No. 11-35850

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL T. MILLER, AMBER LANPHERE, and PAUL M. MATHESON, Individually and on behalf of others similarly situated;

Plaintiffs-Appellants,

v.

CHAD WRIGHT, Puyallup Tribe Tax Department, Enforcement Officer, HERMAN DILLON SR., Chairman, Puyallup Tribe of Indians and THE PUYALLUP TRIBE OF INDIANS, a federally recognized Indian tribe;

Defendants-Respondents.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
NO. 3:11-cv-05395-RBL
THE HONORABLE RONALD B. LEIGHTON
UNITED STATES DISTRICT COURT JUDGE

OPENING BRIEF OF APPELLANTS

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STATEMENT OF FACTS

On May 20, 2011, Daniel T. Miller, a non-Indian, bought Marlboro cigarettes from Paul Matheson's tribal Indian store on the Puyallup Indian Reservation. He spent less than two hours on the

reservation. (Excerpts of Record 31 hereafter "ER"). The Puyallup Indian Tribe formed an economic development corporation that operates a competing retail store selling the same cigarette brands as Matheson less than a mile from Matheson's store. The new Puyallup Indian Tribe store opened in 2011. The Tribe forced Matheson to sell to Miller at a minimum price that includes the tribal tax.

Matheson was required by the Tribe to comply with state law requiring him to buy his cigarettes from wholesalers certified by the State who charged over five dollars more than non-state certified retailers. The Tribe's requirements add price increases to Matheson's sales. The more the Tribe adds, the more it profits from its competitive sales and the more it collects from Matheson's purchasers who are non-Indian. (ER 27-88). The trial court dismissed the case. The Appellants-Plaintiffs, the store owner and his non-Indian customers, want relief from this illegal price fixing.

STATEMENT OF JURISDICTION

The Complaint alleges jurisdiction by Article III based on allegations that the Puyallup Tribe damaged Plaintiffs by unfair competition. The harm can be redressed by a favorable decision "against Defendants." (ER 36).

Defendant Chad Wright has retaliated and harassed Matheson and discriminated against his employees. (ER 59-60). These facts and illegal actions waive immunity of the Tribe and allow a civil rights action giving federal court jurisdiction where state and tribe personnel are the perpetrators. *Evans v. McKay*, 869 F.2d 1341, 1347 (9th Cir. 1989); *Dennis v. Higgins*, 498 U.S. 439, 451, 111 S.Ct 865, 112 L.Ed.2d 969 (1991). *Mims v. Arrow Financial Services, LLC*, ___ U.S. ____, 132 S.Ct 740, 753 (2012); 15 U.S.C. § 375(9) defines interstate commerce to include commerce between a state and any Indian Country in the state.

The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. §§ 1331, 1362, 1738, 42 U.S.C. § 1983, 15 U.S.C. § 15 and federal preemption. *Freedom Holdings v. Spitzer*, 357 F.3d 205,

233 (2nd Cir. 2004). U.S.Const. Art. 1 § 8, cl. 3. Adjudicative authority over non-members by an Indian tribe is a federal question. See e.g., *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 324, 128 S.Ct 2709, 171 L.Ed.2d 457 (2008). This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The District Court entered the Order dismissing Plaintiffs-Appellants' Complaint on October 6, 2011. A timely appeal from the Order was filed on October 17, 2011. The Appellants' Opening Brief is due February 8, 2012.

STATEMENT OF ISSUES

1. Whether the court must first consider its jurisdiction over the non-Indian, non-resident parties before Defendants can raise sovereign immunity?

2. Has the Puyallup Tribe waived sovereign immunity when the Puyallup Tribe competes at retail and sets the selling price of tobacco products?

3. Whether the antitrust statutes are federal laws of general applicability that waive sovereign immunity of the Puyallup Tribe?

4. Can the Puyallup Tribe force Matheson, its tribal member, to follow state statutes requiring that he purchase from state certified wholesalers who charge $5 or more higher prices?

5. Can the Puyallup Indian Tribe claim sovereign immunity against all the Appellants, including the non-Indian, non-resident Appellants?

6. Does the doctrine of Indian tribe sovereign immunity apply to Chad Wright, the Puyallup Tribe Tax Administrator, when the Appellants alleged that he acted beyond any scope of authority the Tribe could bestow on him?

7. Is Respondent Herman Dillon Sr., protected by tribal immunity?

8. Do the facts of competition and unidentical parties prevent the application of res judicata?

9. Discovery should have been allowed on whether the Tribe ceded control of its cigarette business to an economic organization and also to the State of Washington by a joint control agreement.

SUMMARY OF ARGUMENT

The Puyallup Tribe and its employees cannot violate federal antitrust laws by fixing minimum prices to Matheson its competitor in retail sales to non-Indians.

ARGUMENT

A. Standard of Review

The Puyallup Tribe moved to dismiss the case "Pursuant to 12(b)(1) of the Federal Rules of Civil Procedure for lack of jurisdiction based on the Tribe's sovereign immunity from suit; and (2) the res judicata effect of rulings by two court systems on the issue of immunity in earlier versions of this case." (ER 19). The Trial Court granted the motion. (ER 5). The standard of review on all issues in this Court is de novo. *Boozer v. Wilder*, 381 F.3d 931, 934 (9th Cir. 2004); *Green v. United States*, 630 F.3d 1245, 1248 (9th Cir. 2011).

B. In a 12(b)(1) Dismissal, All Material Allegations of the Complaint must be Accepted as True; The Complaint is Sufficient if it Alleges Facts of Jurisdictional Standing.

A district court cannot treat a Fed.R.Civ.P 12(b)(1) lack of jurisdiction motion as a 12(b)(6) motion. In such a motion, plausibility of pleadings is not the standard. The standard "the jurisprudence that deals with constitutional standing." *Maya v. Centex Corporation*, 658 F.3d 1060, 1068 (9th Cir. 2011).

The trial court's order (ER 5) states that the case involves a facial attack on the Complaint. (ER 27). The criterion is "whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in plaintiff's position a right to judicial relief." *Frayley v. Facebook, Inc.*, ___ F.Supp.2d ___, 2011 WL 6303898, pg. 6 (N.D.Cal 2011).

Alturas Indian Rancheria v. California Gambling Control Commission, 2011 WL 6130912, (E.D.Cal 2011) holds: "The factual allegations of the complaint are presumed to be true, and the motion is granted only if the plaintiff fails to allege an element necessary for subject matter jurisdiction."

Where factual issues are intertwined with jurisdictional issues going to the merits, it is reversible error to dismiss the case on a 12(b)(1) motion. See e.g., *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1040 (9th Cir. 2004).

The State/Tribe Agreement also provides for "mandatory mediation." (ER 102). "The Tribe's conduct delegated its powers to the State of Washington, an entity that is not an arm of the Tribe." (ER 45). The district court's order granting the motion to dismiss (ER 5) stated that "under the agreement, the Tribe and the State shared enforcement jointly." The wholesaler is required to put the stamps on the packages (ER 98) and the tribal retailer can only buy from a state wholesaler. (ER 97). Matheson can only sell for the minimum wholesale price he paid, plus the tribal tax. (ER 97). The legality of the State/Tribe agreement is not at issue. (ER 44).

In the eight year State/Tribe cigarette tax agreement dated April 20, 2005, (ER 104), the parties agreement was as follows: "The parties recognize that this Agreement describes a mutual undertaking with shared responsibilities. . .The Tribe is responsible

for. . .dispute resolution." Dispute resolution procedures were included. (ER 101).

C & L Enterprises v. Citizen Band of Potawotami Tribe, 532 U.S. 411, 420, 121 S.Ct 1589, 149 L.Ed.2d 623 (2001) holds that mediation by contract is an implicit waiver of immunity. "An Indian tribe's sovereign immunity may be limited by either tribal conduct, (i.e., waiver of consent) or congressional enactment (i.e., abrogation)." *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 25 (1st Cir. 2006). The trial court's statement (ER 9) limiting sovereignty to express waiver is reversible error.

The Affidavit of Chad Wright filed in this case (ER 21) did not dispute the allegations contained in the Complaint. Mr. Wright agreed with the facts contained in the Complaint. He admitted that Marine View Ventures is an economic development corporation owned by the Tribe. It sells cigarettes at retail. The Affidavit of Eric A. Scott (ER 23) also confirms that the Puyallup Tribe collects cigarette tax.

C. The Puyallup Tribe Waived Sovereign Immunity by Agreeing to a Joint Control Agreement with the State. The Court Should Allow Discovery on this Issue.

The Complaint (ER 58) alleges that the Tribe waived its immunity by ceding its authority to the State. The Court's Order notes that the State and Tribe "shared enforcement jointly." The Compact, (ER 99) states, "Responsibility for enforcement of the terms of this agreement shall be shared by the State and the Tribe." The Compact requires wholesalers to Matheson and the Tribe comply with state law. (ER 99).

"Arm of the tribe" is a sovereign immunity issue. *Inyo County v. Paiute Shoshone Indians*, 538 U.S. 701, 705, n. 1, 123 S.Ct 1887, 155 L.Ed.2d 933 (2003).

In *Agua Caliente Band of Cahuilla Indians v. Superior Court*, 40 Cal.4th 239, 148 P.3d 1126, 1138 (Cal. 2006), the court held that state's rights trumps tribal sovereign immunity, especially in this case where the Tribe agreed to abide by state laws.

Narragansett Indian Tribe v. Rhode Island, 449 F.3d 16, 24 (1st Cir. 2006) holds that a tribe abrogates and waives sovereign

immunity when it operates a retail cigarette outlet. The court stated 449 F.3d at 22, "The Tribe abandoned any right to an autonomous enclave. . .Thus we rest our decision squarely on these idiosyncratic features."

At 449 F.3d 25, the court held, "The provision quoted above clearly and unambiguously establishes that the parties to the J-Mem intended to subjugate the Tribe's autonomy on and over the settlement lands (and, thus, it sovereign immunity) to the due enforcement of the State's civil and criminal laws. . . .Hence, there was a waiver."

Narragansett, 449 F.3d at 30 states, ". . .we add, moreover, that even if the tribe was entitled to the protection of sovereign immunity in this case, which it is not, that protection would not cover the tribal members involved in the operation of the smoke shop."

The decision also holds that the rule is that a tribe has no sovereign immunity from "declaratory or injunctive remedies." *Narragansett*, 449 F.3d at 29. The case further holds, "An Indian

tribe's sovereign immunity may be limited by either tribal conduct (i.e., waiver of consent) or congressional enactment." 449 F.3d at 24.

Runyon ex rel. B.R. v. Associations of Council Presidents, 84 P.3d 437, 441 (Alaska 2004) holds that tribal immunity does not apply where the entity formed cannot obligate tribal funds. All waivers apply here as the Tribe agreed to apply state law; it formed a joint venture to operate cigarette stores as a competitor and also requires minimum prices by virtue of a joint control agreement with the State. The federal price fixing laws abrogate any immunity.

When a state and tribe make an agreement on tax collection, tribal officials who act outside of their authority have no immunity to federal prosecution. *U.S. v. Finn*, 919 F.Supp 1305, 1341 (D.Minn 1995). Accordingly, there is no sovereign immunity regarding the compact or Dillon's authority to execute the compact.

Building Inspector and Zoning Officer v. Wampanoag Aquinnah Shellfish Hatchery Corp., 818 N.E.2d 1040, 1050 (Mass. 2004) also holds that a state/tribe agreement waives sovereign immunity of the

tribe.

Plaintiffs were denied discovery regarding this critical issue. The facts were wholly within the possession of Defendants. Discovery could have stripped Chad Wright of any argument of personal sovereignty as he confirmed that he ran the cigarette business, possibly in his complete control. His Affidavit waived any immunity the Tribe had regarding discovery. *Gavle v. Little Six Inc.*, 555 N.W.2d 284, 294 (Minn. 1996) holds that the factor of whether the business entity is organized for a purpose that is governmental in nature, rather than commercial, is a critical factor in denying tribal sovereign immunity. The facts developed in defending against the motion to dismiss easily raised the "arm of the tribe" issue.

Wright v. Prairie Chicken, 579 N.W.2d 7, 10 (S.D. 1998) holds that an entity formed by the tribe is presumed not to be an arm of the tribe.

Similarly, *Dye v. Chocktaw Casino of Pocola*, 230 P.3d 507 (Okla. 2009) holds that by entering into a gaming compact, a tribe waived its sovereign immunity.

Dixon v. Picopa Construction Co., 772 P.2d 1104, 1109-10 (Ariz. 1989) rejected tribal immunity where the board of directors was different from the tribe's council and the entity had full managerial control. The admitted facts of this case indicate control in Marine View Ventures, not the Tribe. Denying any discovery is reversible error.

Cash Advance and Preferred Cash Loans v. State, 242 P.3d 1099 (Colo. 2010) holds that a tribe is required to furnish discovery at the "arm of the tribe" issue. The court remanded the case to allow discovery. The *Cash Advance* Court adopted federal precedent and reversed the dismissal based on the state court 12(b)(1) motion. The court adopted the three factor test of the dissent in *Wright v. Colville Tribal Enterprise Corp.*, 159 Wash.2d 108, 128-131, 147 P.3d 1275 (Wash. 2006).

The *Wright* dissent criticized the majority for not allowing development of a factual record on a 12(b)(1) motion. *Id.* at 128, "We are not fact finders." Among the factors are whether the entity is commercial, generates its own revenue and whether the tribal

officials have control over the entity.

State ex rel. Suthers v. Cash Advance and Preferred Cash Loans, 205 P.3d 389 (Colo. 2008) also holds that discovery must be allowed.

These facts from 2011 were not in existence when the prior cases were litigated. The damage from the Tahoma Market which, contrary to Chad Wright's Affidavit, is "going strong in Fife" (ER 17) and will host Kurt Busch with his race car clearly indicates additional damages. Matheson's store is also at Fife less than a mile away. (Miller Affidavit, ER 14).

The new store was opened in 2011, so new damages are occurring daily from the opening. The Tahoma convenience store is less than one mile from Matheson's convenience store. The 2011 facts prove the same market area, the facts of market participant and additional competition by Defendants will be denied. Further, the arm of the tribe argument has the new facts of the Marine View Ventures entity.

Discovery that could have established additional facts of waiver was denied. (ER 19, 20). In *Oklahoma Tax Commission v. Graham*, 489 U.S. 838, 841, 109 S.Ct 1519, 103 L.Ed.2d 924 (1989), the Supreme Court characterized tribal immunity as a possible defense. This case should go forward to give Appellants a chance to find facts on this sovereignty issue.

D. The Presumption Against Personal Jurisdiction of Appellants Miller and Lanphere Requires Reversal.

In addition to the Tribe, the Complaint alleges that Wright and Dillon acted outside the scope of any immunity. ER 33-4. Off-reservation tort conduct is alleged against Chad Wright. Complaint, ER 59-60. Wright states (Affidavit, ER 21) that he was the tribal tax administrator. This term is now defined in the federal cigarette law. 15 U.S.C. § 375(13).

Cohen's *"Handbook of Federal Indian Law,"* 2005 Edition, Nell Jessup Newton Ed., § 705[1][a], p. 637 states, "In *Santa Clara Pueblo v. Martinez*, the court stated that tribal officials are not protected by tribal immunity when acting beyond the scope of their authority." The case further states, "As an officer of the Pueblo,

petitioner Lucario Padilla is not protected by the Tribe's immunity from suit." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59, 98 S.Ct 1670, 56 L.Ed.2d 106 (1978).

A clear and unbroken law of cases in the Ninth Circuit hold that tribal immunity does not protect tribal officials who assess unconstitutional tribal taxes; thereby allowing prospective relief. *Burlington Northern Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007); *Arizona Public Service v. Aspaas*, 77 F.3d 1128, 1134 (9th Cir. 1995); *Big Horn Electrical Co-op v. Adams*, 219 F.3d 944, 953 (9th Cir. 2000).

Crowe & Dunlevy v. Stidham, 640 F.3d 1140, 1154 (10th Cir. 2011) holds that an ongoing violation of federal law waives both tribal immunity and immunity of a tribal judge. At 1155, "today we join our sister circuits in expressly recognizing *Ex parte Young* as an exception not just to state sovereign immunity but also tribal sovereign immunity." The court noted that *Plains Commerce, supra*, has limited the scope of sovereign immunity. To date, the Ninth Circuit has not ruled directly on this tribal immunity issue. The

Ninth Circuit should join the Eighth, Tenth and Eleventh Circuits.

E. Chad Wright and Herman Dillon are not Immune, Especially to the Relief Sought by Miller and Lanphere.

The Complaint seeks a declaratory judgment and prospective relief against all Defendants. (ER 62-70, 84-86).

Inquiry Concerning Complaint of Judicial Standards v. Leroy Not Afraid, 245 P.3d 1116, 1120 (Mont. 2010) states that "Not afraid has been subjected to this proceeding for his individual acts, so he cannot personally raise the defense of sovereign immunity." The individual parties must prove that they acted constitutionally and their actions did not violate the law. *Redding Rancheria v. Superior Court*, 88 Cal.App.4th 384, 105 Cal.Rptr.2d 773, 777 (Cal.App 2001).

The Tribe is presumed not to have jurisdiction of non-Indian, non-resident Plaintiffs Miller and Lanphere. The incidence of cigarette tax is on them as retail purchasers. (ER 43). *Confederated Tribes and Bands of the Yakama Indian Nation v. Gregoire*, 658 F.3d 1078, 1089 (9th Cir. 2011). They had no consensual relationship with the Tribe as they bought nothing from the Tribe. (ER 31-33,

37-38, 42-45, 61-62). They never met Matheson or dealt in any way with the Tribe. (ER 42). The compact never mentions the retail purchasers like Miller and Lanphere.

Montana v. United States, 450 U.S. 544, 564-567, 101 S.Ct 1245, 67 L.Ed.2d 493 (1981) established the principle that if non-members do not enter into agreements or deal with a tribe, the tribe has no jurisdiction of the non-member. The incidence of cigarette tax is on Miller and Lanphere.

Atkinson Trading Co. v. Shirley, 532 U.S. 645, 655, fn. 6, 121 S.Ct 1825, 149 L.Ed.2d 889 (2001) placed the incidence of tribal tax on the itinerant traveler, a non-Indian. Therefore, the Tribe exceeded its tax authority. The consensual relationship must have a "nexus to the consensual relationship itself." (532 U.S. at 656). Since the non-member had the legal incidence, the status of the hotel owner was not relevant as the tax exceeds the Tribe's authority. *Id.* at 655, fn. 6.

Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 330, 128 S.Ct 2709, 171 L.Ed.2d 457 (2008) states that

the adjudicative jurisdiction of a tribe cannot exceed its legislative jurisdiction. Both cases hold that tribal regulation of non-members are presumed invalid. The burden is on the Tribe to establish the "*Montana*" exceptions. (*Plains*, 554 U.S. at 330; *Atkinson*, 532 U.S. at 654).

Native Village of Tyonek v. Puckett, 957 F.2d 631 (9th Cir. 1992) applies as the court reversed a dismissal that applied a tribal ordinance to non-members. The Ninth Circuit held that the court had federal question jurisdiction under 28 U.S.C. § 1331 and remanded the case to develop factual issues of sovereignty.

In *Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1387 (9th Cir. 1988), the court upheld an injunction against a tribal tax even though sovereign immunity had not yet been determined.

F. The Complaint Alleges Unconstitutional Conduct of Wright and Dillon Beyond Any Authority the Tribe could Bestow on Them.

The present Supreme Court in *Virginia Office for Protection and Advocacy v. Stewart*, ___ U.S. ___, 131 S.Ct 1632, 1638, 179 L.Ed.2d 675 (2011) expanded the *Ex parte Young*, 209 U.S. 123, 28 S.Ct

441, 52 L.Ed. 714 (1908) doctrine to deny sovereign immunity to a state operated hospital and denied state sovereignty where the issue was an ongoing violation of state law requiring prospective relief.

Regarding injunction against a tribal officer, the law is stated in Canby, "*Federal Indian Law*," 5th Ed. 2009 at 106:

> The Supreme Court has held that a tribal officer is not protected by the tribe's immunity from suit for declarative and injunctive relief. *Santa Clara Pueblo v. Martinez,* 436 U.S. at 59. If the official acts beyond his or her authority, or beyond the authority that the tribe had the power legally to confer, the official may be sued.

The holding of *Burlington Northern Santa Fe Railway v. Vaughn,* 509 F.3d 1085, 1092, (9th Cir. 2007) is also conclusive and provides that, "Under the doctrine of *Ex parte Young,* immunity does not extend to officials acting pursuant to an allegedly unconstitutional statute."

Tenneco Oil Company v. Sac and Fox Tribe of Indians, 725 F.2d 572, 574 (10th Cir. 1984) holds, "When the complaint alleges that the named officer defendants have acted outside the amount of authority that the sovereign is capable of bestowing, an exception

to the doctrine of sovereign immunity is invoked." Here, the Complaint alleges that both individual Defendants acted unconstitutionally and beyond their authority. (ER 33-34).

Bassett v. Mashantucket Pequot Museum and Research Center, 221 F.Supp.2d 271, 277 (D.Conn 2002) holds that the tribal officials are not immune from injunction.

New York v. Shinnecock Indian Nation, 523 F.Supp.2d 185, 299 (E.D.NY 2007) holds that the party asserting the defense of sovereign authority has the burden of proof. It states, "prospective injunctive or declaratory relief is available against tribal officials when a plaintiff claims an ongoing violation of federal law or claims that a tribal law or ordinance was beyond the authority of the Tribe to enact."

Garcia v. Akwesasne Housing Authority, 268 F.3d 76, 86 (2nd Cir. 2001) holds that foreign sovereign law is instructive in reviewing tribal sovereign immunity. *Samantar v. Yousuf,* 130 S.Ct. 2278, 176 L.Ed.2d 1047 (2010) holds that a suit against an individual foreign official is not against a foreign state and no

sovereign immunity is available to the individual. The case is analogous.

In *Vann v. Kempthorne,* 534 F.3d 741, 750 (D.C.Cir. 2008) a case where slaves of the Cherokee Tribe sought tribal voting rights by injunctive relief, the court stated the rule denying sovereignty to tribal officials:

> Applying the principle of *Ex parte Young* in the matter before us, we think it clear that tribal sovereign immunity does not bar the suit against tribal officers. . . Faced with allegations of ongoing constitutional and treaty violations, and a prospective request for injunctive relief, officers of the Cherokee Nation cannot seek shelter in the tribe's sovereign immunity.

Wright and Dillon agreed to apply state law and state control to Matheson. They had no constitutional jurisdiction of Miller and Lanphere. The cited cases apply and require reversal.

G. The Federal Cigarette Contraband Tax Laws and the Wage and Hour Laws are Laws of General Applicability and Apply to Indian Tribes. Federal Antitrust Laws meet the Same Standards.

In *U.S. v. Baker*, 63 F.3d 1478, 1484 (9th Cir. 1995), the court applied the federal law of transporting cigarettes to Indians as it held that the law, 18 U.S.C. § 2342, was a federal law of general

applicability. Citing the principals of *Donovan v. Coeur d'Alene Tribal Farms*, 751 F.2d 1113, 1115 (9th Cir. 1985). The court held that none of the exceptions applied.

In *Solis v. Matheson*, 563 F.3d 425 (9th Cir. 2009), the court held that Baby Zack's owned by the same Paul Matheson who is a party in this case, was subject to federal wage and hour laws as the Tribe had no wage and hour laws. The Puyallup Tribe has no antitrust laws. The court noted that Matheson's store was a commercial enterprise. The Puyallup Tribe runs the same type of retail business and is subject to federal antitrust law.

San Manuel Indian Bingo and Casino v. N.L.R.B., 475 F.3d 1306, 1315 (D.C.Cir 2007) held that a casino was not engaged in internal governance therefore the tribe has no sovereign immunity from federal labor laws. *San Manuel* notes that the customers were non-Indians.

The *San Manuel* decision followed *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116, 80 S.Ct 543, 4 L.Ed.2d 584 (1960) which allowed federal condemnation laws to be applied

to real estate owned by the Indian tribe that was part of its reservation.

The Tribe attempts to license wholesalers and tax non-members, non-Indian, non-resident persons. These acts are beyond their authority and jurisdiction. Therefore, they have no immunity. *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676, 680 (5th Cir. 1999).

Baker, Matheson, Wilbur, Dillon, Wright and Fiander are all tribal Indians. The Tribe claims to be immune from the federal contraband cigarette tax law. Regardless of the Tribe's issue, Wright and Dillon are not immune.

The trial court ignored the harassment allegations of Matheson by Wright (ER 59) and also weighed the evidence on the merits of allegations beyond authority. ER 10. Wright's Affidavit states that he is CEO of a commercial development corporation competing with Matheson. Dillon is prohibited by the Constitution from compacting with the State without congressional authority. U.S.Const. Art. 1 § 8, cl. 3, or compacting with another state. U.S.Const Art 1 § 10. "Enter into any agreement or compact with another state." Current

federal cigarette tax law defines person and state shipment to include Indian tribes. 15 U.S.C. § 375(9)(A) and (B).

The State/Tribe agreement does not apply to Miller and Lanphere. The Tribe forced the price fixing as a competitor. The validity of the compact is not the issue. Chad Wright is subject to the federal contraband law and has no immunity from it and also the federal antitrust law.

The Complaint (ER 58) alleges that dealing by the Tribe at wholesale and retail is a waiver of sovereign immunity and that by collecting for the State of Washington, the Tribe waives sovereign immunity. The Complaint (ER 41) alleges that the Tribe violated the Revenue Rule prohibiting one sovereign from collecting the other's taxes. Two cigarette tax cases uphold this principle. *European Community v. RJR Nabisco Inc.*, 424 F.3d 175 (2nd Cir. 2005) and *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 110 (2nd Cir. 2001).

The Complaint alleges wholesale violations as the retailers have to purchase inventory from wholesalers certified by the State

of Washington. (ER 57). The Tribe agreed to buy from state certified wholesalers who had to pay the MSA into state escrow. Wash.Rev.Code 70.157, 70.158. This requirement adds to the cost about $5 per carton to pay into a State of Washington fund owned by the State. None of the Plaintiffs in this action were parties to the compact. The Puyallup Tribe had no legal obligation to pay the master settlement premium into the State's escrow. *North Carolina v. Seneca-Cayuga Tobacco Co.*, 676 S.E.2d 579 (N.C. 2009). This provision (ER 98-99) alone waives sovereign immunity.

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 100 S.Ct 2069, 65 L.Ed.2d 10 (1980) allowed the Indian tribes who sell to non-tribal purchasers to charge its tribal cigarette tax. This holding is consistent with consensual relationships. The case, however, did not involve the Tribe competing with its members or sales by members to non-Indians. *U.S. v. Lara*, 541 U.S. 193, 206, 124 S.Ct 1628, 158 L.Ed.2d 420 (2004) teaches that case law is confined to the time the decisions were at issue. Tribal sovereignty has no constitutional or

statutory basis, but was created by case law that currently is eroding the doctrine.

H. Tribal Immunity is Also Preempted by the Federal Antitrust Laws.

The Sherman Antitrust Act, 15 U.S.C. § 15, prohibits any practice that forces higher prices of a cost of product is a per se violation as it creates a horizontal price fixing monopoly by Respondents against Appellants. *Freedom Holdings v. Spitzer*, 363 F.3d 149 (2nd Cir. 2004) held that the same master settlement agreements are at issue here, (ER 43, 54-57) violate the antitrust laws. *Id.* at 158, "The PM's were constrained in their ability to compete." "PM's" are participating manufacturers. *Omnicare Inc. v. United Health Group Inc.*, 629 F.3d 697, 705 (7th Cir. 2011); *Denny's Marina Inc v. Renfro Productions Inc.*, 8 F.3d 1217, 1221 (7th Cir. 1993) also prohibit this type of price fixing.

Knevelbaard Dairies v. Kraft Foods, 232 F.3d 979, 986 (9th Cir. 2000) and *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002) allow RICO suits where horizontal price fixing among competitors is alleged.

Hollynn D'Lil v. Cher-Ae Heights Indian Community, 2002 WL 33942761 (N.D.Cal 2002) holds that sovereign immunity does not apply to an Indian tribe that runs a hotel and restaurant. The case follows *Donovan v. Coeur d'Alene Tribal Farms*, 751 F.2d 1113 (9th Cir. 1985).

I. *Jefferson County* Applies.

The trial court (ER 9) held *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 460 U.S. 150, 155, 103 S.Ct 1011, 74 L.Ed.2d 882 (1983) "has no bearing whatsoever on Indian sovereign immunity" and "that case is inapplicable here."

The court committed reversible error as *Jefferson County* unequivocally holds that when a government engages in proprietary functions with competitive advantages, it is bound to apply antitrust laws. The case carefully reviewed the same antitrust statutes here involved and denied 10th Amendment immunity against price fixing. The case states (460 U.S. at 170), "there is simply no unambiguous evidence of congressional intent to exempt purchases by a state for the purpose of competing in the private retail market with a price

advantage." The court noted that the state was "the strongest competitor of them all and that Congress feared any law that "denied small business" antitrust relief from competing governments. *Id.* at 171.

The trial court (ER 9) wrongfully relied on *Parker v. Brown*, 317 U.S. 341, 352, 63 S.Ct 307, 87 L.Ed 315 (1943) a case decided forty years before *Jefferson County* that required that states be mentioned to be included in the antitrust law. The *Parker* case did not involve an agreement of price fixing and merely acted as a government, not a competitor.

Here, extensive violations are alleged in the Complaint by Defendants making Matheson buy only from state certified wholesalers who charge more as they add amounts for payments into the state escrow to pay the tobacco settlement. (ER 43, 28, 41). *Freedom Holdings v. Spitzer*, 357 F.3d 205, 233 (2nd Cir. 2004) held that the federal antitrust laws completely preempted the state escrow statutes. The State does not actively supervise the escrow, hence *Parker v. Brown* does not apply. The trial court (ER 9,

10)followed *Parker* and states that government entities were not subject to antitrust laws and therefore *Donovan v. Coeur d'Alene Farm Tribes*, 751 F.2d at 1116 was proof that "sovereign entities were not intended to be regulated under federal antitrust laws." The conclusion constitutes reversible error as government entities that compete are subject to antitrust laws. The case must be reversed on misapplication of *Parker v. Brown*.

Krystal Energy v. Navajo Nation, 357 F.3d 1055, 1061 (9th Cir. 2004) applied syllogistic reasoning to abrogate tribal immunity from the bankruptcy code. It states, "But the Supreme Court's decisions do not require Congress to utter the magic words 'Indian tribes' when abrogating tribal sovereign immunity." The same reasoning applies to the antitrust laws. Governments in retail competition are within the Act's definition of "person." Governments are not defined.

Limeco v. Division of Lime of Mississippi, 546 F.Supp 868, 871 (D.C.Miss 1982) held antitrust liability to the state stating, "the state clearly is acting as one among a number of competitors in the lime industry and as such cannot invoke the principles of

federalism so as to procure exemption from Sherman Act coverage."

Cossey v. Cherokee Nation Enterprises, LLC, 212 P.3d 447, 456-7 (Okla. 2009) holds that a tribe's sovereign powers apply only if a tribe has authority to regulate. If a tribe cannot regulate, it has no consensual relationship. *Cossey* follows *Atkinson Trading v. Shirley*, 532 U.S. 645, 121 S.Ct 1825, 149 L.Ed.2d 889 (2001). *Cossey*'s updated language is important here. *Id.* at 458:

> Without the logic of *Plains*, which incorporates the general rule of *Montana* and its exceptions, Cossey and all other non-Indians who unknowingly subject themselves to tribal regulation, and, thus, to tribal court jurisdiction without their consent merely by entering a casino in Indian Country. Moreover, without *Plains* and *Montana*, non-Indians could unwittingly waive their rights to seek relief in the state courts of Oklahoma.

Id. at 460, "The Compact represents a consensual relationship between the Tribe and State, but Cossey was not a party to it." It applies here as none of the Appellants were parties to the State/Tribe agreement.

City of New York v. Golden Feather Smoke Shop, 2009 WL 705815, page 5 (E.D.NY 2009) goes further and holds that sovereign

immunity is a defense and the burden of proof is on the tribe.

J. The Marine View Ventures was Formed in 2011 to Operate the Tahoma Market. This Entity may not be an Arm of the Tribe, a key Sovereignty Issue. The 2011 Facts Denying Sovereignty also Prevent Res Judicata and Issue Preclusion.

The Complaint alleges that the Tahoma Market at Tacoma, Washington, sells cigarettes in the same market area. (ER 29). The Affidavit of Chad Wright (ER 21) verifies that the Tribe owns Marine View Ventures and that it sells cigarettes. The Complaint states at page 4 (ER 30) that Miller could have purchased "from the tribal store" but he would have had to pay the same price or greater. The Complaint (ER 28) states that "both Matheson and the Tribe sell cigarettes of the same kind and quality to the general public in the same market area." The Affidavit of Plaintiff Miller (ER 15) states that he went to the Tahoma Market on May 20, 2011. He attached a news clipping dated May 12, 2011, that stated the store opened two months before. The article confirms that the Tahoma Market is the same facility owned by Marine View Ventures.

Chad Wright states that he is chief executive officer of the Tribe's economic development corporation called Marine View Ventures. (ER 21). Plaintiff Daniel T. Miller in his Affidavit (ER15) states that he could have purchased as many cigarettes as he wanted and all major brands were on display. The Complaint (ER 33) alleges that Wright is CEO of the Tahoma Market. Miller has never sought relief in the Tribal Court. (ER 81).

Plaintiff alleged that an entity in which the Tribe does not have control is not an arm of the Tribe. The allegation applies to Marine View Ventures.

Where a complaint concerns facts such as a waiver of immunity as it does at (ER 31, 38, 44-46) and throughout, the court should consider documentary and testimonial evidence and allow further discovery.

The Trial Court's Order (ER 7) cites the prior case of *Matheson v. Gregoire*, 139 Wash.App 624, 161 P.3d 486 (Wash. 2007). It did not allege antitrust violations by unfair competition nor did it ask for prospective relief. The Tahoma Store was not in existence in

2006 when the state court suit was filed. The case filed in Tribal Court on September 28, 2006, was sent back to the district court to exhaust remedies. *Lanphere v. Wright*, 387 Fed.Appx 766, 767 (9th Cir. 2010). It was not final on any issue. The opinion stated "at this stage of the proceeding we need not and do not, decide definitively whether the tribal courts have jurisdiction." Daniel T. Miller never filed in Tribal Court and the tax he paid was paid in 2011. The facts of the new tribal store were not in existence until 2011. Miller is not in privity with Lanphere as the direct competition by the Tribe of the store opened in 2011 created an entirely new set of material facts not in existence in Lanphere's transaction.

The issue in the state court action are factually and legally substantially different. They were not validly resolved in the tribal case as the jurisdiction issue of Lanphere was reserved and the controlling legal issues have turned against the Tribe by the U.S. Supreme Court by the 2008 *Plains Commerce* decision (554 U.S. 316) substantially limiting *Montana v. United States*, 450 U.S. 147, 155 (1979). *Cossey v. Cherokee Nation Enterprises, LLC,* 212 P.3d

447, 458 (Okla. 2009) notes the change in the law.

A law review by Jesse Sixkiller, "*Procedural Fairness:Ensuring Tribal Civil Jurisdiction After Plains Commerce Bank*," 26 Ariz.J.Int'l & Comp.L at 779 (2009) notes the significant shift from tribal jurisdiction by the case.

Allflex v. Avid Identification Systems, 2007 WL 2701331 (D.C.Cal 2007) applies and denies res judicata to later unfair competition not litigated in the prior case. The court held that the new patents involved materially different unfair competition and business conduct. The new facts could prove new liabilities. The three pronged test of issue preclusion is flunked in this case.

C.I.R. v. Sunnen, 333 U.S. 591, 598, 68 S.Ct 715, 92 L.Ed. 898 (1948), a tax case, states that "the parties are free to litigate points that were not at issue in the first proceeding. It limits preclusion to points, "actually litigated and states that each year is the origin of a new liability." It also states that the case "judicial declaration intervening between the two proceedings may so charge the legal atmosphere as to render the rule of collateral estoppel inapplicable."

Burlington Northern Santa Fe Railroad Company v. The Assiniboine and Sioux Tribes of the Fort Peck Reservation, 323 F.3d 767, 771 (9th Cir. 2003) follows *Sunnen* and is controlling precedent. It holds that a prior determination does not prohibit future tax cases. The decision on past tribal tax cannot apply to later periods. Otherwise the Tribe could collect taxes forever.

A new factual claim by a non-tribal court litigant not in existence in the prior case precludes comity. *Southern California Stroke Rehabilitation Associates v. Nautilus*, 782 F.Supp.2d 1096 (S.D.Cal 2011).

Any factual deviation prevents the doctrine. The claims must be identical. *Chase Manhattan Bank v. Celotex Corp.*, 56 F.3d 343, 346 (2nd Cir. 1995).

Virtual representations must be the same. The general rule is against preclusion as everyone should have his own day in court. *Taylor v. Sturgell*, 553 U.S. 880, 892-3, 128 S.Ct 2161, 171 L.Ed.2d 155 (2008). *Sturgell* also rejects the use of privity.

CONCLUSION.

Antitrust conduct in the market area by the Defendant Tribe in 2011 and by forming Marine View Ventures to conduct the competition was never at issue in any prior litigation, nor was Daniel T. Miller a party. The Tribe's jurisdiction does not include Miller or Lanphere. There is no doubt the Ninth Circuit law allows prospective relief against Wright and/or Dillon in this case. An Indian tribe loses immunity when it cedes its control to the State, agrees to apply state law to its members and regulate commercial activity when at the same time, it competes at retail with the member. For all of the above reasons, the case must be reversed.

DATED this 8th day of February 2012.

Respectfully Submitted,

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, counsel hereby certifies that, to the best of his knowledge and belief, that there is one case that has issues related to this case. It is *Tonasket, et al, v. Sargent, et al.*, Case No. 11-36001.

DATED this 8th day of February 2012.

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BRIEF FORMAT CERTIFICATION PURSUANT TO CIRCUIT RULE 32(a)(7)

Pursuant to Fed.R.App.P. 32(a)(7), I hereby certify that the OPENING BRIEF OF APPELLANTS is: proportionately spaced, has a typeface of 14 point or more, contains fewer than 14,000 words (opening and answering briefs).

DATED this 8th day of February, 2012.

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CERTIFICATE OF SERVICE

I certify that two copies of Appellants' Opening Brief and Excerpts were served on Counsel for Appellee, by ECF and mailing the same by regular mail on February 8th , 2012, in a postage-paid envelope addressed as follows:

John Bell
Director of Legal Department
Puyallup Indian Tribe
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Tacoma, WA 98404

Dated this 8th day of February, 2012.

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