CASE NO. 10-6157

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TINA MARIE SOMERLOTT,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
CHEROKEE NATION DISTRIBUTORS, INC., AN OKLAHOMA CORPORATION, AND CND, L.L.C., AN OKLAHOMA LIMITED LIABILITY COMPANY,	)
	)
Defendant-Appellees	)

On Appeal From The United States District Court
for the Western District Of Oklahoma
The Honorable Judge Timothy D. DeGiusti
D.C. No. 5:08-cv-00429-D

APPELLANT'S SUPPLEMENTAL BRIEF

Respectfully submitted,

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April 27, 2012

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STATEMENT OF THE SUPPLEMENTAL ISSUES

I. WHETHER CND'S ORGANIZATION AS AN OKLAHOMA LIMITED LIABILITY COMPANY PRECLUDES IT FROM SHARING IN THE CHEROKEE NATION'S SOVEREIGN IMMUNITY BY CO-EXTENSIVE APPLICATION OF THE DOCTRINE PRECLUDING U.S. SOVEREIGNITY FROM EXTENDING TO U.S. WHOLLY OWNED CORPORATIONS.

II. WHETHER APPLICATION OF THE DOCTRINE APPLIED TO CORPORATIONS WHOLLY OWNED BY THE UNITED STATES IS PROPERLY BEFORE THIS COURT IN LIGHT OF BRIEFING TO THE DISTRICT AND CIRCUIT COURTS.

III. WHETHER CND HAS FORFEITED ANY ARGUMENT THAT SOMERLOTT WAIVED OR FORFEITED THE FOREGOING ISSUE, BY FAILING TO ARGUE WAIVER OR FORFEITURE ON APPEAL.

IV. WHETHER THE DISTRICT COURT'S ORDER FAILS PLAIN ERROR REVIEW EVEN ASSUMING THAT APPLICATION OF THE DOCTRINE APPLIED TO CORPORATIONS WHOLLY OWNED BY THE UNITED STATES WAS FORFEITED OR WAIVED BY SOMERLOTT.

SUMMARY OF THE ARGUMENT

CND, an Oklahoma LLC, objects to U.S. jurisdiction and applicability of Title VII and the ADEA, because the Cherokee Nation is its sole shareholder through CNDI, a holding company. Somerlott contends that CND's formation as an Oklahoma LLC precludes it from sharing in the Nation's immunity, or from being considered to be a part of the Nation for purposes of Title VII or the ADEA. Indeed, since this Court holds tribal sovereign immunity to be co-extensive with U.S. sovereign immunity, and since the U.S. cannot extend its immunity to its own corporations, there is no basis for extending the Nation's immunity to CND.

The parties previously briefed Federal Court treatment of various kinds of *tribal* entities, but neither party touched upon the logical correlation in treatment of U.S. and tribal corporations, given the co-extensive nature of tribal and U.S. sovereign immunity. Even so, the issue is properly before the Court for consideration as a natural extension of Somerlott's prior argument that CND's organization as an Oklahoma LLC should extinguish any application of its owner's sovereign immunity. Even if the correlation was forfeited by Somerlott, CND failed to preserve the forfeiture argument. Moreover, given no factual dispute, and because of the manifest injustice and plain error of applying sovereign immunity to an entity that is clearly not entitled to it, the Court may consider the correlation between U.S. sovereign immunity and tribal immunity for the first time on appeal.

ARGUMENT

I. CND'S ORGANIZATION AS AN OKLAHOMA LIMITED LIABILITY COMPANY PRECLUDES IT FROM SHARING IN THE CHEROKEE NATION'S SOVEREIGN IMMUNITY BY CO-EXTENSIVE APPLICATION OF THE DOCTRINE PRECLUDING U.S. SOVEREIGNITY FROM EXTENDING TO U.S. WHOLLY OWNED CORPORATIONS.

As noted in this Court's order dated April 13, 2012, the 10th Circuit has previously held that "[t]ribal sovereign immunity is deemed to be coextensive with the sovereign immunity of the United States." *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1011 (10th Cir. 2007) (citation omitted). *See also, Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989)("The common law immunity afforded Indian tribes is coextensive with that of the United States . . ."). Since tribal immunity extends only so far as U. S. sovereign immunity, the Court can properly look to how corporations wholly owned by the Federal government are treated for guidance in this case, and extend that same treatment to CND. Because CND was organized under the general incorporation laws of the state of Oklahoma, tribal ownership does not operate to confer sovereign immunity to it.

The U.S. Supreme Court has addressed this issue with respect to U.S.-owned corporations, and has refused to extend Federal sovereign immunity to corporations formed under a state's general laws of incorporation – even where the companies were purchased pursuant to a Federal statute. In *Keifer & Keifer v.*

Reconstruction Finance Corporation, 306 U.S. 381, 388 (1939), the Supreme Court held:

> The government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work. For more than a hundred years corporations have been used as agencies for doing work of the government. **Congress may create them 'as appropriate means of executing the powers of government, as, for instance, * * * a railroad corporation** for the purpose of promoting commerce among the states.' *Luxton v. North River Bridge Co.*, 153 U.S. 525, 529 (1894). **But this would not confer on such corporations legal immunity even if the conventional to-sue-and-be-sued clause were omitted.**[1]

More than seventy years later, *Keifer* remains intact.

In its Order authorizing supplemental briefing, this Court acknowledged the holding in *Panama R. Co. v. Curran*, 256 F. 768, 771-72 (5th Cir. 1919) which adopted this doctrine before *Keifer* was decided. In that case, a private railroad company was purchased by the U.S. Government as a profitable endeavor and also to promote interstate commerce – one of the government's inherent powers. U.S. Const. art. I, § 8. Although the U.S. Government owned the railroad and its profits flowed into the U.S. treasury, the 5th Circuit refused to extend federal immunity to the company. The Court held:

> The suit is against a corporation, and the judgment is to be satisfied by the property of the corporation, not by that

[1] Citing *United States v. Lee*, 106 U.S. 196, 213, 221 (1882) and *Sloan Shipyards Corp. v. U.S. Shipping Board Emergency Fleet Corp.*, 258 U.S. 549, 567 (1922).

> of the individual incorporators… It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. **Instead of communicating to the company its privileges and its prerogatives, [the sovereign] descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.**

Id. at 772 (*citing Bank of the United States v. Planters' Bank*, 9 Wheat. 904 (1824)).

The organization and management of CND is parallel to that of *Panama Railroad Co*. As explained in CND's Response Brief, CND is wholly-owned by the Cherokee Indian Tribe, but is established as an Oklahoma Limited Liability Company. The acts of the tribe, in particular the Jobs Growth Act of 2005, demonstrate clear intent to preserve the company's existence as a private corporation. Although CND's board of directors is selected by the Principal Chief and the Tribal Council received notice and approved members of its board, there is no showing that the Tribe exerted day-to-day control over the business activities or that it was actually operated by the Tribe. Although profits would accrue to the Tribe, but there is no showing that the Tribe would be exposed to any of CND's liabilities – such as a money judgment in a civil action.

In *Bank of the United States v. Planters' Bank*, 9 Wheat. 904 (1824), the Supreme Court considered whether a bank owned by the United States was entitled to U.S. sovereign immunity. In considering that issue the Court reasoned:

> The government of the Union held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the Bank. The United States was not a party to suits brought by or against the Bank in the sense of the constitution. So with respect to the present Bank, suits brought by or against it are not understood to be brought by or against the United States. **The government, by becoming a corporator, lays down its sovereignty, so far as respects the transactions of the corporation,** and exercises no power or privilege which is not derived from the charter.

Here, to the extent that the Cherokee Nation chose to act though an Oklahoma LLC, it voluntarily stripped itself of any sovereign immunity objections as to the corporate form of CND. In turn, CND itself *never* enjoyed the Nation's immunity.[2] *See also, Salas v. United States*, 234 F. 842, 844–45 (2d Cir. 1916).

The 6th Circuit visited this issue most recently in *Parrett v. Southeastern Boll Weevil Eradication Foundation, Inc.*, 155 Fed. Appx. 188 (6th Cir. 2005). There, the court notes that *Keifer* is the last time that the Supreme Court has expressly ruled on this issue. *Id.* at 191. The court further observes that even where a Department, Agency, or statutory entity is formed and operates under the

[2] The Nation itself is not a party to this lawsuit and, accordingly, there has never been an issue as to whether the Nation waived sovereign immunity. Moreover, as to CND, there was never any sovereign immunity to waive, so waiver of sovereign immunity is not an issue.

Laws of the United States, as opposed to general state laws of incorporation, a series of criteria needs to be present for sovereign immunity to apply. Specifically, the *Parrett* court would require a showing, among other things, that the sovereign would be exposed to a money judgment if damages were awarded in a civil action; that the business activities be in furtherance of the function of the sovereign; and that the sovereign exert significant control over the day-to-day business operations of the entity. *Id.* Here, none of those criteria are met by CND *or* CNDI. Accordingly, even under the most liberal handling of the issue, neither CND nor CNDI should be afforded sovereign immunity.

The history of excluding state-formed commercial entities from federal and, by extension now, tribal immunity, is based in sound logic and furthers the purpose of sovereign immunity without placing citizens in undue danger of being subjected to arbitrary bad acts with no remedy. The *Keifer* court was highly critical of such application. Here, there is no justification for extension of immunity to CND either as a matter of judicial precedent or in the furtherance of public policy.

II. APPLICATION OF THE DOCTRINE APPLIED TO CORPORATIONS WHOLLY OWNED BY THE UNITED STATES IS PROPERLY BEFORE THIS COURT IN LIGHT OF BRIEFING TO THE DISTRICT AND CIRCUIT COURTS.

A. Jurisdictional Issues Are Always Preserved For Appeal, Particularly Where, As Here, Their Evidentiary Basis Is Preserved.

Generally, matters not raised at the District Court level may not be raised for the first time on appeal. The authority cited by CND in furtherance of this proposition is *Lyons v. Jefferson Bank & Trust*, 994 F. 2d 716 (10th Cir. 1993). The *Lyons* decision explains that the initial rationale behind this principle is fairness in allowing the parties to gather necessary evidence to address the issue on appeal. As *Lyons* explains:

> [T]his is "essential in order that parties may have the opportunity to offer all the evidence that they believe relevant to the issues ... [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence."

Id. at 720 (*quoting Singleton v. Wulff*, 428 U.S. 106, 120 (1976)). *See also, Hicks v. Gates Rubber Co.*, 928 F.2d 966, 970-71 (10th Cir.1991)(seeking to avoid numerous remands for additional evidence and factual findings).

In the issue at bar, all of the evidence needed to deduce whether CND is entitled to sovereign immunity was presented below (as discussed in subsection II. B. *infra*). Specifically, it was well established by the evidence that CND is a Limited Liability corporation formed under the general corporation laws of Oklahoma. Therefore, neither side is at a disadvantage by any failure to adduce evidence. In short, both sides knew that CND's status as an Oklahoma LLC was at issue, and that Somerlott believed it to be relevant in the determination of the question of Federal jurisdiction. There was, in turn, no invited error.

As further enunciated in *Lyons*, "this rule is not without exceptions." *Id.* The Court explains: "We have held that it does not apply to 'cases where the jurisdiction of a court to hear a case is questioned, [or] sovereign immunity is raised.'" *Id.*, *quoting Hicks*, 928 F.2d at 970. In addition, any matter at all may be taken up for the first time on appeal, in the broad discretion of the Appellate Court. For this proposition, the *Lyons* court looks again to *Singleton*, stating:

> The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule. Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt ... or where "injustice might otherwise result."

428 U.S. at 121.

Based upon the broad discretion of the Court to hear jurisdictional matters on appeal, and the admission that CND is an Oklahoma LLC, the issue of CND's entitlement to tribal sovereign immunity being co-extensive with that of a U.S. Corporation is properly considered on appeal.

B. CND's Status As An Oklahoma Corporation As A Basis For Denial Of Sovereign Immunity And, By Extension, Correlation Between Handling of U.S. Corporations, Was Adequately Preserved By Appellant Before the District Court.

At the District Court level, CND moved to dismiss Somerlott's Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(1), for lack of subject matter

jurisdiction and on the basis that Somerlott's claims were barred by both tribal sovereign immunity and the statutory tribal exclusions contained in Title VII and the Age Discrimination in Employment Act. *See* 42 U.S.C §2000 e(b) and 42 U.S.C. §621, et seq. In response, and as enunciated in the underlying District Court order, "*Plaintiff in this case contests Defendant's claim that CND is a subdivision of the Cherokee Nation entitled to the tribe's sovereign immunity.*" Somerlott argued that CND's status as an Oklahoma LLC should preclude it from sharing the Nation's sovereign immunity. (v. 2, doc. 17, pp. 5 and 11).

CND's initial Motion to Dismiss states that, "CND is a limited liability company organized under the laws of the State of Oklahoma and wholly owned by Cherokee Nation Business ("CNB"), a limited liability company wholly owned by the Cherokee Nation." (v. 1, doc. 2) Additionally, the motion acknowledged "both CND and CNDI were created by, [and] are ultimately wholly owned by" the Cherokee Indian Tribe. (v. 1, doc. 2 at p. 2) In its Motion to Dismiss Plaintiff's Amended Complaint, CND uses the terms commercial enterprise, tribal enterprise, tribal commercial activity, and tribally owned corporation, among others, interchangeably to describe its operations and/or relationship to the Nation. (v. 1, doc. 6) CND contends that, absent an unequivocal waiver, tribal sovereign immunity extends to such commercial enterprises belonging to tribes, including "ski resorts, gambling and sales of cigarettes to non-Indian." (Answer Brief, pg. 5).

CND further argues that Title VII and the ADEA exempt its commercial enterprises from their application. (*Id*. at 10, 12)

In response to the second Motion to Dismiss, Somerlott argued that tribal sovereign immunity should not be stretched to extend to a corporation owned by a corporation owned by a tribe. (v. 2, doc. 17) Somerlott began by defining the extent of tribal sovereign immunity when applied to tribally owned corporations. *Id*. at 5. Somerlott cited *Myrick v. Devil's Lake Sioux Mfg. Corp*., 718 F. Supp. 753, (D.N.D. 1989) and *Cano v. Cocopah Casino*, 2007 U.S. Dist. LEXIS 54377 (D. Ariz. 2007), for the proposition that where the corporation employing her was not the tribe itself, or an economic arm of the tribe (such as its department of revenue), or dealing with an intramural tribal governance issue on tribal property, CND was certainly not entitled to share in the Tribe's sovereign immunity and Title VII and ADEA exemptions. (*Id.* at pp. 7-10)

The arguments and analysis placed before the District Court expressly called into question CND's status as a corporation separate from the tribe. The arguments placed before the District Court proffered that the removal of CND from tribal intramural existence should operate as a bar to the extension of tribal immunity to it. The arguments placed before the District Court advanced the underlying rationale that the *Keifer* and *Panama Railroad* cases adopted in addressing the immunity properly afforded to U.S.-owned corporations.

Accordingly, this matter was properly preserved in briefing before the District Court.

C. CND's Status As An Oklahoma Corporation As A Basis For Denial Of Sovereign Immunity And, By Extension, Correlation Between Handling of U.S. Corporations, Was Adequately Preserved By Appellant Before the Circuit Court.

In her Opening Brief before this Court, Somerlott contested CND's entitlement to sovereign immunity on the basis of its status as an Oklahoma LLC, arguing: "Defendants, CND, LLC and Cherokee Nations Distributors, Inc. ("CND/CNDI"), are business endeavors organized under Oklahoma state law. Although the Cherokee Tribes have a financial stake in these businesses, they have no involvement in any traditional, sovereign functions on tribal property. Nevertheless, defendants have claimed the benefit of Tribal sovereign immunity to avoid the instant action for sex and age discrimination pursuant to 42 U.S.C. § 2000 et seq. (Title VII) and 29 U.S.C. § 621-34 (ADEA)."

In placing this analysis before the Court, Somerlott again argues the underlying rationale expressed in *Keifer*, without actually citing to it. Failure to cite to the case itself does *not* waive or forfeit the issue, the argument, or the analysis. Because of the corporate veil between CND and the Nation, there is simply no precedent for allowing it to benefit from the Tribe's immunity for its mere business endeavor. As Somerlott pointed out in her brief, there is certainly

no precedent for extending tribal sovereign immunity to CND. Accordingly, the issue was not forfeited.

Additionally, Plaintiff did not *waive* the issue by way of her conditional argument that CND fails even to meet the more relaxed criteria enunciated by some courts when dealing with corporations formed under tribal law, or by advocating that this Court adopt the intramural relationship test in weighing whether or not a corporation formed under either state or Tribal law is subject to its immunity. As Somerlott argued:

> [W]here a state-formed entity operates as a mere business, arm-of-the-tribe immunity should not apply. *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 at 171 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 at 148 (1973); *N.L.R.B. v. Chapa De Indian Health Program*, 316 F.3d 995 (2003). In *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040 (8th Cir. 2000), the court distinguished between the subject company, that was chartered, funded, and controlled by the Tribe to provide education to tribal members *on Indian land* and a "mere business." **As a purely economic endeavor, the activities of CND/CNDI constitute, at best, the kind of "mere business" for which sovereign immunity will not apply.**

(emphasis added). In asserting this position, Somerlott expressly placed CND's status as an Oklahoma LLC before the Court for consideration, arguing that its status as a non-tribal formed entity should preclude it from the Nation's immunities. But by arguing the outcome should the Court apply the intramural relationship test, or any other test, Somerlott did not waive the applicability of the

doctrine applied to corporations owned by the United States for purposes of determining whether CND is entitled to sovereign immunity. Accordingly, CND's status as an Oklahoma LLC and the impact that has upon its entitlement to the privileges and immunities of the Cherokee Nation are properly before this Court for consideration.

III. CND HAS FORFEITED ANY ARGUMENT THAT SOMERLOTT WAIVED OR FORFEITED THE FOREGOING ISSUE, BY FAILING TO ARGUE WAIVER OR FORFEITURE ON APPEAL.

CND has forfeited any opportunity to object to the consideration of the co-extensive nature of U.S. and tribal sovereign immunity by failure to argue the Somerlott waived or forfeited the argument in its briefing above or below. "[T]he defense of waiver can itself be waived by not being raised." *Garlington v. O'Leary*, 879 F.2d 277, 282–83 (7th Cir.1989). CND never asserted waiver or forfeiture as to this specific issue.

CND argued waiver on two bases in the brief, and never once argued forfeiture. On page 8 of the Answer brief, CND argues that Somerlott waived any argument as to the "sue and be sued" clause of CND's corporate charter, for failure to present the issue below. Failure to present the argument below is different than waiver. Waiver would exist only if Somerlott had conceded that the sue and be sued clause did not operate to limit sovereign immunity. She did not.

The second area that CND alleges to have been waived below is Somerlott's argument that the ADEA does not, by its terms, preclude action against businesses formed under state laws that are owned by an Indian tribe. Again, this is a forfeiture issue, not a waiver issue, so by CND's own advocated standard, it forfeits the forfeiture argument. Answer brief at p. 19 (citing *Lyons* narrowly).

CND's failure to allege forfeiture in its brief or at oral argument is not fundamental and cannot be reviewed for plain error. While the issue of sovereign immunity is a critical one, which can result in manifest error (as discussed below), the issue of forfeiture is NOT a critical error, which can result in manifest miscarriage of justice. A search of all federal Circuits has failed to elicit even one example of a forfeiture or waiver argument being revived on the basis of manifest injustice or plain error. Accordingly, plain error review cannot apply and the issue of CND's status as an Oklahoma LLC and the correlation between the treatment of U.S. corporations is properly before this Court, even if it was waived or forfeited by Somerlott, for failure of CND to argue that waiver or forfeiture in her brief.[3]

[3] CND does advance the argument that at no time does Somerlott demonstrate an Indian corporation that was denied sovereign immunity merely because it was incorporated under State law. However, that is significantly different than the issue presently before the Court: Whether the Court should consider those cases where U.S.-owned corporations were denied sovereign immunity, in light of the co-extensive nature of tribal and U.S. sovereign immunity.

IV. THE DISTRICT COURT'S ORDER FAILS PLAIN ERROR REVIEW EVEN ASSUMING THAT APPLICATION OF THE DOCTRINE APPLIED TO CORPORATIONS WHOLLY OWNED BY THE UNITED STATES WAS FORFEITED OR WAIVED BY SOMERLOTT.

A. Jurisdictional issues based on sovereign immunity are subject to review for plain error.

As stated in *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1127–28 (10th Cir.2011):

> [W]e will reverse on the basis of a legal theory not previously presented to the district court **when the correct resolution of that theory is beyond a reasonable doubt and the failure to intervene would result in a miscarriage of justice.** More recently, we have stated this standard in slightly different terms, requiring a litigant to show the four elements of plain error. Linguistic packaging aside, the substantive analysis under either articulation of the standard is similar, and the litigant's burden is the same: establishing a clear legal error that implicates a miscarriage of justice.

See also Jordan v. U.S. Dep't of Justice, 668 F.3d 1188 (10th Cir.2011) ("When a matter is forfeited, we may review for plain error, but that review is limited to whether there was a clear legal error that implicates a miscarriage of justice." (quotations omitted)).

Appellate courts have discretion to hear matters not raised or argued below under certain circumstances. Somerlott placed this general proposition before the Court in her timely filed Reply to CND's Answer Brief. Therein, Somerlott noted:

"Those circumstances may include issues regarding jurisdiction and sovereign immunity, and instances where public interest is implicated, or where manifest injustice would result[.]" (citing *Rademacher v. Colorado Ass'n of Soil Conservation Districts Medical Ben. Plan*, 11 F. 3d 1567, 1572 (10h Cir 1993)).

Courts may also consider an issue first raised on appeal if it is a purely legal issue central to the case, such that there need be no further development of the facts, and it is important to the public interest. Appellate courts have found great public interest where issues concerning acts of Congress were raised for the first time on appeal. *Dean Witter Reynolds, Inc. v. Fernandez,* 741 F.2d 355, 360-61 (11th Cir.1984)(finding "great public concern" where Cuban assets control regulations were argued for the first time on appeal); *Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255, 1266 (4th Cir.1974), (finding public importance where the Occupational Safety and Health Act was raised on appeal); *Green v. Brown,* 398 F.2d 1006, 1009 (2d Cir.1968) (finding great significance in construing the Investment Company Act of 1940 to protect investors on appeal).

While Somerlott argued below in opposition to the claim to Title VII and ADEA exemption, she bolstered her argument on appeal with application of the Small Business Act, as well as discussion of CND's specific and intentional use of Oklahoma's Limited Liability Company Act to insulate the tribe as shareholder and take advantage of SBA resources and programs. There being no facts in dispute as to CND's corporate status, the question becomes purely legal. It being a

matter of great public concern, it should be taken into account, regardless of whether it was raised at the district court level.

B. Manifest Injustice Would Result if This Court Refused to Consider a Fundamental Jurisdictional Issue Raised on Appeal

As clearly indicated by briefing in Somerlott's Motion to Dismiss below, manifest injustice would result if the jurisdictional issues raised on appeal were not considered by this Court. The similarities between In *Panama R. Co.* and this case are clear. There, the United States owned all capital stock of the defendant, a New York Corporation. The directors gave the Secretary of War an irrevocable power of attorney to transfer the stock standing in his name at any time. 256 F. 768 at 771-772. An intention to preserve the existence of the defendant as a private corporation was clearly manifested in acts of Congress. Net profits accruing from the conduct of the business were to be covered annually into the treasury of the United States. Annual reports were to be made to Congress. (*Id.*)

Refusal to consider this issue would result in manifest injustice. Where a question has been briefed fully by the parties and involves a pure legal issue, and important public policy concerns are raised by the issue, this Court has recognized its authority to consider issues first raised on appeal. *Sussman v. Patterson*, 108 F.3d 1206, 1210 (10th Cir. 1997) (issue of § 1988 fee and cost cut off provisions in § 1983 litigation settlements); *See also Harris v. Day*, 649 F.2d 755, 761 (10th Cir. 1981) (because of due process implications this court agreed to decide an issue first

raised on appeal). Even assuming the Court had not permitted the additional briefing herein, it would have had the authority and the duty to resolve the appeal in keeping with the law and the interest of justice.

As stated in the 10th Circuit Practitioner's Guide, Section VII, Subsection C, "The court is duty-bound to do substantial justice in deciding the appeals before it. Judges, however, must necessarily rely upon the advocates to point out the facts of record, the applicable rules of law, and the equities of the particular case that compel a just decision. An effective and carefully prepared brief and argument is more likely to be successful at persuading the court to decide in one's favor than a perfunctory presentation." Accordingly, failure to place a particular rule of law or doctrine before the Court risks its exclusion due to oversight. But where the Court becomes aware of an applicable rule or doctrine, it has a duty to employ that information in reaching a just result for the litigants before it.

Here, the parties fully briefed the questions and have had the opportunity to supplement their briefs after careful consideration by this Court. The issue is a pure question of law. As previously established, the policy concerns are manifold. Therefore, this Court should use its discretion to consider the issues raised on appeal.

CONCLUSION

CND LLC, as an Oklahoma company, is not entitled to the sovereign immunity vested in the Cherokee Nation, its owner.

Respectfully Submitted,

s/ Paula J. Phillips
Attorney for Appellant

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This Brief Complies with the Type-Volume Limitation of Federal Rule of Appellate Procedure 32(a)(7)(B).

The brief contains 5,533 words, including the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This Brief Complies with the Typeface Requirements of Federal Rule of Appellate Procedure 32(a)(5) and the Type Style Requirements of Federal Rule of Appellate Procedure 32(a)(6)

The brief has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen point, Times New Roman font.

s/ Paula J. Phillips
Attorney for Appellant

CERTIFICATE OF DIGITAL SUBMISSION
AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing APPELLANT'S SUPPLEMETNAL BRIEF, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the Symantec Endpoint version 11.0.5002.333, and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

CERTIFICATE OF SERVICE

_X_ I hereby certify that on April 27, 2012, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing, and served via overnight delivery 7 duplicate copies of the supplemental brief in accordance with the Local Rules. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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s/ Paula J. Phillips