government. See *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 341 (2008). Much like the Court found in *Plains Commerce Bank*, the Court must find that the

cancelled economic endeavor is possibly disappointing but hardly imperils the subsistence or welfare of the Nation. *See id.*

In contrast, in *Attorney's Process and Investigation Services, Inc. v. Sac & Fox Tribe of Mississippi in Iowa*, the court did uphold a tribal court's jurisdiction over a non-member based on the second *Montana* exception. 609 F.3d 927, 946 (8th Cir. 2010). There, a non-Indian contractor brought an action against an Indian tribe, seeking declaratory judgment that the tribal court lacked jurisdiction in the tribe's tort action against the company and an order compelling arbitration. *Id.* at 931. A tribal leadership dispute led to elected leaders hiring the non-member to remove opposition leaders from the Tribe's facilities, which was done with 30 agents carrying batons and at least one carrying a firearm. *Id.* at 932. When the Tribe sued the non-member in tribal court and the court found for the tribe, the non-member reopened the case in district court challenging the tribal court's jurisdiction. *Id.* at 933. The Eighth Circuit upheld the tribal court's jurisdiction because the non-member "threatened the tribal community and its institutions ... [and] political integrity and economic security of the Tribe" by attacking the Tribe's seat of tribal government and the casino which serves as the "economic engine" of the Tribe. *Id.* at 939. The court found that "[t]his was a direct attack on the heart of tribal sovereignty, the right of Indians 'to protect tribal self-government.'" *Id.* at 939 (citing *Montana*, 450 U.S. at 564).

Attorney's Process and Investigation Servs., Inc. differs from the current case because there is nothing to demonstrate that the Nation's tribal sovereignty has been threatened by being barred from cultivating marijuana. The Smiths presented no physical force against the Tribe. While the economic security provided by the development of recreational marijuana operations may have provided some benefit to the Tribe, it is not clear that it is an "economic engine" upon which the Tribe depends to uphold political integrity and tribal self-government. *See* 609 F.3d 927, 939.

Because tribal courts traditionally do not hold jurisdiction over non-members and because the Nation cannot satisfy the *Montana* exceptions of non-members entering into a consensual relationship with the tribe or of non-member's conduct imperiling the political integrity and the tribe's survival, the tribal court does not have jurisdiction over the Smiths.

C. Alternatively, the Trial Court Should Stay Suit to Allow the Arizona Federal District Court to Rule on Tribal Jurisdiction.

Federal courts possess a “virtually unflagging obligation” to exercise the jurisdiction given to them. *Colorado River Water Conservation Dist. v. U. S.*, 424 U.S. 800, 817 (1976). In order for the district court to rule on tribal jurisdiction, there must be federal court jurisdiction which is warranted over controversies arising within Indian country and involving tribes or their members on three bases: (1) a special form of federal question jurisdiction under 28 U.S.C. § 1362 available only to Indian tribes; (2) general federal question jurisdiction under 28 U.S.C. § 1331; and (3) diversity of citizenship jurisdiction under 28 U.S.C. § 1332. § 6:1. *See generally American Indian Law Deskbook* § 6:1. Here there is no federal question at issue under 28 U.S.C. § 1362 (“The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.” § 1362. Indian tribes, 28 USCA § 1362.), nor is there a federal question issue under 28 U.S.C. § 1331. (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” § 1331. Federal question, 28 USCA § 1331.). At issue, then, is whether diversity of citizenship jurisdiction under 28 U.S.C. § 1332 exists and if the federal government retains the ability to review the tribal court’s exercise of jurisdiction.

To create diversity citizenship, there must be complete diversity in the sense that each defendant must be a citizen of a different state relative to each plaintiff. *Cohen's Handbook of Federal Indian Law* § 7.04 (2017). However, district courts have found that an “unincorporated Indian tribe is not a citizen of any state within the meaning of § 1332(a)(1).” *Am. Vantage Cos. v. Table Mt. Rancheria*, 292 F.3d 1091, 1098 (9th Cir. 2002).

The Supreme Court in *Iowa Mutual Insurance Co. v. LaPlante* held that “[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty.” 480 U.S. 9, 18 (1987). However, the federal court would retain jurisdiction to review the tribal court’s jurisdiction to provide proper deference to the tribal court system. *Id.* at 19.

The Smiths are not members of the Nation and tribes are not citizens of any state. Therefore, diversity jurisdiction is not immediately apparent. However, the Smiths have exhausted their claims in tribal trial court. This would satisfy the Supreme Court’s requirement that district courts do not infringe upon tribal courts’ right to make rules and self-govern. *See id.* at

14. Therefore, it would be justified to order the trial court to stay the suit and allow the Arizona federal district court to determine jurisdiction.

II. The Trial Court Erred in Dismissing the Smiths' Counterclaims and Third-Party Defendant Claims Because the Nation, EDC, and EDC Officers Captain and Bluejacket Do Not Enjoy Sovereign Immunity.

A. The Nation Expressly Waived Sovereign Immunity from Suit in Its Contracts with the Smiths.

Sovereign immunity does not protect the Nation against the Smiths' claims in the instant suit for two reasons. First, the Nation's contracts with the Smiths provide for an unequivocal and express waiver of the Nation's sovereign immunity. Second, for serious policy reasons, sovereign immunity should not protect the Nation from suit arising from contracts like the Smiths': off-reservation commercial contracts.

"As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998); *see also C&L Enters., Inc. v. Citizen Band of Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001). Congressional abrogation or tribal waiver of immunity cannot be implied, but must be unequivocally expressed. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (quotations and citations omitted). Here, the record is devoid of any indication that Congress intended to abrogate the Nation's sovereign immunity. *See generally* ROA. Thus, the question before this Court is whether the Nation expressly waived its sovereign immunity.

The Nation was organized under Section 17 of the Indian Reorganization Act ("IRA"), former 25 U.S.C. § 477, that provides for incorporation of a tribal business in order to encourage non-Indian businesses to engage in commerce with Indian tribes. 25 U.S.C. § 5124 (2012). Section 17 of the IRA is silent as to whether such Section 17 Corporations are inherently entitled to sovereign immunity. *See id.* Although not yet decided by the Supreme Court of the United States, Appellants acknowledge the majority holding that the act of incorporation under Section 17 of the IRA in itself does not constitute a waiver of the Nation's sovereign immunity. *See, e.g., Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 921 (6th Cir. 2009) (concluding "that the better reading of Section 17 is that it creates 'arms of the tribe' that do not automatically forfeit tribal-sovereign immunity."); *Am. Vantage Cos. v. Table Mt. Rancheria*, 292 F.3d 1091, 1099 (9th Cir. 2002) (holding that "[a] tribe that elects to incorporate does not automatically waive its tribal sovereign immunity by doing so.")

(citations omitted). However, a Section 17 Corporation may choose to expressly waive its sovereign immunity “either in its charter or by agreement.” *Memphis Biofuels*, 585 F.3d at 921. Although the Nation does not automatically waive sovereign immunity as a Section 17 Corporation, the Nation expressly waived sovereign immunity through the terms of the contracts entered into with the Smiths.

1. The Nation Expressly Waived Sovereign Immunity in the Thomas Contract.

The Nation expressly relinquished sovereign immunity through the Thomas Contract, and thus, is not protected from suit regarding the Smiths’ counterclaims. While waiver of sovereign immunity must be clear and unequivocal, a tribe “need not use magic words” to explicitly waive sovereign immunity. *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 25 (1st Cir. 2006) (citation omitted); *see also C&L Enters.*, 532 U.S. at 420-22 (recognizing that no precedent has ever held that an explicit waiver of tribal immunity “must use the words ‘sovereign immunity.’” (quotation marks and citation omitted)).

Similar to the instant case, in *C&L Enterprises*, Citizen Potawatomi Nation entered into an off-reservation commercial contract and expressly waived sovereign immunity in the provisions of the contract. 532 U.S. at 420. The contract there contained the following arbitration clause:

All claims or disputes between the Contractor [C & L] and the Owner [the Tribe] arising out of or relating to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise. . . . The award rendered by the arbitrator or arbitrators shall be final, and *judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.*

Id. at 415 (emphasis added). The American Arbitration Association Rules provided that “[p]arties to these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.” *Id.* Citizen Potawatomi Nation argued that it did not waive sovereign immunity because the contract did not state a specific judicial forum in which to enforce the arbitration decision. *Id.* at 421. However, the Supreme Court rejected that argument, holding that the consent to arbitration in the contract unambiguously

“memorialize[d] the Tribe’s commitment to adhere to the contract’s dispute resolution regime” of the arbitration and choice of law provisions, effectuating an explicit waiver of sovereign immunity. *Id.* at 422. Other courts have subsequently held contractual provisions sufficient to constitute waiver of sovereign immunity, without using the words ‘sovereign immunity.’ *See, e.g., Oglala Sioux Tribe v. C & W Enters., Inc.*, 532 F.3d 224, 230 (8th Cir. 2008) (holding that “an arbitration clause alone [is] sufficient to expressly waive sovereign immunity”); *Oneida Indian Nation of N.Y. State v. County of Oneida*, 802 F. Supp. 2d 395, 417 (N.D.N.Y. 2011) (holding a retainer agreement that provided for the determination of attorney’s fees by “the court or tribunal finally determining” the tribe’s claim an express waiver of sovereign immunity).

In the instant case, and perhaps in an even more explicit waiver of the Nation’s sovereign immunity, the Thomas Contract provided that “any and all disputes arising from the contract [are] to be litigated in a court of competent jurisdiction.” ROA at ¶ 1. Like in *C&L Enters.*, the Thomas Contract does not state a specific judicial forum in which to litigate disputes under it. *Id.*; *see C&L Enters.*, 532 U.S. at 421. However, failure to state a judicial forum, as held in *C&L Enters.*, does not invalidate the express waiver by the Nation. 532 U.S. at 422. Further, the clear and unequivocal waiver here is distinguished from instances where courts refused to find waiver of sovereign immunity. *Cf. Miller v. Wright*, 705 F.3d 919, 925 (9th Cir. 2013) (holding that a mediation provision in contract that did not reference enforcement in any court of competent jurisdiction, coupled with an explicit statement providing for the tribe’s retainer of sovereign immunity, did not constitute a waiver of such immunity); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006) (holding that employment contract provisions stating that an employee could be terminated “for any reason consistent with applicable state or federal law” at most might imply a willingness to submit to lawsuits and did not amount to waiver of sovereign immunity).

Accordingly, the Nation expressly waived sovereign immunity when it clearly consented to litigation of disputes arising from the Thomas Contract. Thus, the Nation cannot cognizably claim sovereign immunity from the Smiths’ counterclaims in this suit.

2. Providing Protection for Off-Reservation Commercial Contracts Is Contrary to Congress' Stated Purpose of the Sovereign Immunity Doctrine.

Although the Nation is not protected from suit by sovereign immunity in the instant case, sovereign immunity nonetheless should not apply to any tribe for disputes arising from off-reservation commercial contracts like the one here. In *Kiowa*, the Supreme Court of the United States broadly extended the judge-made doctrine of sovereign immunity and held, for the first time, that “[t]ribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation.” 523 U.S. at 760. Despite acknowledging that Congress retains plenary power to extend or limit the purview of the sovereign immunity doctrine, *id.* at 758, the *Kiowa* majority, under the guise of congressional deference, expanded the doctrine to protect tribes against suits arising from off-reservation commercial contracts. *See id.* at 765 (Stevens, J., dissenting).

The expansion of the sovereign immunity doctrine by the *Kiowa* majority “is unsupported by any rationale for that doctrine, inconsistent with the limits on tribal sovereignty, and an affront to state sovereignty.” *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2045 (2014) (Thomas, J., dissenting). First, the expansion of the doctrine to off-reservation commercial activities represents a preemption of state power because “[w]hen an Indian tribe engages in commercial activity outside its own territory, it necessarily acts within the territory of a sovereign State.” *Id.* at 2047. Therefore, “absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.” *Id.* (quotation marks and citation omitted). Second, tribal sovereignty is “limited only to what is necessary to protect tribal self-government or to control internal relations.” *Id.* at 2048 (quoting *Montana*, 450 U.S. at 564) (quotation marks omitted). The *Kiowa* majority concedes that the expansion of sovereign immunity “extends beyond what is needed to safeguard tribal self-governance.” *Id.* (quoting *Kiowa*, 523 U.S. at 758). Finally, the *Kiowa* majority’s purported deference to Congress “was a fiction and remains an enigma.” *Id.* at 2049. The expansion of sovereign immunity to off-reservation commercial contracts frustrates the purpose of the sovereign immunity doctrine and encroaches on states’ rights. Accordingly, the Nation should never have been entitled to sovereign immunity for disputes arising from the Thomas Contract.

B. The EDC Is Not Protected by Sovereign Immunity Because It Is Not an Arm of the Tribe.

As discussed in Section II.A., *supra*, this Court should hold that the Nation waived sovereign immunity for disputes arising from its contracts with the Smiths. Thus, sovereign immunity does not protect the EDC, because the EDC, its board, and all employees are only protected by the Nation's sovereign immunity to the fullest extent by law. *See* ROA at ¶ 5; *People v. Miami Nation Enters.*, 2 Cal. 5th 222, 250, 385 P.3d 357, 375 (2016) (noting that “business entities that claim arm-of-the-tribe immunity have no inherent immunity of their own. Instead, they enjoy immunity only to the extent their immunity of the tribe . . . is extended to them.”).

The record reflects that the EDC was created as a wholly-owned subsidiary of the Nation and as an “arm-of-the-tribe.” ROA at ¶ 3. However, arm-of-the-tribe immunity is not a doctrine of form over substance. *See People v. Miami Nation Enters.*, 2 Cal. 5th 222, 250, 386 P.3d 357, 375 (2016). Following the California Supreme Court's factorial test adopted in *Miami Nation*, this Court must hold that the EDC is not an arm of the tribe, and therefore is not entitled to the Nation's sovereign immunity because the EDC's actual activities are too far attenuated to be properly deemed those of the tribe.

The *Miami Nation* court adopted in part a factorial test first articulated by the Tenth Circuit in *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino Resort*, 629 F.3d 1173 (10th Cir. 2010) that considered five factors in determining whether a business entity is entitled to tribal sovereign immunity: method of creation, tribal intent, purpose, control, and financial relationships. *Id.* at 245-48, 386 P.3d 372-74 (choosing not to adopt the sixth factor of the *Breakthrough* court's test because it “overlaps significantly with [the] other factors”). No single factor is universally dispositive, and the *Miami Nation* court held that the lower court erred in giving formal considerations, those focusing on the relevance of a formal relationship between a tribe and business entity, “inordinate weight.” *Id.* at 250, 386 P.3d at 374-75. “The ultimate purpose of the inquiry is to determine whether the entity *acts* as an arm of the tribe so that its *activities* are properly deemed to be those of the tribe.” *Id.* (emphasis in original) (citing *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006)).

1. The EDC's Method of Creation and Tribal Intent in Forming the EDC Are Formal Considerations That Favor Immunity.

Typically, the formation of a business entity under tribal law favors immunity, while formation under state law weighs against immunity.

Miami Nation, 2 Cal. 5th at 245-46, 386 P.3d at 372; see also *Breakthrough*, 629 F.3d at 1187 (holding business entity formed under tribal law and tribal constitution sufficient to favor immunity); *Am. Prop. Mgmt. Corp. v. Superior Court*, 206 Cal. App. 4th 491, 503 (2012) (noting that a business entity formed as a California LLC is not entitled to sovereign immunity). Like in *Miami Nation*, the formation of the EDC and the Nation's stated intent regarding the formation of the EDC suggest sovereign immunity is proper. Here, the EDC was created via a corporate charter under a 2009 tribal commercial code. ROA at ¶ 3; see *Miami Nation*, 2 Cal. 5th at 252, 386 P.3d at 376.

Similarly, where tribal articles of incorporation or ordinances express tribal intent to extend its sovereign immunity to a business entity, intent favors immunity. *Miami Nation*, 2 Cal. 5th at 246, 386 P.3d at 372. Here, the EDC's charter states that "the EDC, its board, and all employees are protected by tribal sovereign immunity to the fullest extent of the law." ROA at ¶ 5; see *Breakthrough*, 629 F.3d at 1193. The purpose of such protection for the EDC is to shield it from unconsented litigation and to assist in the success of the EDC's endeavors. ROA at ¶ 5. The purpose of such protection in the instant case, although frustrated through the Nation's own initiation of suit and waiver of sovereign immunity, is not relevant here. Accordingly, both formation of the EDC and the Nation's explicit intent to extend sovereign immunity to the EDC favor immunity. However, the remaining three factors of *Miami Nation* do not warrant extension of sovereign immunity to the EDC as an arm of the tribe.

2. Although the Stated Purpose of the EDC Favors Immunity, the Realities of the EDC's Actions Do Not Favor Immunity.

Although the stated purpose of the EDC favors sovereign immunity, the actual purpose carried out in the EDC's activities does not reflect the Nation's stated purpose and thus weighs against sovereign immunity. The purpose factor "encompasses both the stated purpose for which the entity was created and the degree to which the entity actually serves that purpose." *Miami Nation*, 2 Cal. 5th at 246, 386 P.3d at 372. According to its charter, the EDC's primary purpose is "to create and assist in the development of *successful* economic endeavors, of any *legal type or business*, on the reservation and in southwestern Arizona." ROA at ¶ 3 (emphasis added). Here, the EDC's lack of economic success is indicative that it does not carry out its stated purpose. First, the EDC has only employed an average of 25 tribal members per year since 2009. *Id.* at ¶ 5; see *Miami Nation*, 2 Cal. 5th at 247, 386 P.3d at 373 (noting that an entity

may bolster its case for immunity by proving the number of jobs it creates for tribal members). Second, the EDC has not generated enough revenue in almost nine years to repay the Nation's \$10 million loan that funded the EDC in 2009. *Id.* at ¶¶ 3, 4. The EDC has only repaid the Nation \$2 million. *Id.* at ¶ 4; *see Miami Nation*, 2 Cal. 5th at 247, 386 P.3d at 373 (noting that an entity may bolster its case for immunity by proving the amount of revenue it generates for the tribe). Finally, the EDC has, contrary to its stated purpose, endeavored to make marijuana cultivation and use on the reservation legal for any and all purposes, contrary to Arizona state law. ROA at ¶ 8. Accordingly, although the stated purpose of the EDC favors extension of the Nation's sovereign immunity, the reality of the EDC's business activities since its inception does not reflect an extension of such immunity.

3. Although the Nation Purports to Exercise Control over the EDC Through the Structure of the EDC, Evidence Suggests That the Nation Does Not Exercise Operational Control over the EDC.

The EDC's structure suggests that the Nation exerts some sort of control over the business entity. The board of directors of the EDC must consist of five individuals, all of whom are experienced in business. ROA at ¶ 3. The inaugural board of directors was selected by the Tribal Council, but directors thereafter are either reelected or replaced by a majority of the directors. *Id.* At all times, three of the directors must be tribal citizens and two may be non-Indians or citizens of other tribes. *Id.* At this time, it is unknown what the makeup of the directors is. *See generally* ROA. The Tribal Council retains the authority to remove any director for cause, or no cause, by a 75% vote. *Id.* at ¶ 3.

Notwithstanding these formal arrangements, evidence suggests that the Nation does not maintain operational control over the EDC. The record is devoid of evidence that points to the Nation's involvement in the EDC's day-to-day operations. *See generally* ROA. Instead, Thomas, a non-Indian, has substantial day-to-day interactions with Captain and Bluejacket, director and employee of the EDC. *Id.* at ¶ 2. The EDC is suffering economically, contrary to its stated purpose, and has failed to generate substantial revenues for the Nation. ROA at ¶ 4. The EDC has only repaid the Nation \$2 million of the \$10 million loan given to the EDC in 2009. *Id.* Further, the record does not indicate that the day-to-day management is controlled by the Nation. *See generally* ROA; *Am. Prop. Mgmt.*, 206 Cal. App. 4th at 505 (indicating that "indirect ownership and control of the tribal corporation" weighs against a finding of immunity). Although the decision

to outsource two of the five directors to non-Indians or non-Nation members and the advice of the Smiths, non-Indians, is not alone enough to tilt this factor against immunity, the lack of operational oversight by the Nation favors a finding against immunity. See *Miami Nation*, Cal. 5th at 252, 386 P.3d at 376 (holding that significant evidence suggests that the Indian tribes did not maintain operational control over the underlying businesses).

4. The Realities of the Financial Relationship Between the Nation and EDC Indicate That Sovereign Immunity Should Not Extend to the EDC.

The financial relationship between the Nation and EDC clearly show that the extension of the Nation's sovereign immunity to the EDC is inappropriate for two reasons. First, the allocation of 50% of the EDC's revenue to the Nation's general fund does not support immunity. Cf. *Breakthrough*, 629 F.3d at 1192-93 (favoring immunity where 100% of a casino's revenue went to the tribe, 50% going to government functions and 15% to tribal economic development). The Nation, as a Section 17 Corporation, in itself is an economic subsidiary of the Tribe and there is no indication that the EDC serves any government function. See generally ROA. Second, and unlike in *Breakthrough*, the Nation does not depend heavily on the EDC to fund other government functions and support other economic development ventures. *Breakthrough*, 629 F.3d at 1195. Instead, the EDC currently indebts the Nation \$8 million and has not had much success since its inception nearly nine years ago. Accordingly, the lack of financial relationship between the Nation and the EDC in this case weighs against sovereign immunity for the EDC as an arm of the tribe.

With respect to three of the five *Miami Nation* factors—purpose, control, and financial relationship—the evidence does not suggest that immunity of the EDC would “serve to meaningfully promote tribal economic development, cultural autonomy, or self-governance, i.e., the purposes of sovereign immunity.” *Miami Nation*, 2 Cal. 5th at 255, 386 P.3d at 378. Although the origination of the EDC appears to favor immunity, through tribal intent and method of creation, both factors “reveal[] little about whether the entity *acts* as an arm of the tribe so that its *activities* are properly deemed to be those of the tribe.” *Id.* at 256, 386 P.3d at 378 (emphasis in original). Accordingly, this Court must hold that the trial court improperly extended tribal sovereign immunity to the EDC, as it is not an arm of the tribe, but rather a separate business entity.

C. Captain and Bluejacket Do Not Enjoy Sovereign Immunity from the Smiths' Claims Because the EDC Is Not an Arm of the Tribe.

As discussed in Section II.B. *supra*, the EDC is not an arm of the tribe and does not enjoy sovereign immunity. Similarly, Captain and Bluejacket, as CEO and Accountant of the EDC respectively, do not enjoy sovereign immunity from the Smiths' claims against them. Accordingly, this Court must hold that the Nation, the EDC, EDC CEO, and Accountant do not enjoy sovereign immunity against the Smiths' claims.

Conclusion

For the foregoing reasons, Appellants Thomas and Carol Smith respectfully request that this Court hold that the trial court erred in asserting personal and subject matter jurisdiction over the Smiths and erred in dismissing the Smiths' counterclaims and cross-claims due to sovereign immunity.