Case No. 07-5104

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NATIVE AMERICAN DISTRIBUTING, a Division of Flat Creek Cattle Co., Inc., a Missouri corporation, and JOHN DILLINER, an individual,

Plaintiffs/Petitioners-Appellants,

vs.

SENECA-CAYUGA TOBACCO COMPANY, an enterprise of the Seneca-Cayuga Tribe of Oklahoma, LEROY HOWARD, an individual, FLOYD LOCKAMY, an individual, and RICHARD WOOD, an individual,

Defendants/Respondents-Appellees.

Case No. 07-5104

On Appeal from the United States District Court
for the Northern District of Oklahoma
Case No. 4:05-CV-00427-TCK-SAJ
Honorable Terence Kern, U.S. District Court Judge

APPELLANTS' OPENING BRIEF

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COUNSEL REQUESTS ORAL ARGUMENT.

UNITED STATES COURT OF APPEALS
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed.R.App.P. 26.1, Plaintiff/Petitioner-Appellant, Native American Distributing, a Division of Flat Creek Cattle Co., Inc., a Missouri corporation (referred to herein as "NAD"), states that Flat Creek Cattle Co., Inc., and Native American Distributing, a division thereof, are not a publicly held corporation or any other form of publicly held entity; they do not have any parent corporation; they are private entities wholly owned by Plaintiff/Petitioner-Appellant, John Dilliner ("Dilliner"), and his wife, Kathy Dilliner. There are no publicly held corporations or other publicly held entities that have a direct financial interest in the outcome of this litigation.

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PRIOR OR RELATED APPEALS

There are no prior or related appeals.

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JURISDICTIONAL STATEMENT

Appellant NAD is a division of a Missouri corporation doing business in the Northern District of Oklahoma. Appellant Dilliner is an individual residing in the Northern District of Oklahoma. He is a shareholder and officer of NAD and a member of the Seneca-Cayuga Tribe of Oklahoma (the "Tribe"). "Seneca-Cayuga Tribe of Oklahoma" is the name of the Tribe and also the name of a Tribal corporation incorporated by the Tribe in 1937 under the Oklahoma Indian Welfare Act ("OIWA"), 25 U.S.C. §503, *et seq*. The Tribal corporation named "Seneca-Cayuga Tribe of Oklahoma" has waived tribal sovereign immunity in its Corporate Charter. Appellee, Seneca-Cayuga Tobacco Company ("SCTC"), is a cigarette manufacturing company located in the Northern District of Oklahoma, purportedly owned by the "Seneca-Cayuga Tribe of Oklahoma." NAD had contracts with SCTC that were made, performed and breached in Oklahoma.

The Corporate Charter of the Seneca-Cayuga Tribe of Oklahoma was duly ratified on June 26, 1937, and remains in effect. Section 3(b) of the Corporate Charter provides that the Tribal corporation has power "to sue and be sued, to complain and defend in any court." The interpretation and application of this Corporate Charter under the facts of this case invokes federal jurisdiction. *See, e.g., Rosebud Sioux Tribe v. Val-U Constr. Co. of South Dakota, Inc*., 50 F.3d 560 (8th Cir. 1995); *United Keetoowah Band of Cherokee Indians v. Oklahoma*, 927 F.2d 1170 (10th Cir. 1991).

Appellees Leroy Howard, Floyd Lockamy and Richard Wood are individuals residing in the Northern District of Oklahoma and were at all relevant times the principal business

managers of SCTC. Howard was Chief of the Tribe and Chief Executive Officer of SCTC. Lockamy was General Manager and Wood was Plant Manager of SCTC. NAD and Dilliner complain of the intentional, wrongful and illegal acts of the individual Defendants acting outside the scope of their authority as employees of SCTC, in violation of the Sherman Act and other applicable laws.

Federal jurisdiction is also predicated on 28 U.S.C. § 1337, and the Sherman Act, 15 U.S.C. §§ 1 and 13, and uncontested allegations that the Defendants/Appellees illegally manipulated domestic and international tobacco markets. Appellate jurisdiction is based on 28 U.S.C. § 1291, as the Judgment on appeal is a final judgment of the District Court. By Order of the Tenth Circuit Mediation Office, Lance Orwell, Circuit Mediator, the deadline for filing the Appellants' Opening Brief is September 25, 2007.

NAD and Dilliner have exhausted all tribal remedies. A detailed demand was served on the Business Committee, the highest authority of the Tribe, the Business Committee has consistently refused to negotiate or act, and there is no other tribal remedy.

STATEMENT OF THE ISSUES

1. Whether the Court erred in not permitting any discovery as to the true identity of the Defendant, the Seneca-Cayuga Tobacco Company, where the Tribe's constitutional entity, which is entitled to claim sovereign immunity, and the Tribe's corporate entity, which has explicitly waived sovereign immunity, have exactly the same legal name, the "Seneca-Cayuga Tribe of Oklahoma."

2. Whether the Court erred in dismissing the Plaintiffs' claims with prejudice on grounds of sovereign immunity without permitting any discovery where the entity that owns and operates Defendant Seneca-Cayuga Tobacco Company is named "Seneca-Cayuga Tribe of Oklahoma," which is the exact name of the tribal corporation that explicitly waived sovereign immunity in its Corporate Charter.

3. Whether the Court erred in specifically finding that "there are no questions presented upon which discovery would potentially assist Plaintiffs."

4. Whether the Plaintiffs/Appellants should have been given an opportunity to prove that the Seneca-Cayuga Tobacco Company was in fact *not* operated as a function of the Tribe's constitutional entity, but as a function of the Tribal corporation that explicitly waived sovereign immunity.

5. Whether the Court erred in finding that the unsworn declaration of Chief Paul Spicer, whose assertions are directly contradicted by other record evidence, and a resolution of the Tribe's Business Committee, constitute "compelling evidence" that the Seneca-Cayuga Tobacco Company was operated as an enterprise of the Tribe's constitutional entity, and that such evidence was sufficient to support summary dismissal.

6. Whether the Court erred in refusing to apply the doctrine of equitable estoppel where the management of Seneca-Cayuga Tobacco Company admittedly represented to NAD and Dilliner that in dealing with Seneca-Cayuga Tobacco Company, they were dealing with the Tribal corporation and there was no need to obtain a further written waiver of sovereign immunity.

7. Whether the Court erred in finding that equitable doctrines cannot be grounds for finding a waiver of tribal sovereign immunity, even where application of sovereign immunity leaves a party with no judicial remedy.

8. Whether the Court erred in specifically finding that "policy concerns have no place in the sovereign immunity analysis."

9. Whether the doctrine of tribal immunity should protect the Defendants/Appellees in this case, where none of the policy considerations that originally supported the establishment of the doctrine of tribal immunity exist.

10. Whether the Court erred in specifically finding that the Seneca-Cayuga Tobacco Company "is the type of entity capable of being clothed with the sovereign immunity of the Tribe."

11. Whether the Court erred in finding that the Seneca-Cayuga Tobacco Company, which was financed, built and initially operated by non-Indians on Tribal land, and which degrades the health of Tribal members and the public and contributes to a major national health problem, constitutes an "essential governmental function" of the Tribe, and therefore is entitled to claim sovereign immunity of the Tribe's constitutional entity.

12. Whether a single Tribal resolution to establish the Seneca-Cayuga Tobacco Company and declaring it to be an "essential governmental function" of the Tribe constitutes sufficient grounds to find the tobacco company to be in fact an essential governmental function entitled to tribal immunity.

13. Whether the Court erred in finding, based solely on the pleadings, that the officers of Seneca-Cayuga Tobacco Company who admittedly manipulated markets in violation of the Sherman Act and other laws "were acting at all times with at least a 'colorable claim of authority' from the Tribe" and were therefore entitled to the protection of tribal immunity.

STATEMENT OF THE CASE

NAD and Dilliner allege claims for breach of contract and civil conspiracy, claiming that SCTC and the individual Defendants breached agreements with NAD and conspired to manipulate tobacco markets in violation of state and federal laws, the result of which was to drive NAD out of business. The Trial Court prohibited discovery and dismissed all claims on grounds of tribal immunity, despite the fact that the Seneca-Cayuga Tribe of Oklahoma, a corporate entity, clearly waived sovereign immunity in its Corporate Charter. The Trial Court found that SCTC is an enterprise of the Tribe, not the Tribal corporation. This ruling was based on a single Tribal resolution establishing the tobacco company and declaring it to be an essential governmental function of the Tribe, and the "unsworn declaration" of Chief Paul Spicer claiming that the Tribal corporation exists "only on paper." Chief Spicer's declaration is directly contradicted by other record evidence, including *inter alia* a recent Tribal resolution in which Chief Spicer and the Tribal Business Committee invoked specific powers of the Tribal corporation, and a transcript of a recent hearing in the Court of Indian Offenses in which Chief Spicer and the Tribe's legal counsel invoked the Corporate Charter as the basis for their actions.

STATEMENT OF FACTS

For about four years, NAD was a distributor of SCTC's products under oral and written agreements between NAD and SCTC ("Agreements"). Relying on the Agreements, NAD developed a multi-tiered distribution chain and became one of the largest distributors of SCTC products. In 2004, SCTC and its managers, Defendants Howard, Lockamy and Wood, systematically breached the Agreements to prevent NAD from realizing the benefit of its bargain, with the intention of destroying NAD's business in favor of other distributors. SCTC and its managers undercut NAD's pricing and the pricing of its lower-tier distributors in domestic and international markets, made direct sales to NAD's customers, and otherwise interfered with NAD's customers and markets in breach of the Agreements.

SCTC permitted diversion of SCTC products by more favored distributors into the exclusive markets of NAD and its lower-tier distributors, resulting in unfair competition and market manipulation in breach of the Agreements and in violation of federal and state laws. Such diversion of products, knowingly permitted by SCTC and its managers, Howard, Lockamy and Wood, resulted in the destruction of NAD's business and dramatic increases in SCTC's liability for tobacco escrow payments required by Oklahoma law, 37 Okla. Stat. §600.23, and the laws of other states, as well as increasing SCTC's tax liability under the laws of Oklahoma and other states. NAD and Dilliner suffered financial injury as a result of the market manipulation, escrow and tax evasion, and other wrongful acts of SCTC, Howard, Lockamy and Wood. Ultimately, NAD and Dilliner suffered the total destruction of their business. Aplt. App. 11-12.

SCTC holds itself out to be an enterprise of the "Seneca-Cayuga Tribe of Oklahoma," which is the name of the Tribe and also the name of the Tribal corporation, which waived sovereign immunity in its Corporate Charter. Aplt. App. 83-84. In dealings between NAD and SCTC's management, Dilliner was told that because of the Tribe's business structure, there was no need for a further written waiver of tribal sovereign immunity; he was dealing with the Tribal corporation. Aplt. App. 89-90, 244-46. When suit was filed, SCTC and the individual Defendants moved to dismiss the Complaint on grounds of tribal immunity.

Two items were produced by SCTC in support of its motion to dismiss: (1) a Tribal resolution authorizing a tobacco company to be formed and declaring it to be "an essential governmental function" of the Tribe, and (2) an "unsworn declaration" of Chief Paul Spicer stating that the Tribal corporation "has never had any operations" and "exists only on paper." Aplt. App. 179-81, 301. In response, NAD produced a recent resolution of the Tribal Business Committee signed by Chief Spicer, invoking the corporate powers of the Tribal corporation and citing specific provisions of its Corporate Charter to remove a member of the Business Committee. Aplt. App. 247-48. NAD also produced excerpts of a transcript of a hearing in the Court of Indian Offenses at which the Tribal representatives including Chief Spicer cited the Corporate Charter as the authority for their actions, and other Tribal documents invoking the Corporate Charter. Aplt. App. 362, 366, 371. In addition, NAD produced a recent forensic audit of SCTC showing the magnitude of its business operations, describing its "inaccurate and misleading" accounting and tax reporting, referencing a possible bankruptcy filing, and discussing the many active misrepresentations made by the

former management of SCTC in "a culture of inappropriate actions, decisions and omissions that permeated SCTC." Aplt. App. 265-70.

The Trial Court found the Tribal resolution and unsworn declaration submitted by SCTC to be "compelling evidence that SCTC was formed as an enterprise of the Tribe and not the Tribal corporation." Aplt. App. 386-87. The Trial Court further held that equitable doctrines and policy concerns "have no place in the sovereign immunity analysis." The case was dismissed prior to discovery. Aplt. App. 393. The Trial Court acknowledged that the dismissal, where there is no alternative remedy, is "a harsh result." Aplt. App. 394.

The Trial Court then found that tribal immunity extends to the individual Defendants because they "were acting at all times with at least a 'colorable claim of authority' from the Tribe." Aplt. App. 396.

SUMMARY OF ARGUMENT

The judge-made doctrine of tribal sovereign immunity is an anachronism. In an age of billion dollar Indian casinos, racetracks, tobacco companies and other tribal enterprises, the original rationale for extending sovereign immunity to Indian tribes is no longer valid. The original purpose of tribal immunity was to protect limited resources of unsophisticated Indian tribes who were at a disadvantage in the business world a century ago. That purpose is not served when a sophisticated tobacco company cynically uses tribal immunity to shield itself from prosecution for blatant, intentional illegal conduct.

"Seneca-Cayuga Tribe of Oklahoma" is the name of both the Tribe's constitutional entity and its corporate entity, which has waived tribal immunity in its Corporate Charter.

NAD presented documentary evidence that the Tribe's Business Committee, the governing body of the Tribe, and Chief Paul Spicer, recently invoked powers granted in the Corporate Charter in Tribal resolutions, in the Court of Indian Offenses, and in other Tribal documents. Dilliner has testified that the Tribal Business Committee uses its corporate power when it deems it expedient to do so, acting as either a corporation or a constitutional entity, as it suits their immediate purpose, which is corroborated by record evidence. SCTC's management told Dilliner and he reasonably believed that the "Seneca-Cayuga Tribe of Oklahoma" that operates the tobacco company was the Tribe's corporate entity that has waived sovereign immunity, and there was no need for any further written waiver of immunity. Under these circumstances, SCTC should be equitably estopped from claiming tribal immunity.

SCTC was initially built, equipped, financed and operated by non-Indians. A minority of its employees are Indians. It holds itself out in the business world and does business as a "company" or "corporation." Manufacturing cigarettes, which degrade the health of the Tribe and the general public, cannot be an "essential governmental function." SCTC is not an enterprise of the Tribe; it is an enterprise of the Tribal corporation that unequivocally waived tribal immunity in its Corporate Charter. The Trial Court erred in dismissing the case on grounds of tribal immunity, based on scant evidence and without permitting any discovery as to the true nature and identity of SCTC.

The Trial Court further erred in holding that there is no place for policy concerns or equitable doctrines in the tribal immunity analysis. Controlling Supreme Court authorities including the *Kiowa Tribe* case and others do *not* declare equitable doctrines and policy

considerations to be irrelevant to the question of tribal immunity. Under the circumstances of this case, the Trial Court should have equitably estopped SCTC from claiming that it has not waived tribal immunity, where Dilliner was told by SCTC's management that he was dealing with the Tribe's corporation and there was no need for any further written waiver of tribal immunity. The Trial Court erred by holding that "policy concerns" are irrelevant to the tribal immunity analysis. That is not the law of the land. Tribal immunity only exists as a judicial doctrine because of "policy concerns."

The individual Defendants/Appellants were not acting under "color of authority" of the Tribe when they knowingly committed illegal acts. The individuals acted outside the scope of authority the Tribe was capable of bestowing. Their conduct, therefore, was not protected by the immunity of the Tribe under controlling Tenth Circuit authority.

ARGUMENT

I. The Standard of Review on Appeal.

The Trial Court's dismissal of this case prior to discovery was based on questions of law and mixed questions of law and fact, *i.e*., whether tribal immunity exists under the facts of this case. A trial court's conclusions of law are reviewed de novo on appeal. *Johnson v. Kindt*, 158 F.3d 1060, 1063 (10th Cir. 1998); *Moore's Federal Practice 3d*, § 206.04[1]. The standard of review for mixed questions of law and fact is unsettled, but the Supreme Court has ruled that, in general, mixed questions of law and fact are reviewed de novo. *Moore's Federal Practice 3d*, § 206.04[3][a], citing *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982). A "deferential review" rather than a de novo

review of mixed questions may be warranted in situations where the trial court is in a better position to decide the issue in question. *Cooter & Gell v. Hartmarx Corp*., 496 U.S. 384, 402, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990).

In the case at bar, the Trial Court's Judgment was based exclusively on documentary evidence contained in the record on appeal. The Trial Court was in no better position to decide the applicability of tribal sovereign immunity than the Court of Appeals. Therefore, the standard of review of all issues in this case should be de novo.

II. The Judicial Doctrine of Tribal Sovereign Immunity Should Not Apply under the Circumstances of this Case.

A. The Rationale Supporting Tribal Immunity Does Not Exist in this Case.

Thirty (30) years ago, U.S. Supreme Court Justice Harry Blackmun suggested that the doctrine of tribal immunity from suit may have outlived its usefulness. In *Puyallup Tribe, Inc. v. Department of Game of State of Washington*, 433 U.S. 165, 175 S.Ct. 2616, 53 L.Ed.2d 667 (1977), Justice Blackmun, one of the strongest proponents of Indian rights on the Court, wrote a separate concurring opinion expressing "doubts . . . about the continuing vitality in this day of the doctrine of tribal immunity . . . . I am of the view that that doctrine may well merit re-examination in an appropriate case." *Id*. at 433 U.S. 179.

Nine (9) years ago, in *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc*., 523 U.S. 751, 758, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998), Justice Kennedy observed that the concept of tribal immunity from suit "developed almost by accident" in *Turner v. United States,* 248 U.S. 354, 39 S.Ct. 109, 63 L.Ed. 291 (1919), when the Supreme Court made an

"assumption of immunity for the sake of argument, not a reasoned statement of doctrine." *Kiowa Tribe*, 523 U.S.at 757. *Turner* was thereafter cited as the basis for tribal sovereign immunity in later cases which, "with little analysis, reiterated the doctrine." *Id*.

Considering this history of the doctrine, the Supreme Court in *Kiowa Tribe* said:

> There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. See *Mescalero* v. *Jones*, 411 U.S. 145 (1973)*; Potawatomi, supra*; *Seminole Tribe of Fla.* v. *Florida,* 517 U.S. 44 (1996). In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims.

Kiowa Tribe, 523 U.S. at 758, 118 S.Ct. at 1704.

While the Court in *Kiowa Tribe* chose not to abrogate the doctrine under the facts of that case, it made further observations concerning the weakening rationale for retaining the doctrine, as expressed in *Okla Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okla*., 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991):

> The rationale, it must be said, can be challenged as inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities. Justice Stevens, in a separate opinion, criticized tribal immunity as "founded upon an anachronistic fiction" and suggested it might not extend to off-reservation commercial activity. *Id.,* at 514, 515 (concurring opinion).

Kiowa Tribe, 523 U.S. at 757-58, 118 S.Ct. at 1704, quoting dissent of Justice Stevens in *Potawatomi Tribe*, 498 U.S. 505.

Last year, the California Supreme Court addressed the issue of tribal immunity in *Agua Caliente Band of Cahuilla Indians v. Superior Court of Sacramento County,* 40 Cal. 4th 239, 148 P.3d 1126, 52 Cal. Rptr. 3rd 659 (Cal.S.Ct. 2006), finding Indian tribes subject to suit for violation of state laws requiring reporting of political campaign contributions. The California Court provided a detailed and careful analysis of the origins and history of the doctrine of tribal immunity, observing that the U.S. Supreme Court "has grown increasingly critical of its continued application in light of the changed status of Indian tribes as viable economic and political nations." *Agua Caliente Band*, 148 P.3d at 1135, citing *Kiowa Tribe*, 523 U.S. at 759, 118 S.Ct. 1700. On balance, the California Supreme Court held that the state's interest in a transparent election process with "rules that apply equally to all parties who enter the electoral fray" outweigh "concepts of tribal immunity." *Id*. at 1140.

The United States District Court for the District of Columbia considered the issue recently in *Marilyn Vann v. Dirk Kempthorne*, Civil Action 03-cv-01711, when Cherokee Freedmen, descendants of former slaves of the Cherokees who intermarried with Cherokees, sued the Department of the Interior, seeking to enjoin the Cherokee Nation from excluding Cherokee Freedmen from tribal elections. The court concluded that tribal immunity does not protect the Cherokee Nation from suit for claims arising under the Thirteenth Amendment, which includes the fundamental right to vote. *See* Memorandum Opinion and Order filed December 19, 2006, Document 41, p. 20, *Marilyn Vann v. Dirk Kempthorne*, Civil Action 1:03-cv-01711-HHK, in the United States District Court for the District of Columbia, which opinion can be found at http://www.indianz.com/docs/court/freedmen/order121906.pdf. The

district addressed other issues relevant to the case at bar, including the application of tribal immunity to tribal officers, who the court permitted to be joined in the action.[1]

These very recent cases show that lower courts are more narrowly construing tribal immunity in light of *Kiowa Tribe* and acknowledging the fact that tribal immunity is not an impervious shield against any and all litigation. As the justifications for tribal immunity wain and the Supreme Court's support for its own doctrine erodes, as discussed by the Court in *Kiowa Tribe*, lower courts are becoming more willing to balance the interests of the parties when considering the applicability of the doctrine of tribal immunity.

A century ago, policy considerations justified the protection of Indian tribes and their officers from litigation. Tribal immunity sprung from the laudable goal of supporting the early business efforts of tribes who were at a disadvantage in the business world. Those concerns no longer exist. Given the explosive growth and sophistication of tribal businesses, tribal immunity should be strictly construed. It should be found to be inapplicable in this case, where SCTC was operated as an enterprise of the "Seneca-Cayuga Tribe of Oklahoma," a chartered Tribal corporation that waived tribal immunity in its Corporate Charter, and the evidence of the wrongful acts of its management is overwhelming.

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[1] Significantly, the district court in *Vann* granted the Plaintiffs leave to amend to join individual officials of the Cherokee Nation. Quoting *Tenneco Oil Co. v. Sac and Fox Tribe of Indians of Okla.*, 725 F.2d 572, 574 (10th Cir. 1984), the court said that when a tribal officer "acted outside the amount of authority that the sovereign is capable of bestowing, an exception to the doctrine of sovereign immunity is invoked." The district court further quoted the *Tenneco* case: "Any other rule would mean that a claim of sovereign immunity would protect a sovereign in the exercise of power it does not possess." *Id.*

B. The Record Contains Insufficient Evidence to Support The Judgment that SCTC Is an Enterprise of the Tribe.

The Trial Court held that the evidence was "compelling" that SCTC was formed as an enterprise of the Tribe and not the Tribal corporation. Aplt. App. 386-87. The evidence relied upon by the Trial Court was (1) a single Tribal resolution authorizing the creation of a tobacco company and declaring its activities to be an "essential governmental function" of the Tribe, and (2) the unsworn declaration of Chief Spicer stating that SCTC was organized and operated as a division of the Tribe and that the Tribal corporation is a mere "shell" that "existed only on the paper issued to the tribe by the federal government." Aplt. App. 387, n.11.

NAD presented substantial documentary and testimonial evidence contradicting the Tribal resolution and the Chief's unsworn declaration. NAD produced *inter alia* Tribal Resolution #31-060306, dated June 3, 2006, signed by Chief Spicer, invoking the corporate powers granted in the Corporate Charter of Seneca-Cayuga Tribe of Oklahoma, proving that the Tribal corporation is an active, viable entity. Aplt. App. 336-37. NAD also presented a transcript of a hearing in the Court of Indian Offenses, BIA Miami Field Office, dated November 17, 2006, wherein legal counsel for the Tribe repeatedly invoked the Corporate Charter as the sole authority for revoking the voting rights and the Business Committee seat of a Tribal member. Aplt. App. 362, 366. In addition, NAD produced a copy of the Tribe's current Absentee Request used by the Tribe for absentee voting, in which the Tribal member must certify that he or she has not had voting rights withheld pursuant to the Corporate Charter. Aplt. App. 371. Finally, NAD produced a recent forensic audit of SCTC which

discloses the magnitude of the business, broadly supports NAD's allegations concerning the wrongdoing of SCTC's former management, and references a possible future bankruptcy filing by SCTC. Aplt. App. 265-70.

Clearly, the Corporate Charter is not viewed by the Tribe as a "dormant" document foisted on the Tribe by Congress decades ago and never used since, as Chief Spicer alleged. Instead, it is being regularly invoked by the Chief and the Tribe through its legal counsel as the authority for Tribal acts. Chief Spicer is well aware of these and other activities of the Tribal corporation, having signed Resolution #31-060306 and participated in the hearing in the Court of Indian Offenses. He was aware of these corporate actions when he filed his unsworn declaration denying that the Tribal corporation exists. The falsity of Chief Spicer's statements is palpable. Such statements cannot constitute "compelling evidence," in view of the contradictory record evidence of the ongoing viability of the Tribal corporation. Considering the totality of the circumstances, including the history of the tobacco company as outlined in the Affidavits of John Dilliner, Rick W. Riggs and Robert B. June (Aplt. App. 89-90, 143-149, 244-46), the Trial Court erred when it found that SCTC is an enterprise of the Tribe, as opposed to the Tribal corporation, based on a single Tribal resolution and a patently false unsworn declaration.

The forensic audit is telling. SCTC always has been operated and holds itself out to the public as a business corporation. The reference to a possible bankruptcy filing indicates that the management and its auditors perceive SCTC as a business corporation that could be required to file bankruptcy. Such a filing would be inconsistent with sovereign immunity.

If discovery were permitted, undoubtedly more facts and circumstances would show that SCTC has been operated, not as a division of the Tribe, but as a separate business corporation with the attributes of a corporation. Where the names of the Tribe and the Tribal corporation are identical, evidence of the actual daily operations of the business would be far more probative than a single resolution and an unsworn declaration.

The forensic audit also evidences the many illegal acts of SCTC's management, some of which are the very acts described in the Complaint. The Court should not turn a blind eye to these intentional wrongs, when a clear and unequivocal waiver of tribal immunity exists in the Corporate Charter *and* in the representations made by SCTC to Dilliner.

Strange fictions arise as a result of the doctrine of tribal immunity. The concept that a cigarette manufacturing company, which contributes to a public health crisis in the Tribe, is an "essential governmental function" would be ludicrous, but for the doctrine of tribal sovereign immunity. According to the founders of SCTC, who were non-Indians, SCTC was organized, built, financed and operated by non-Indians on Indian land under a contract with the "Seneca-Cayuga Tribe of Oklahoma." Aplt. App. 143-149. But for the doctrine of tribal immunity, SCTC would not have been declared an "essential governmental function" of the Tribe, which strains credulity.

The evidence in this case does not compel a finding that SCTC is an enterprise of the Tribe, as opposed to the Tribal corporation. The evidence shows *inter alia* that (1) Chief Spicer's statement concerning the Tribal corporation is untrustworthy, (2) SCTC is operated as a stand-alone business apart from the Tribe and is managed by non-Indians; (3) the Tribal

corporation unequivocally waived tribal immunity in its Corporate Charter; (4) the names of the Tribe and the Tribal corporation are identical, and (5) SCTC management represented to NAD and Dilliner that they was dealing with the Tribal corporation and therefore, there was no need for a further waiver of immunity. To hold that SCTC is entitled to tribal immunity under these circumstances is to exalt form over substance in a most flagrant way.

III. The Doctrine of Equitable Estoppel and Policy Concerns Should Be Considered Under the Circumstances of This Case.

A. Supreme Court Authority Does Not Proscribe Consideration of Equitable Doctrines and Policy Concerns.

The Trial Court declined to apply equitable estoppel in this case and expressly held that "'policy concerns' have no place in the sovereign immunity analysis." Aplt. App. 391, 393. In support of these holdings, the Trial Court cites *Ramey Construction Co. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315 (10th Cir. 1982). In fact, the words quoted by the Trial Court in support of this proposition are found in *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998).[2] In *Ute Distribution Corp*., the Tenth Circuit states in dicta:

> In the absence of a clearly expressed waiver by either the tribe or Congress, the Supreme Court has refused to find a waiver of tribal immunity based on policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case.

This language is founded upon an interpretation of *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc*., 523 U.S. 751, 118 S. Ct. 1700, 140 L.Ed.2d 981 (1998),

[2] The Judgment cites the correct page number for the quoted language, but the wrong case name and volume. See Aplt. App. 391.

by a panel of the Tenth Circuit Court of Appeals (Baldock, Holloway and Murphy, Circuit Judges). With respect, the gloss the Tenth Circuit panel put on the *Kiowa Tribe* opinion is incorrect. At best, *Kiowa Tribe* states a lukewarm support for the doctrine of tribal sovereign immunity. Kiowa Tribe does *not* stand for the proposition that neither equitable principles nor policy concerns may be considered in the tribal immunity analysis. In a six-to-three split, the majority opinion in *Kiowa Tribe* questioned "the wisdom of perpetuating the doctrine" of tribal sovereign immunity and observed that certain factors "might suggest a need to abrogate tribal immunity, at least as an overarching rule." *Id*. at 523 U.S. at 758, 118 S.Ct. 1704-05. The Court in *Kiowa Tribe* ultimately deferred to Congress on the question of the continuing viability of tribal immunity, inviting legislation, and found that tribal immunity exists for off-reservation tribal acts unless immunity is waived. But *nothing* in the *Kiowa Tribe* opinion states that neither policy concerns nor equitable doctrines may be considered in determining whether tribal immunity exists. The *Ute Distribution Corp*. opinion stretches the meaning of *Kiowa Tribe* beyond what was apparently intended by the Supreme Court, and the Trial Court takes it one step further. *Kiowa Tribe* simply does not stand for the proposition that neither equitable doctrines nor policy concerns may be considered in the tribal immunity analysis.

The three Justice dissent in *Kiowa Tribe* argued that the majority improperly extended sovereign immunity to off-reservation commercial activities in derogation of state rights, granting tribes immunity beyond that enjoyed by federal, state and foreign governments. The dissent concluded: "Governments, like individuals, should pay their debts and should be held

accountable for their unlawful, injurious conduct." *Id*. at 523 U.S. 766, 118 S.Ct. 1708. This may soon be, and should be, the opinion of the majority.

If the law in fact proscribes any consideration of equity or policy in the sovereign immunity analysis, then the law should change. This case exemplifies the abuses that can arise from granting complete immunity from suit to large tribal business concerns. As tribal enterprises expand, the courts cannot continue to disregard or protect the patently illegal business practices in which some tribes engage. This case is an example of a tribal business run amok, unrestrained by law, as evidenced by the forensic audit commissioned by the Tribe, which cites the many illegal business practices that took place at SCTC.

B. SCTC Should Be Equitably Estopped from Claiming the Protection of Tribal Immunity.

In his Second Affidavit, Dilliner testified that in dealing with SCTC, he was told by the management that he was dealing with the Tribe's corporation under the terms of its Corporate Charter, including the waiver of immunity contained therein, and that he need not be concerned with obtaining a written waiver of tribal immunity. He was led to believe by the tobacco company's management that the issue of sovereign immunity was "handled" in the Corporate Charter and in the event of a breach of contract by SCTC, he would have a remedy in court. Aplt. App. 244. He also testified that he has observed the Tribe's Business Committee using the Tribe's constitutional identity and its corporate identity interchangeable as it suits their purpose, since the Tribal entities conveniently have exactly the same name. Aplt. App. 244-46. His testimony in this regard is uncontested. Under these circumstances, SCTC should be equitably estopped from claiming the extraordinary protection of tribal

immunity, given the admitted misconduct of its management and the other relevant facts of this case.

The Trial Court states in its Judgment: "Plaintiffs make some compelling arguments that tribal immunity is not, in this case, furthering the policy goals originally intended by Congress . . . ." Aplt. App. 393. The Trial Court goes on, however, to state that it has "no authority to find a waiver of immunity based on policy concerns regarding whether Congress' intent is being furthered in a given case." *Id.* The Trial Court concludes that this seems to "render a harsh result" under the unique circumstances of this case, but finds, in essence, that under binding precedent, the Trial Court is powerless to do justice, due to the breadth of the doctrine of tribal immunity. *Id*.

The law is a living institution which must change with changing circumstances. The doctrine of tribal immunity has outlived its usefulness. When justice is turned on its head and federal courts are prohibited from doing justice by the rigid application of anachronisms like the judge-made doctrine of tribal sovereign immunity, the law should change.

Under the Trial Court's logic and its strained interpretation of the jurisprudence of tribal immunity, any tribe could, by tribal resolution, declare *any* business, whether or not owned or operated by the tribe and whether or not located on Indian lands, to be an "essential governmental function" of the tribe, thereby obtaining tribal immunity for that business. Thereafter, employees of the business, whether Indian or not, could be ordered to violate any law under "color of authority" and be totally immune from prosecution. This cannot be what the U.S. Supreme Court intended. Policy concerns *must* be considered.

This case presents compelling facts and circumstances for a reinterpretation of the doctrine of tribal immunity. Where the Tribe and the Tribal corporation have exactly the same name, where SCTC's management actively misrepresented to NAD and Dilliner the legal attributes of SCTC, where the Tribe was only minimally involved in the development and management of SCTC which holds itself out as a business corporation, where federal and state laws were clearly broken, where there is an unequivocal waiver of sovereign immunity in the Corporate Charter – the case should not have been dismissed without permitting any discovery as to the true nature and identity of SCTC.

IV. The Officers of SCTC Should Not Be Immune From Prosecution for Their Patently Illegal Acts.

The Trial Court held that the individual Defendants, Howard, Lockamy and Wood, were protected by tribal immunity because they were "acting at all times with at least a 'colorable claim of authority' from the Tribe." Aplt. App. 396. The Trial Court cited and followed a line of federal district court and appellate decisions to find that merely alleging that the Defendants violated federal and state laws does not abrogate their immunity. *Id*.

Another line of decisions, however, relies upon *Tenneco Oil Co. v. Sac and Fox Tribe of Indians of Okla*., 725 F.2d 572, 576 n.1 (10th Cir. 1984), in which the Tenth Circuit Court of Appeals said:

> [S]overeign immunity does not extend to an official when the official is acting as an individual or outside the scope of those powers that have been delegated to him.

Id., citing *Larson v. Domestic & Foreign Corp*., 337 U.S. 682, 689-90, 69 S.Ct. 1457, 1461, 98 L.Ed. 1628 (1949). The *Larson* case stands for the proposition that an exception to

sovereign immunity exists as to individual officers when they have "acted outside the amount of authority that the sovereign is capable of bestowing." *Id.* "Any other rule would mean that a claim of sovereign immunity would protect a sovereign in the exercise of power it does not possess." *Tenneco Oil Co. v. Sac and Fox Tribe of Indians of Okla*., 725 F.2d at 574. Thus, the Tenth Circuit recognizes an exception to tribal immunity for tribal representatives acting beyond the amount of authority the "sovereign is capable of bestowing." Further, this "exception to sovereign immunity is 'especially appropriate' with regard to Indian tribes, who are otherwise protected by an extremely broad immunity that would prevent federal courts from reviewing many aspects of federal law." Memorandum Opinion and Order, *Marilyn Vann v. Dirk Kempthorne*, Civil Action 1:03-cv-01711-HHK, U.S. District Court for the District of Columbia, p. 26, *supra*, quoting *Tenneco Oil Co.*, 725 F.2d at 574 (concluding that tribal officials are not immune from suit for their official actions taken to deny the voting rights of the Cherokee Freedmen.)

The individual Defendants is this case violated state and federal laws. The Trial Court held that they were acting with "color of authority" when they did so. The legal issue is whether they acted beyond the amount of authority the Tribe was capable of bestowing. If so, they are not protected by tribal immunity. The question arises, then, whether the Tribe is capable of bestowing on its representatives the authority to flagrantly and intentionally violate federal and state laws. The answer *must* be an emphatic "No."

The extension of tribal immunity to tribal employees or officers acting within the scope of their authority is a question of degree. The Trial Court cites cases holding that a

mere allegation that individual defendants violated state or federal laws does not state a claim that they acted outside their authority. However, as a matter of policy, it is clear that a tribe *cannot* properly bestow on its representatives the authority to intentionally violate federal laws, thereby clothing them with immunity for intentional illegal acts. Could a tribe's chief authorize tribal members to burn down a competing casino, then claim immunity from suit on the grounds that they were acting under "color of authority?"

Tribal sovereign immunity has always been a troublesome doctrine. The extension of the doctrine to protect managers of a tobacco company from suit for their intentional illegal acts under the circumstances of this case is fundamentally wrong. The courts should not extend a well-meaning doctrine to reach such an absurd result, which is certainly *not* mandated by controlling case law.

V. Conclusion and Statement of Specific Relief Sought.

This case presents the Court of Appeals with an opportunity to circumscribe and further define the doctrine of tribal immunity as it *should* exist in today's world.

The Court of Appeals should reiterate its holding in *Tenneco Oil Co.* that immunity of tribal officers is limited to their actions taken within the amount of authority that the sovereign is capable of bestowing on them, but add that tribes are not capable of bestowing upon their officers or employees authority to intentionally violate state and federal laws, thereby clothing them with tribal immunity for illegal acts. This is a reasonable extension of the holding of *Tenneco Oil Co.* Consequently, in this case the individual Defendants are not immune from suit for their intentional violations of the state and federal laws.

The Court of Appeals should review the *Kiowa Tribe* case and reconsider the gloss put on it by the Tenth Circuit panel in *Ute Distribution Corp*. and its implications for the use of equitable doctrines and policy concerns in the sovereign immunity analysis. The Court of Appeals should recognize that the very foundation of the doctrine of tribal immunity is "policy concerns" and the Supreme Court has *not* explicitly held that policy concerns and equitable doctrines are not relevant to the tribal immunity analysis. The Court of Appeals should hold that the representations made to Dilliner by SCTC's management concerning the need for a further waiver of immunity preclude SCTC from arguing it is *not* an enterprise of the Tribal corporation that has waived tribal immunity in its Corporate Charter.

Alternatively, the Court of Appeals could hold that the record evidence is insufficient to support a Judgment that SCTC is entitled to tribal immunity as an enterprise of the Tribe, as opposed to the Tribal corporation, and the Trial Court on remand should permit discovery as to the operations of SCTC at the relevant times. If the evidence shows that SCTC held itself out in business as a corporation, then the Trial Court should find that it is an enterprise of the corporate "Seneca-Cayuga Tribe of Oklahoma" and not the constitutional "Seneca-Cayuga Tribe of Oklahoma."

STATEMENT CONCERNING ORAL ARGUMENT

Counsel requests oral argument to fully elucidate the application of the doctrine of tribal immunity to the facts of this case and to discuss judicial activism and judicial restraint in the context of the judicial doctrine of tribal immunity.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Section 1. Word Count

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 7,276 words. I relied on my word processor to obtain the word count and it is WordPerfect X3.

Section 2. Line Count

My brief was prepared in a monospaced typeface and contains 651 lines of text using WordPerfect X3 in font size 13 and Times New Roman. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

s/Jonathan C. Neff
Jonathan C. Neff

CERTIFICATE OF DIGITAL SUBMISSION

I, Jonathan C. Neff, hereby certify on this 25th day of September, 2007, that:

(1) all required privacy redactions (below) have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk, and

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s/Jonathan C. Neff
Jonathan C. Neff

CERTIFICATE OF SERVICE

I, Jonathan C. Neff, hereby certify that on this 25th day of September, 2007, a true and correct copy of the foregoing *Appellants' Opening Brief* was mailed by first class mail, postage prepaid, and by electronic mail per the Emergency General Order as amended January 1, 2006 section (e) Service to the following:

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