Case No. 16-35632

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KONIAG, INC. and MICHAEL P. O'CONNELL,

Plaintiffs-Appellees,

v.

KURT KANAM and ORBIE MULLINS,

Defendants-Appellants.

Appeal from the United States District Court, District of Alaska,
District Court No. 3:12-cv-00077-SLG

RESPONSE BRIEF BY KONIAG, INC.

James E. Torgerson, Alaska Bar No. 8509120
Renea I. Saade, Alaska Bar No. 0911060
Jason T. Morgan, Alaska Bar No. 1602010
STOEL RIVES LLP
510 L Street, Suite 500
Anchorage, Alaska 99501
Phone: (907) 277-1900
Facsimile: (907) 277-1920

Attorneys for Plaintiffs-Appellees

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Koniag, Inc. hereby certifies it is an Alaska corporation that has no parent corporation, and that no publically traded company owns 10% or more of Koniag's stock.

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I. INTRODUCTION

This is the third appeal filed by pro se defendants Kurt Kanam ("Kanam") and Orbie Mullins ("Mullins") in response to a summary judgment order and permanent injunction. Kanam and Mullins' first appeal was dismissed for missing the deadline for interlocutory appeal. SER 11-13.[1] Their second appeal was dismissed for being filed prematurely. SER 4-5. The case is now, finally, properly before the Court.

The procedural history of this case is long and complicated, and is set forth in detail below in Section IV. In short, Kanam, acting as the tribal attorney for the Native Village of Karluk (a small village on Kodiak Island, Alaska), and Mullins, acting as the Village's tribal court judge, initiated a series of lawsuits in tribal court against Koniag Corporation ("Koniag") and one of its attorneys, Michael O'Connell ("O'Connell"), purporting to affect their legal rights.[2] Neither Koniag nor O'Connell are members of the Karluk tribe, and the tribe plainly lacks jurisdiction over them. Accordingly, Koniag and O'Connell sought and received a permanent injunction from the U.S. District Court - District of Alaska against

[1] Kanam and Mullins filed no excerpts of record, and did not even include attachments referenced in their "Brief of Appellant" ("Op. Brief"). Respondents have provided supplemental excerpts of record ("SER") for the Court's review.

[2] To Koniag's knowledge, Kanam and Mullins are not licensed members of any state or federal bar. *See Kanam v. Tingle*, No. 3:13-cv-05194-RJB (W.D. Wash. Mar. 19, 2013) (summary dismissal of a U.S. District Court case filed in the Western District of Washington explaining that Kanam is not a licensed attorney and that "Mr. Kanam may not appear in this court on behalf of the Native Village of Karluk and/or the Karluk Tribal Court").

Kanam and Mullins requiring them to dismiss the existing tribal lawsuits, and refrain from initiating additional such suits.

The tribal lawsuits against Koniag are part of Kanam and Mullins' pattern and practice. They commence show cause proceedings or file lawsuits in various tribal courts (which they create) against parties who are not tribal members, enter default judgments against those parties, and then try to register the judgments in state courts. For example, Kanam and Mullins created the tribal court for the "Kikiallus Nation" (not a federally recognized tribe) and tried to use tribal court authority to transfer the ownership of oil and gas leases in Oklahoma to a Washington corporation. *See Unit Corp. v. TMI Ministries*, No. 5:14-cv-00070R (W.D. Okla. June 13, 2014) (Order and Permanent Injunction).[3]

The common response to Kanam and Mullins' overreach is to file an injunction in federal district court. That is what the plaintiffs did in *Unit Corp*., who were facing tribal court claims from Kanam and Mullins. That is what similarly situated plaintiffs did in *KPMG LLP v. Kanam*, No. 15-35714, 2016 WL 3408904, at *1 (9th Cir. June 21, 2016). And that is what Koniag and O'Connell did in this case.

Kanam and Mullins' response to these federal cases also follows a now well-established pattern. They do not show up to the hearings. They do not respond to

[3] In addition, Kanam and Mullins have attempted to use the "Karluk Tribal Court" to declare the rights of the Pilchuck tribe in Washington (also not a federally recognized tribe) including establishing Kanam's "complete control of the Pilchuck government and its members." *See Kanam v. All Active Parties*, No. 3:12-mc-05019 (W.D. Wash. 2012).

the substance of motions for summary judgment or for injunctions. And they do not comply with any orders issued by the district court, including injunctions. Instead they throw stones at the parties, attorneys, and judges by filing bar complaints, trying to recuse judges as being dishonest or "mentally disabled" (SER 93), or filing a "frivolous" lawsuit against the presiding judge.[4]

Notwithstanding the complicated procedural history, Kanam and Mullins' pattern and practice ultimately make these cases easy to resolve on appeal. Kanam and Mullins on appeal present three reasons why they believe the district court erred in granting relief to Koniag and O'Connell. However, they never made these arguments at the trial court level, and never responded to the motion for summary judgment and permanent injunction. Kanam and Mullins have, therefore, waived their arguments, and the Court can summarily resolve this case. Indeed, this is precisely how the Court handled Kanam and Mullins' appeal in *KPMG*, when they raised the exact same three issues,[5] but failed to present those issues to the district court. 2016 WL 3408904, at *1.

Even if the Court reaches the substance of the appeal, Kanam and Mullins' arguments have no merit. The district court judge carefully reviewed and applied the law regarding the scope of tribal court authority, granted Koniag and O'Connell summary judgment because there were no issues of material fact as to

[4] *See Kanam v. Gould*, No. 3:13-cv-05885-BHS (W.D. Wash. 2013) (order dismissing case *sua sponte* as frivolous).

[5] Kanam and Mullins' brief in this appeal is almost identical to the brief they filed in *KPMG*. Kanam and Mullins simply substituted "Koniag" for "KPMG" and then filed the same brief (even leaving the district court cause number from the *KPMG* brief in place).

the scope and limits of the Native Village of Karluk's jurisdiction, and properly granted a permanent injunction based on the appropriate legal standard. The decision was reasoned and consistent with the law, and Kanam and Mullins provide no credible reason to reach a different result. Accordingly, their present appeal should be denied.

II. JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because Koniag's cause of action is based on questions of federal law, including federal common law regarding tribal jurisdiction over non-members. This Court has jurisdiction over the district court's entry of final judgment in this case under 28 U.S.C. § 1291.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Kanam and Mullins waived their issues on appeal by declining to participate in the district court proceedings and not raising their present issues with the district court.

2. Assuming that these issues were not waived, whether the district court properly granted partial summary judgment and a permanent injunction to prevent Kanam and Mullins from exercising tribal court jurisdiction over Koniag and O'Connell.

Relevant statutory provisions are reproduced in the Addendum.

IV. STATEMENT OF THE CASE

A. The Alaska Native Claims Settlement Act Created Native Corporations And Abrogated Reservations In Alaska.

Congress enacted the Alaska Native Claims Settlement Act ("ANCSA") in 1971 to settle all land claims by Alaska Natives. 43 U.S.C. § 1601, *et seq*. The intent of ANCSA was "to end the sort of federal supervision over Indian affairs that had previously marked federal Indian policy." *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 523-24 (1998).

To accomplish that goal, ANCSA "revoked" existing reservations (save one), and "completely extinguished all aboriginal claims to Alaska land." *Id*. at 520. As compensation, ANCSA granted $962.5 million in state and federal funds and approximately 44 million acres of land to state-chartered private business corporations whose shareholders were Alaska Natives. *Id*. ANCSA established 13 regional corporations, and further authorized the creation of village corporations. 43 U.S.C. §§ 1606(a), 1607. ANCSA further authorized the merger of village corporations, as well as the merger of village and regional corporations, pursuant to state law. 43 U.S.C. § 1627(a).

Koniag is the ANCSA-created regional corporation for all villages on or around Kodiak Island. 43 U.S.C. § 1606(a)(11). In 1980, several village corporations in the region, including the Karluk Native Corporation, merged with Koniag under state law, as provided in 43 U.S.C. § 1627(a). SER 151-155. Subsequently, some village corporations complained about the disclosures associated with the merger, filed suit in state court, and as part of the settlement were allowed out of the merger agreement. *See* Effect of Proposed Settlement of

Koniag Litigation, No. 366-005-841983, 1983 WL 42572, at *1 (Alaska A.G. July 22, 1983) (discussing history of case and settlement); *see also Leisnoi, Inc. v. Stratman*, 835 P.2d 1202, 1205 (Alaska 1992) (discussing history), *opinion modified on reh'g* (July 24, 1992). However, the Karluk Native Corporation did not join in those lawsuits.

B. Kanam Initiated Suit In The Karluk Tribal Court Purporting To Declare Rights With Respect To Koniag.

On March 19, 2012, more than 30 years after the Koniag merger, Kanam filed an "Original Complaint for Declaratory Judgment" with the Karluk Tribal Court, on behalf of the Native Village of Karluk. SER 214. Kanam requested a declaration that the Native Village of Karluk "decided to de-mergered [sic] from the Koniag Corporation" and unspecified damages based on the above described litigation from the 1980s. SER 215, 217. On that same day, Mullins issued an Order to Show Cause, requiring Koniag to respond by sometime between April 8 and April 20, 2012 as to why the tribal court should not grant the requested relief. SER 211.

Koniag learned of the tribal court action on March 27, 2012. SER 246. On March 28, 2012, Koniag through its legal counsel attempted to contact the Karluk Tribal Court to obtain the rules of practice and requirements for admission to practice. SER 246-47. The clerk of the Karluk Tribal Court issued a "response" explaining that "local council [sic] will be required" and directed Koniag to a person named Kurt Riggin in Colorado, who the clerk asserted is a "tribal attorney

barred [sic] with the Native Village of Karluk Tribal Court." SER 243. Mr. Riggin is banned from the practice of law in Colorado.[6]

One of Koniag's attorneys, O'Connell, made several calls to Kanam, and sent two letters (one addressed to Kanam, and one addressed to Kanam and Mullins) requesting an extension of time, and explaining that if no such extension was granted by 5:00 p.m. on Friday, April 6, Koniag would seek an injunction in federal court (as the 20-day show cause period was arguably set to expire on Sunday, April 8). SER 247-49, 251-54. O'Connell spoke to Kanam twice, but did not receive consent to an extension. SER 248-49.

C. Koniag Files Suit In Federal District Court To Enjoin The Tribal Court Action.

Koniag filed suit in federal district court on Monday, April 9, 2012. SER 255. Koniag's complaint sought "injunctive and other prospective relief" to prevent Kanam and Mullins "from violating federal law by unlawfully exercising jurisdiction in the Karluk Tribal Court over Koniag" in the identified Karluk Tribal Court case. SER 255. Koniag explained that the Karluk Tribal Court lacked jurisdiction over it because, among other reasons, Koniag was not a member of the Karluk Tribe, the Karluk Tribe has no territorial jurisdiction, Koniag business operations do not have a nexus with the tribe, and Koniag has not otherwise consented to tribal jurisdiction. SER 262. On that same day, Koniag filed a motion for a temporary restraining order and a preliminary injunction. SER 35.

[6] *See People v. Riggin*, Report re: Unauthorized Practice of Law Pursuant to C.R.C.P. 236(a) (O.P.D.J. Nov. 21, 2007).

D. Kanam And Mullins Respond To The Litigation By Filing Additional Tribal Court Actions.

Although Koniag was not aware of it at the time, Kanam and Mullins took a number of actions on April 9, 2012, in response to the federal suit. Specifically, Kanam filed another action against O'Connell and the bar associations of seven states. SER 193. Kanam's complaint alleged that O'Connell was criminally liable under 18 U.S.C. § 1503, which imposes criminal sanctions for threats or acts of intimidation against judicial officers. SER 196-97. Specifically, the complaint claimed that Koniag's letter expressing intent to seek a federal injunction was judicial intimidation. SER 196. Mullins signed a new show cause order to O'Connell on April 10, 2012. SER 199.

Also on April 9, 2012, Mullins entered an "Order Assigning Counsel," finding that O'Connell had "threatened the judge of this court" by seeking a federal injunction. SER 178-79. Mullins' order further "appoints Tribal Attorney Kurt Riggin . . . to represent Koniag Inc." SER 180. Riggin, for his part, immediately proceeded to give an interview where he identified himself as Koniag's counsel, and stated that Koniag "made certain threats to the tribal court and their officials" and that "[p]eople are jailed for things like that." SER 187-88. Koniag sent a letter to Riggin declining his representation in this matter. SER 184-85.

Koniag proceeded to file special appearances in the pending tribal actions, for the limited purpose of challenging the tribal court jurisdiction, and filed motions to dismiss on that ground. SER 37. In addition, on April 11, 2012, Koniag amended its complaint in federal court to include O'Connell as a plaintiff. SER 36. On April 17, 2012, Koniag filed a second motion for preliminary

injunction in federal court. SER 37. The second motion sought the same preliminary injunctive relief for O'Connell as was sought by Koniag in its initial motion. SER 37.

E. The District Court Grants Preliminary Injunctive Relief.

On July 3, 2012, the district court granted preliminary injunctive relief to Koniag and O'Connell. SER 49. The district court applied the traditional four-factor test that applies to preliminary injunctions as set forth in *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008), and found that both Koniag and O'Connell were entitled to injunctive relief. SER 41-48. The court then enjoined Kanam and Mullins from retaining, exercising, or threatening to retain or exercise jurisdiction with respect to the two tribal court actions. SER 48-49.

Despite the district court's order, Kanam and Mullins did not dismiss the two pending tribal court actions against Koniag and O'Connell. SER 27-28. In addition, they proceeded to initiate new tribal court actions against Koniag on August 24, 2012, and against O'Connell on November 6, 2012. SER 28. In addition, Kanam and Mullins attempted to use orders from the Karluk Tribal Court to "remove" another action filed by Koniag in federal district court (*Koniag, Inc. v. Andrew Airways* (Case No. 3:13-cv-00051-SLG, (D. Alaska 2013)) to the Karluk Tribal Court.[7] SER 28-29.

[7] This action had no relation to Kanam or Mullins but the named defendants included Alicia Reft, the President of the Karluk Tribal Council. Although he did not formally appear, based upon the filings she submitted to the court, Kanam appeared to be assisting Ms. Reft in the case during the time she was "pro se".

F. The District Court Grants Permanent Injunctive Relief.

In response to Kanam and Mullins' continued unlawful attempts to exercise jurisdiction, Koniag again amended its complaint and filed a motion for partial summary judgment, permanent injunction, and contempt. SER 26. Kanam and Mullins did not file a response. Instead, they filed a "Cross Complaint," making allegations under the False Claims Act, that named the "Office of Sharon Gleason" (the presiding district court judge) and the "Office of Geoffrey Haskett, USFW Regional Director" as parties and alleged that these parties had "a duty to protect the American people from a violation of the False Claim Act." SER 109-111. The district court took no action on the "Cross Complaint" and instead instructed Kanam and Mullins that they needed to seek leave to amend the pleadings. SER 26.

On July 29, 2013, the district court granted summary judgment in favor of Koniag and issued a permanent injunction. SER 26-30. The district court concluded that there was no issue of material fact as to jurisdiction, and that the Native Village of Karluk lacked jurisdiction over Koniag and O'Connell. SER 27. The district court applied the four-factor test applicable to granting a permanent injunction (*W. Watersheds Project* v. *Abbey*, 719 F.3d 1035, 1054 (9th Cir. 2013)), and concluded that a permanent injunction was warranted. SER 27. The district court issued a permanent injunction requiring Kanam and Mullins to dismiss with prejudice all tribal court actions against Koniag and O'Connell, and further enjoined Kanam and Mullins from taking similar actions against Koniag and O'Connell in the future. SER 29-30. On that same day, the court issued a show

cause order against Kanam and Mullins to appear at a hearing regarding contempt sanctions for violating the preliminary injunction. SER 31.

G. Kanam And Mullins File Their First Appeal.

On August 19, 2013, Kanam and Mullins filed a notice of appeal in the district court, and then filed an amended notice of appeal on September 26, 2013. SER 12-13. This Court dismissed the appeal because the August 19, 2013 notice of appeal did not challenge an interlocutory order, and the amended notice of appeal was filed more than 30 days after the challenged order. *Koniag, Inc. v. Kanam*, 615 F. App'x 403 (9th Cir. 2015) (unpublished) (available at SER 11-13).

H. Kanam And Mullins Violate The Permanent Injunction.

While the first appeal was pending, the district court proceeded to address the issue of contempt. Kanam and Mullins did not respond to the district court's show cause order. SER 25. Instead they filed papers with the district court purporting to remove (transfer) the entire case to the Karluk Tribal Court. SER 112. On August 30, 2013, the district court held a hearing on contempt, and Kanam and Mullins did not appear at the hearing. SER 25.

Before the district court ruled on the contempt proceedings, on September 12, 2013, Kanam and Mullins filed a "Notice of Security Fraud" claiming that the district court judge "is openly and intentionally engaged in securities fraud." SER 101. At the same time, Kanam and Mullins filed an Affidavit of Prejudice seeking to recuse the presiding district court judge. SER 95. Kanam and Mullins alleged that "[e]ither the Federal Government does not pay Federal Judge Sharon L. Gleason enough to keep her honest and without basis [sic] or she is mentally

disabled." SER 99. The motion for recusal was referred to and denied by the chief judge for the district. SER 22-24.

On September 25, 2013, Judge Gleason found Kanam and Mullins to be in civil contempt for refusing to discharge the tribal court actions. SER 18. The district court again ordered Kanam and Mullins to discharge the tribal court actions, and imposed a fine of $200 per day until Kanam and Mullins filed documentation of compliance. SER 19-20. The Court also awarded Koniag and O'Connell attorneys' fees. SER 20.

Kanam and Mullins did not comply with these orders either. Instead, Kanam and Mullins proceeded to file numerous frivolous pleadings. They filed a second motion to disqualify the presiding district court judge, this time claiming the district court judge is "actively and with foreknowledge supporting Securities fraud." SER 62. They filed a cross-complaint naming the United States Director of Government Accountability, the Alaska Commissioner of the Department of Commerce, and an accounting firm (KPMG)[8] that does work for Koniag, seeking to "involuntarily dissolve Koniag Inc." by virtue of another tribal action (instituted in contempt of the district court's injunction) declaring dissolution in the public interest. SER 53-56.[9] They also filed a lawsuit in the Western District of Washington (dismissed *sua sponte* as "frivolous") against the presiding district

[8] As discussed above, Kanam and Mullins also filed a separate lawsuit against KPMP in the Karluk Tribal Court. *See KPMG*, 2016 WL 3408904, at *1.

[9] To be clear, this was the second cross-complaint filed by Kanam and Mullins. They also tried to file a cross-complaint against the presiding district court judge and the Director of the U.S. Fish and Wildlife Service. SER 109.

court judge in Alaska and the director of the U.S. Fish and Wildlife Service. *See Kanam v. Gould*, No. 3:13-cv-05885-BHS (W.D. Wash. 2013). They also filed something (incomprehensible) with this Court titled "appellee's motion to conyinue [sic]; notice of continued fraud; motion for default; request for fereral appelee [sic] to the United States attorney to be prosecuted for fraud," which this Court denied. SER 14.

I. Kanam and Mullins Appeal, Again.

Following dismissal of Kanam and Mullins' first appeal as untimely, the district court asked for a status report. Kanam and Mullins responded that no further action in this case was needed because Kanam and Mullins had already taken jurisdiction over the federal case (apparently by virtue of their notice of removal) and (conveniently) dismissed the injunction against them. SER 7-8. The district court did not agree, and proceeded to resolve Koniag's pending request for an award of fees associated with the Court's prior contempt order. SER 10.

On January 5, 2016, Kanam and Mullins filed an appeal of the award of fees and costs. SER 51. Following a show cause order, the Court concluded that it lacked jurisdiction because the award of fees was not a final or appealable decision. SER 4-5.

After remand of the second appeal to the district court, Koniag then filed for entry of final judgment in the case. On July 22, 2016, the district court entered final judgment on all claims. SER 1. Kanam and Mullins then filed the present appeal on August 4, 2016.

V. SUMMARY OF ARGUMENT

Kanam and Mullins challenge the district court's summary judgment order and permanent injunction on three grounds. They assert that the district court ignored their sovereign immunity, failed to require Koniag to exhaust its remedies in tribal court, and failed to apply the doctrine of unclean hands to Koniag's request for an injunction.

The Court should reject these arguments because they were never made to the district court. In fact, Kanam and Mullins did not respond to the motion for summary judgment and preliminary injunction at all. Having failed to make these arguments with the district court, these issues are waived on appeal.

Even if not waived, the arguments have no merit. The district court properly concluded that the Karluk Tribal Court lacked jurisdiction over Koniag and O'Connell based on undisputed facts and well settled law, and issued an injunction based on an undisputed showing of irreparable harm to Koniag and O'Connell. Sovereign immunity has no application here because Koniag sued Kanam and Mullins in their individual capacities. Exhaustion has no application here because the tribal court is plainly lacking jurisdiction, and in any event, exhaustion in this case would have been futile. The doctrine of unclean hands has no application here because the sole issue in the case is the jurisdiction of the tribal court, not the merits of any dispute. Accordingly, the judgment of the district court should be affirmed.

VI. ARGUMENT

A. Standard Of Review.

The district court's decision to grant permanent injunctive relief is reviewed for an abuse of discretion or application of erroneous legal principles. *See Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1079 (9th Cir. 2004) (reviewing summary judgment). The district court's decision to grant summary judgment is otherwise reviewed de novo. *Midgett v. Tri-County Metro. Transp. Dist.*, 254 F.3d 846, 849 (9th Cir. 2001). Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

B. Kanam And Mullins Have Waived Their Arguments On Appeal.

As an initial matter, the Court need not address any of Kanam and Mullins' arguments on appeal because these issues were never raised below. This Court requires a party to raise its issues first with the district court. *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999). "The district court is not merely a way station through which parties pass by arguing one issue while holding back a host of others for appeal." *Crawford v. Lungren*, 96 F.3d 380, 389 n.6 (9th Cir. 1996). Failure to identify a disputed issue of material fact at summary judgment may constitute waiver. *See Int'l Union of Bricklayers v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985) (stating that absent exceptional circumstances "appellants may not upset an adverse summary judgment by raising an issue of fact on appeal that was not plainly disclosed as a genuine issue before the trial court"). Failure to raise a legal argument in opposition to summary judgment may

constitute waiver. *See Alexopulos by Alexopulos v. Riles*, 784 F.2d 1408, 1411 (9th Cir. 1986) (statute of limitation tolling argument waived). Legal theories abandoned at the summary judgment stage will not be considered on appeal. *See USA Petroleum Co. v. Atl. Richfield Co.*, 13 F.3d 1276, 1284 (9th Cir. 1994) (surveying waiver cases).

Here, Kanam and Mullins raise three issues on appeal: (a) Kanam and Mullins have sovereign immunity; (b) Koniag failed to exhaust tribal remedies; and (c) Koniag has "unclean hands." Op. Brief at 6-7. Kanam and Mullins never presented these arguments to the district court. Indeed, they did not respond to the motion for partial summary judgment and permanent injunction, and as a result, have no issues to now present to the Court. These "newly minted" theories were not presented to the district court, and are therefore waived on appeal. *Crawford*, 96 F.3d at 389 n.6.

Kanam and Mullins' pro se status is no excuse. The doctrine of waiver applies to pro se litigants. *See Freeman v. Arpaio*, 125 F.3d 732, 735 n.1 (9th Cir. 1997) (applying waiver to pro se litigant), *abrogated on different grounds as stated in Shakur v. Schriro*, 514 F.3d 878, 885 (2008). Kanam and Mullins are no strangers to judicial proceedings, holding themselves out as a tribal attorney and tribal judge. Kanam has been a pro se litigant in many cases.[10] Although much of

[10] In addition to those already noted and described above, Kanam filed a lawsuit as a pro se plaintiff in *Kanam v. Downs*, No. CIV 09-5559-RBL, 2009 WL 3046142, at *1 (W.D. Wash. Sept. 21, 2009), and *Kanam v. Department of Natural Resources*, No. C16-5702-RBL, 2016 WL 4611544, at *2 (W.D. Wash. Sept. 6, 2016), and was a pro se intervenor defendant in *Mills v. Wood*, No. 4:10-CV-00033-RRB, 2016 WL 6821062, at *1 (D. Alaska Nov. 17, 2016).

what they have argued in those other cases is "unintelligible and nonsensical," *Kanam v. Department of Natural Resources*, No. C16-5702-RBL, 2016 WL 4611544, at *2 (W.D. Wash. Sept. 6, 2016), or otherwise "frivolous," *Kanam v. Gould*, No. 3:13-cv-05885-BHS, they are sufficiently familiar with federal and state court proceedings and the waiver doctrine should apply with equal force.

Ultimately, Kanam and Mullins simply elected to forgo making their arguments to the district court, and instead chose a strategy (detailed above) of trying to impugn the district court judge as corrupt or "mentally disabled," and taking other dilatory and abusive actions. *See supra* page 11. Having elected to forgo participation in the district court, they should not be rewarded for these efforts by addressing the argument in this Court in the first instance. The Court in *KPMG* concluded that Kanam and Mullins waived their right to the appeal of these same three issues identified in this appeal by failing to respond to a motion for a preliminary injunction in the district court. 2016 WL 3408904, at *1. The Court should reach the same result here. Any other result would turn the district court into "a way station." *Crawford*, 96 F.3d at 389 n.6.

To be sure, the Court has recognized very limited exceptions to the waiver rule. But where, as here, a party has failed to offer any evidentiary basis for their new argument on appeal or any explanation for why they elected not to raise an issue before the district court, such exceptions have no application. *Meyer v. Portfolio Recovery Assocs.*, 707 F.3d 1036, 1044 (9th Cir. 2012) (enforcing waiver where party failed to "argue any exception to the rule that arguments not raised before the district court are waived"); *see also Raich v. Gonzales*, 500 F.3d 850,

868 (9th Cir. 2007) (deeming argument waived where party declined to "address the wavier issue in her opening brief, nor d[id] she cite any relevant exception that might apply to her argument").

Kanam and Mullins have offered no explanation why this Court should consider arguments that they have raised for the first time on appeal. This Court should find that Kanam and Mullins' arguments have been waived and affirm the judgment in this case.

C. The District Court's Permanent Injunction Was Properly Issued.

1. The District Court Identified The Correct Legal Standard And Correctly Applied That Standard To The Undisputed Facts.

Even if the appeal is deemed timely, Kanam and Mullins' appeal has no merit. The district court correctly granted summary judgment to Koniag on the scope of Karluk Tribal Court authority, and did not abuse its discretion in granting a permanent injunction to restrain improper exercise of that authority.

Starting with summary judgment, the district court identified the proper legal framework for deciding the scope of tribal court jurisdiction in *Montana v. United States*, 450 U.S. 544 (1981). SER 42-43. The Supreme Court in *Montana* established the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U.S. at 565. The Court recognized two exceptions for civil jurisdiction over "non-Indians on their reservations": (1) "[a] tribe may regulate … the activities of nonmembers who enter consensual relationships with the tribe or its members"; and (2) "[t]he tribe may regulate … the conduct of non-Indians on fee lands within its reservation in specified circumstances." *Id.* As the district court explained,

both of these *Montana* exceptions are limited to non-member activities *on the reservation*. SER 43.

The district court further correctly explained that tribal jurisdiction is even further limited in Alaska under ANCSA. SER 44. In *Venetie*, 522 U.S. at 532, the Supreme Court held that ANCSA extinguished "Indian country" in nearly all of Alaska. Accordingly, the jurisdiction of the Alaska Native tribal courts extends only to "their members and other internal affairs." SER 44 (citing David Case & David Voluck, *Alaska Natives and American Laws* 437 (2d ed. 2002)).

The district court properly applied this standard to the Native Village of Karluk. The district court explained that the Native Village of Karluk is a federally recognized tribe, but that it was undisputed that the Karluk Reservation was revoked by ANCSA. SER 45. It was similarly undisputed that Koniag and O'Connell are not members of the Native Village of Karluk. SER 46. Accordingly, the district court appropriately concluded that the tribal court cannot exercise jurisdiction over Koniag and O'Connell under *Venetie*. SER 46.

With respect to the permanent injunction, the district court also correctly identified the correct legal standard as set forth by this Court:

> "Before a court may issue a permanent injunction, a party must show (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of the hardships between the plaintiff and the defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction."

SER 27-28 (quoting *W. Watersheds Project*, 719 F.3d at 1054). Applying that standard the Court concluded that (1) Koniag and O'Connell were suffering irreparable harm based on the costs of defending against multiple tribal court actions and the risk of adverse judgment entered by the tribal court (SER 49, 46-47); (2) legal remedies were inadequate to compensate for these injuries because the harm suffered by an adverse judgment without due process would be irremediable (SER 28-29, 46-47); (3) the balance of hardships favored an injunction because the tribal court was plainly without jurisdiction, and the Native Village of Karluk could pursue its claims in state or federal court (SER 29, 47-49); and (4) the public interest was served by halting proceedings that were clearly in excess of tribal court jurisdiction (SER 29, 48).

Here too, Kanam and Mullins filed no opposition regarding Koniag's motion for a permanent injunction. Accordingly, Kanam and Mullins have no grounds for arguing that the district court abused its discretion in issuing the permanent injunction.

2. Kanam and Mullins' New Arguments Raised For The First Time On Appeal Have No Merit.

Even if the Court is willing to consider Kanam and Mullins' newly minted arguments on appeal, the issues they identify (to the extent understandable) do not present any basis on which to find that the district court erred in this case.

First, Kanam and Mullins appear to argue that the district court erred by "failing to respect the sovereign and judicial immunity of the duly constituted tribal court." Op. Brief at 6-7. But Koniag has not sued the Karluk Tribe. Rather, it has sued Kanam and Mullins in their official and individual capacities. SER

255. It is well settled that such suits are authorized against officials of Indian tribes. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978) (while "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers . . . an officer of [an Indian tribe] . . . is not protected by the tribe's immunity from suit" (citations omitted)). This argument, therefore, fails.

Second, Kanam and Mullins argue that Koniag was required to exhaust its tribal remedies before seeking relief in federal court, citing *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845 (1985). This argument ignores both the law and the facts of this case. The "rule stated in *National Farmers* was 'prudential,' not jurisdictional." *Strate v. A-1 Contractors*, 520 U.S. 438, 451 (1997). Moreover, the Court in *National Farmers* articulated three exceptions: (1) when the assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith"; (2) when the assertion of tribal jurisdiction is "patently violative of express jurisdictional prohibitions"; or (3) where "exhaustion would be futile." 471 U.S. at 856 n.21. Likewise, when "it is plain" that tribal jurisdiction is lacking, exhaustion would serve no purpose and therefore is not required. *Strate*, 520 U.S. at 459 n.14.

Koniag did attempt to exhaust its tribal remedies. Although not raised by Kanam and Mullins, the district court raised exhaustion concerns in response to Koniag's initial pleadings, and Koniag thereafter filed a special appearance with the Karluk Tribal Court, and filed a motion with the Karluk Tribal Court to dismiss the case for lack of jurisdiction. SER 37-39. The Karluk Tribal Court did not

address the motion to dismiss, and instead granted itself an unspecified length of time to address the question. SER 38. The district reviewed these actions and found that "the Karluk Tribal Court's lack of jurisdiction is clear" and that "according to the tribal court an opportunity to determine the scope of its jurisdiction over this matter 'would serve no purpose other than delay.'" SER 49 (quoting *Strate*, 520 U.S. at 459 n.14).

The district court's reasoning was entirely correct. Tribes generally have jurisdiction authority "over both their members and their territory." *Montana*, 450 U.S. at 563 (internal quotation marks and citation omitted). Tribal jurisdiction does "not extend to the activities of nonmembers of the tribe." *Id*. at 565. The only exceptions to that rule are for non-member activities that occur "on their reservations," specifically: (1) non-members who enter into consensual relationships with the tribe or its members, and (2) activities on "fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id*. at 565-66. This authority over non-members is limited to activities *on the reservation*, and has no application in Alaska where ANCSA has extinguished all reservations and "Indian country." *Venetie*, 522 U.S. at 524.

Accordingly, it is plain that the Native Village of Karluk lacks jurisdiction over Koniag and O'Connell. Koniag and O'Connell are not members of the Karluk Tribe (SER 46), and thus the tribe could only have jurisdiction if one of the two *Montana* exceptions applies. But both *Montana* exceptions apply only inside the reservation, and the Native Village of Karluk has no reservation. Thus, as the

district court explained, "there is no basis for the Karluk Tribal Court to exercise jurisdiction." SER 46.

Much of Kanam and Mullins' argument appears to be premised on their belief that the Karluk Reservation still exists. It does not. ANILCA abrogated the Karluk Reservation, and along with it, the territorial authority over non-members discussed in *Montana*. 43 U.S.C. §§ 1603, 1618(a); *Venetie*, 522 U.S. at 524. As one federal agency explained:

> Pursuant to section 17(d)(1) of the Alaska Native Claims Settlement Act of December 18, 1971, and Public Land Order 5188 signed on March 15, 1972, revoked land reserves within Alaska, including the Karluk Indian Reservation, were set aside for the use or administration of Alaska Native affairs. As a result, all the land and Alaska Native land claims within the boundary of the former Karluk Indian Reservation came under the administration of the Bureau of Land Management (BLM), Department of the Interior. . . . BLM conveyed the majority of the land within the former Karluk Indian Reservation to Alaska Native corporations and Native allottees.

79 Fed. Reg. 19,638, 19,639 (Apr. 9, 2014). Even land "owned in fee simple" by the Karluk Tribe would not qualify as "Indian country." *Venetie*, 522 U.S. at 523. The Karluk Tribal Court therefore can have no jurisdiction over Koniag and O'Connell.

Furthermore, tribal jurisdiction here makes no sense given the underlying dispute. To the extent their claims are understandable, Kanam and Mullins' tribal lawsuit appears to challenge the validity of the merger in 1980 between Koniag and the Karluk Village Corporation. However, under ANCSA these corporations

are "state-chartered and state-regulated private business corporations." *Id*. at 534. Merger is governed by the "laws of the State of Alaska." 43 U.S.C. § 1627(a). These corporations exist independent of the Native Village of Karluk, and the propriety of any state-law merger agreement between two corporations, or any purported action to "de-mergered" [sic], is not a tribal court matter.

In addition, even if there were some arguable basis for tribal jurisdiction (there is not), it is readily apparent that exhaustion would be futile. Kanam and Mullins will conclude that the Karluk Tribe has jurisdiction in this case and their reasoning will be "unintelligible and nonsensical," *Kanam v. Department of Natural Resources*, 2016 WL 4611544, at *2, or otherwise "frivolous," *Kanam v. Gould*, No. 3:13-cv-05885-BHS. Their own pattern and practice demonstrate this. Kanam and Mullins believe the Karluk Tribal Court has jurisdiction to declare that Kanam has "complete control of the Pilchuck government and its members" in Washington, which plainly has nothing to do with the Karluk Tribe or its members on Kodiak Island. *See Kanam v. All Active Parties*, No. 3:12-mc-05019 (W.D. Wash. 2012). Under these circumstances, no useful purpose would be served by allowing Kanam and Mullins to opine on the reasons why they believe that the Karluk Tribal Court has jurisdiction, and the exhaustion requirement does not apply for this reason as well. *Strate*, 520 U.S. at 459 n.14.[11]

[11] In addition to all these reasons, it is equally apparent that the tribal action against O'Connell on the grounds that he "threatened the judge of this court" by seeking a federal injunction, was either made by Kanam and Mullins in bad faith or is patently frivolous (or both). Exhaustion of that tribal case was therefore not required for this reason as well. *National Farmers*, 471 U.S. at 856 n.21 (exhaustion not required for action filed in bad faith).

Lastly, Kanam and Mullins argue for the first time on appeal that Koniag has "unclean hands" because it "stole the Karluk reservation" in the 1980 merger of Koniag and the Karluk Native Corporation, and therefore Koniag is not entitled to injunctive relief. Op. Brief at 13. However, the Karluk reservation was terminated by Congress, not by any action of Koniag. *Venetie*, 522 U.S. at 524. No action against Koniag (in any jurisdiction) can bring the Karluk reservation back.

In any event, the doctrine of unclean hands has no application to an injunction targeted at Kanam and Mullins' improper assertion of jurisdiction. As this Court has explained, "the unclean hands doctrine requires that the plaintiff have 'dirtied [his hands] in acquiring the right he now asserts, or that the manner of dirtying renders inequitable the assertion of such rights against the defendant.'" *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 725 F.3d 940, 947 (9th Cir. 2013) (quoting *Republic Molding Corp. v. B. W. Photo Utils.*, 319 F.2d 347, 349 (9th Cir. 1963)). Thus, for example, the doctrine has no application to a party asserting rights "th[at] flow automatically from customary international law and treaties," because that party "has done nothing to acquire [those] rights." *Id.*

Here too, Koniag has "done nothing" to acquire its right to be free of the jurisdiction of the Karluk Tribal Court; those rights "flow automatically" to the limited sovereignty possessed by tribes under settled law. The doctrine of unclean hands cannot create jurisdiction for the Karluk Tribal Court where none exists. This argument, therefore, fails as well.

VII. CONCLUSION

For all these reasons, Kanam and Mullins' appeal has no merit, and the decision of the district court should be affirmed.

DATED: January 11, 2017.

Respectfully submitted,

STOEL RIVES LLP

By: *s/ Jason T. Morgan*
JAMES E. TORGERSON
(AK BAR NO. 8509120)
RENEA I. SAADE
(AK BAR NO. 0911060)
JASON T. MORGAN
(AK BAR NO. 1602010)

Attorneys for Plaintiffs-Appellees

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-1.1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 16-35632

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 28-1.1.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the longer length limit authorized by court order dated [ ]
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).

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Signature of Attorney or Unrepresented Litigant: s/Jason T. Morgan

Date: January 11, 2017

("s/" plus typed name is acceptable for electronically-filed documents)

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Plaintiff-Appellees state that they are not aware of any related cases pending before this Court.

CERTIFICATE OF SERVICE AND FILING

I hereby certify that on the 11th day of January, 2017, I electronically filed the foregoing ***Response Brief by Koniag, Inc.,*** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Mr. Kurt Kanam
Tribal Attorney
Karluk Tribe
2103 Harrison Street, #143
Olympia, WA 98502

Honorable Orbie Mullins
Village of Karluk Tribal Judge
Native Village of Karluk
PO Box 237
Toledo, WA 98591

DATED: January 11, 2017.

s/ Jason T. Morgan
Jason T. Morgan

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ADDENDUM

Table of Contents

43 U.S.C.
United States Code, 2009 Edition
Title 43 - PUBLIC LANDS
CHAPTER 33 - ALASKA NATIVE CLAIMS SETTLEMENT
Sec. 1603 - Declaration of settlement
From the U.S. Government Printing Office, www.gpo.gov

§1603. Declaration of settlement

(a) Aboriginal title extinguishment through prior land and water area conveyances

All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.

(b) Aboriginal title and claim extinguishment where based on use and occupancy; submerged lands underneath inland and offshore water areas and hunting or fishing rights included

All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.

(c) Aboriginal claim extinguishment where based on right, title, use, or occupancy of land or water areas; domestic statute or treaty relating to use and occupancy; or foreign laws; pending claims

All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.

43 U.S.C.
United States Code, 2009 Edition
Title 43 - PUBLIC LANDS
CHAPTER 33 - ALASKA NATIVE CLAIMS SETTLEMENT
Sec. 1606 - Regional Corporations
From the U.S. Government Printing Office, www.gpo.gov

§1606. Regional Corporations

(a) Division of Alaska into twelve geographic regions; common heritage and common interest of region; area of region commensurate with operations of Native association; boundary disputes, arbitration

For purposes of this chapter, the State of Alaska shall be divided by the Secretary within one year after December 18, 1971, into twelve geographic regions, with each region composed as far as practicable of Natives having a common heritage and sharing common interests. In the absence of good cause shown to the contrary, such regions shall approximate the areas covered by the operations of the following existing Native associations:

(1) Arctic Slope Native Association (Barrow, Point Hope);

(2) Bering Straits Association (Seward Peninsula, Unalakleet, Saint Lawrence Island);

(3) Northwest Alaska Native Association (Kotzebue);

(4) Association of Village Council Presidents (southwest coast, all villages in the Bethel area, including all villages on the Lower Yukon River and the Lower Kuskokwim River);

(5) Tanana Chiefs' Conference (Koyukuk, Middle and Upper Yukon Rivers, Upper Kuskokwim, Tanana River);

(6) Cook Inlet Association (Kenai, Tyonek, Eklutna, Iliamna);

(7) Bristol Bay Native Association (Dillingham, Upper Alaska Peninsula);

(8) Aleut League (Aleutian Islands, Pribilof Islands and that part of the Alaska Peninsula which is in the Aleut League);

(9) Chugach Native Association (Cordova, Tatitlek, Port Graham, English Bay, Valdez, and Seward);

(10) Tlingit-Haida Central Council (southeastern Alaska, including Metlakatla);

(11) Kodiak Area Native Association (all villages on and around Kodiak Island); and

(12) Copper River Native Association (Copper Center, Glennallen, Chitina, Mentasta).

Any dispute over the boundaries of a region or regions shall be resolved by a board of arbitrators consisting of one person selected by each of the Native associations involved, and an additional one or two persons, whichever is needed to make an odd number of arbitrators, such additional person or persons to be selected by the arbitrators selected by the Native associations involved.

* * * *

43 U.S.C.
United States Code, 2009 Edition
Title 43 - PUBLIC LANDS
CHAPTER 33 - ALASKA NATIVE CLAIMS SETTLEMENT
Sec. 1607 - Village Corporations
From the U.S. Government Printing Office, www.gpo.gov

§1607. Village Corporations

(a) Organization of Corporation prerequisite to receipt of patent to lands or benefits under chapter

The Native residents of each Native village entitled to receive lands and benefits under this chapter shall organize as a business for profit or nonprofit corporation under the laws of the State before the Native village may receive patent to lands or benefits under this chapter, except as otherwise provided.

(b) Regional Corporation: approval of initial articles; review and approval of amendments to articles and annual budgets; assistance in preparation of articles and other documents

The initial articles of incorporation for each Village Corporation shall be subject to the approval of the Regional Corporation for the region in which the village is located. Amendments to the articles of incorporation and the annual budgets of the Village Corporations shall, for a period of five years, be subject to review and approval by the Regional Corporation. The Regional Corporation shall assist and advise Native villages in the preparation of articles of incorporation and other documents necessary to meet the requirements of this subsection.

(c) Applicability of section 1606

The provisions of subsections (g), (h) (other than paragraph (4)), and (*o*) of section 1606 of this title shall apply in all respects to Village Corporations, Urban Corporations, and Group Corporations.

43 U.S.C.
United States Code, 2009 Edition
Title 43 - PUBLIC LANDS
CHAPTER 33 - ALASKA NATIVE CLAIMS SETTLEMENT
Sec. 1618 - Revocation of reserved rights; excepted reserve; acquisition of title to surface and subsurface estates in reserve; election of Village Corporations; restoration of land to Elim Native Corporation
From the U.S. Government Printing Office, www.gpo.gov

§1618. Revocation of reserved rights; excepted reserve; acquisition of title to surface and subsurface estates in reserve; election of Village Corporations; restoration of land to Elim Native Corporation

(a) Revocation of reserved rights; excepted reserve

Notwithstanding any other provision of law, and except where inconsistent with the provisions of this chapter, the various reserves set aside by legislation or by Executive or Secretarial Order for Native use or for administration of Native affairs, including those created under section 497 of title 25, are hereby revoked subject to any valid existing rights of non-Natives. This section shall not apply to the Annette Island Reserve established by section 495 of title 25 and no person enrolled in the Metlakatla Indian community of the Annette Island Reserve shall be eligible for benefits under this chapter.

* * * *

43 U.S.C.
United States Code, 2009 Edition
Title 43 - PUBLIC LANDS
CHAPTER 33 - ALASKA NATIVE CLAIMS SETTLEMENT
Sec. 1627 - Merger of Native corporations
From the U.S. Government Printing Office, www.gpo.gov

§1627. Merger of Native corporations

(a) Applicability of State law

Notwithstanding any provision of this chapter, any corporation created pursuant to section 1606(d), 1607(a), 1613(h)(2), or 1613(h)(3) of this title within any of the twelve regions of Alaska, as established by section 1606(a) of this title, may, at any time, merge or consolidate, pursuant to the applicable provisions of the laws of the State of Alaska, with any other of such corporation or corporations created within or for the same region. Any corporations resulting from mergers or consolidations further may merge or consolidate with other such merged or consolidated corporations within the same region or with other of the corporations created in said region pursuant to section 1606(d), 1607(a), 1613(h)(2), or 1613(h)(3) of this title.

* * * *