

CASE NO. 17-15515

**In The
UNITED STATES COURT OF APPEALS
For the Ninth Circuit**

DUANNA KNIGHTON,

Plaintiff-Appellant

v.

**CEDARVILLE RANCHERIA OF NORTHERN PAIUTE INDIANS,
CEDARVILLE RANCHERIA TRIBAL COURT, PATRICIA R. LENZI,
in her capacity as Chief Judge of the
CEDARVILLE RANCHERIA TRIBAL COURT,**

Defendants-Appellees

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF EASTERN CALIFORNIA AT SACRAMENTO
Case No. 2:16-cv-02438-WHO
The Honorable William H. Orrick III**

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
I. JURISDICTIONAL STATEMENT	1
II. STATEMENT OF THE ISSUES	1
III. STATEMENT OF THE CASE	2
A. Factual Background.....	2
B. Procedural History.....	5
C. Summary of Argument.....	8
IV. ARGUMENT.....	10
A. Standards of Review.....	10
B. Tribal Jurisdiction Is Improper Under <i>Water Wheel</i> Because The Tribe Has Exceeded Its Authority Over Knighton.....	11
1. Two distinct frameworks exist for evaluating tribal jurisdiction over a nonmember.....	11
2. The Ninth Circuit’s treatment of location as a threshold question that must be answered before <i>Montana</i> can be applied is at odds with the Court’s prior rulings in <i>McDonald</i> and <i>Smith</i> and represents a split from the Seventh, Eighth and Tenth Circuits	15
3. The present case is distinguishable from <i>Water Wheel</i> and <i>Grand Canyon</i> because landowner status is not at the heart of this dispute.....	18

4.	Even applying the right-to-exclude framework, the Tribe exceeded its jurisdiction by subjecting a nonmember former employee to a judicial code and adjudicative forum that did not exist at the time of the events giving rise to this employment dispute.	19
C.	Tribal Jurisdiction Is Improper Under <i>Montana</i> Because The Tribe Has Exceeded Its Authority Over Knighton.	24
1.	The right-to-exclude framework is inappropriate here because the conduct giving rise to this dispute did not involve possession or use of tribal land nor occur exclusively on tribal land.	24
2.	The first <i>Montana</i> exception does not apply because the Tribe did not establish its Tribal Court or Judicial Code until after Knighton’s employment ended.	25
3.	The second <i>Montana</i> exception does not apply because the conduct by Knighton that the Tribe alleges “directly imperiled the Tribe” is vague, attenuated, and was approved by tribal leadership.	28
V.	CONCLUSION.....	31
	STATEMENT OF RELATED CASES	33
	CERTIFICATE OF COMPLIANCE.....	34
	CERTIFICATE OF FILING AND SERVICE	35

TABLE OF AUTHORITIES

<u>Cases</u>	Page(s)
<i>Atkinson Trading Co. v. Manygoats</i> No. CIV 02-1556 PCT-SMM, 2004 U.S. Dist. LEXIS 31789 (D. Ariz. Mar. 16, 2004)	26, 29
<i>Atkinson Trading Co. v. Shirley</i> 532 U.S. 645, 656 (2001)	26
<i>Attorney’s Process and Investigation Servs. v. Sac & Fox Tribe</i> 609 F.3d 927 (8th Cir. 2010)	17, 29, 30, 31
<i>Cedarville Rancheria of Northern Paiute Indians v. Duanna Knighton, et al.</i> CED-CI-2014-00002	5
<i>Cty. of Lewis v. Allen</i> 163 F.3d 509 (9th Cir. 1998)	29
<i>Dolgencorp, Inc. v. Miss. Band of Choctaw Indians</i> 746 F.3d 167 (5th Cir. 2014)	18
<i>FMC v. Shoshone-Bannock Tribes</i> 905 F.2d 1311 (9th Cir. 1990)	8, 11
<i>Grand Canyon Skywalk Dev., Ltd. Liab. Co. v. ‘SA’ Nyu Wa, Inc.</i> 715 F.3d 1196 (9th Cir. 2013)	10, 16, 18, 19, 25
<i>Lake v. Lake</i> 817 F.2d 1416 (9th Cir. 2987)	27
<i>MacArthur v. San Juan Cty</i> 497 F.3d 1057 (10th Cir. 2007)	17
<i>Manzarek v. St. Paul Fire & Marine Ins. Co.</i> 519 F.3d 1025 (9th Cir. 2008)	10, 11

<i>McDonald v. Means</i> 309 F.3d 530 (9th Cir. 2002)	9, 15, 16
<i>Montana v. United States</i> 450 U.S. 544 (1981)	<i>passim</i>
<i>Nat’l Famers Union Ins. Companies v. Crow Tribe of Indians</i> 471 U.S. 845 (1985).....	1
<i>Nevada v. Hicks</i> 533 U.S. 353 (2001).....	9, 13, 14, 15, 16, 17, 18, 20, 25
<i>Nord v. Kelly</i> 520 F.3d 848 (8th Cir. 2008)	17
<i>Plains Commerce Bank v. Long Family Land & Cattle Co.</i> 554 U.S. 316 (2008).....	1, 12, 17, 20, 26, 27, 28, 29
<i>Smith v. Salish Kootenai College</i> 434 F.3d 1127 (9th Cir. 2006)	9, 10, 15, 16, 27
<i>South Dakota v. Bourland</i> 508 U.S. 679 (1993).....	20
<i>Stifel v. Lac DU Fambeau Band of Lake Superior Chippewa Indians</i> 807 F.3d 184 (7th Cir. 2015)	17
<i>Strate v. A-1 Contractors</i> 520 U.S. 438 (1997).....	12, 13, 20, 29
<i>Water Wheel Camp Rec. Area, Inc. v. Larance</i> 642 F.3d 802 (9th Cir. 2011)	1, 2, 8, 9, 11, 13, 14, 15, 16, 17, 18, 19, 20, 24, 25
<i>Window Rock Unified Sch. Dist. v. Reeves</i> Nos. 13-16259, 13-16278, 2017 U.S. App. LEXIS 14254 (9th Cir. Aug. 3, 2017).....	12, 15, 16, 17, 24
<i>World-Wide Volkswagen Corp. v. Woodson</i> 444 U.S. 286 (1980).....	27

Statutes

28 U.S.C. § 1291	1
28 U.S.C. § 1331	1

Rules

Fed. Rules App. Proc. R. 4.....	1
Fed. Rules Civ. Proc. R. 8.....	11
Fed. Rules Civ. Proc. R. 12.....	6, 7, 8, 10, 17

Other Materials

Jacob R. Masters, <i>Off the Beaten Path?</i> <i>The Ninth Circuit's Approach to Tribal Courts' Civil Jurisdiction over</i> <i>Nonmember Defendants</i> 38 Am. Indian L. Rev. 187, 204-207 (2013)	17
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I. JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. § 1291 as this is an appeal from the final judgment of a United States District Court. The District Court had original subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because Plaintiff has brought claims arising under the Constitution, laws, or treaties of the United States. Under Section 1331, a federal court may determine whether an Indian Tribe has exceeded its adjudicative authority over a nonmember. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008); *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 852-53 (1985). The District Court's final order, granting Defendant's Motion to Dismiss, was entered on February 15, 2017. The appeal is timely under Rule 4(a)(1) of the Federal Rules of Appellate Procedure, as Plaintiff filed her notice of appeal on March 17, 2017.

II. STATEMENT OF THE ISSUES

1. Does the *Water Wheel* right-to-exclude framework or *Montana* framework apply to the question of tribal jurisdiction in the present case?
2. Did the Cedarville Rancheria of Northern Paiute Indians exceed its regulatory or adjudicative authority by filing a lawsuit against Duanna Knighton, a nonmember, in a tribal court and pursuant to tribal laws that did not exist at the time of the events giving rise to the dispute?

3. Under *Water Wheel*, does the Tribe have jurisdiction over nonmember conduct that did not occur exclusively on tribal land?
4. Can the consensual relationship exception under *Montana* be satisfied where the nonmember defendant did not consent to or reasonably anticipate the adjudicative forum or governing laws under which the Tribe brought suit against her?
5. Can the “direct effects” exception under *Montana* be satisfied where the conduct alleged to have “directly imperiled” the Tribe is vague, attenuated and was approved by tribal leadership?

III. STATEMENT OF THE CASE

A. Factual Background

The Cedarville Rancheria of Northern Paiute Indians (the Tribe) is a federally recognized Indian Tribe, with its reservation, housing, travel and community centers located on trust lands in Cedarville, Modoc County, California (ER 2¹). The Tribe’s administrative headquarters is located approximately 30 miles away in Alturas, California on land owned in fee by the Tribe. (ER 87).

Duanna Knighton (Knighton) was employed by the Tribe from approximately July 1996 to March 2013 and served as Tribal Administrator at the time her employment ended. (ER 89). She is not a member of the Tribe and has never resided

¹ The term “ER” refers to the Excerpts of Record.

nor owned property on tribal land. (ER 89). Knighton is currently employed by Resources for Indian Student Education (RISE), a California not-for-profit corporation that provides education services and programs to Indian children, where she has worked since 1995. (ER 89).

Prior to creating a Constitution and Bylaws (2011), and Tribal Court and Judicial Code (December 2013), the Tribe regulated employment matters pursuant to Articles XIII – XVIII and XX of the Cedarville Rancheria Policies (Personnel Manual). (ER 90). Those policies established disciplinary and grievance procedures for tribal employees and provided for Tribal Council control over disciplinary action involving the Tribal Administrator. (ER 90-91).

In February 2011, the Tribe enacted a Constitution and Bylaws, which provided for internal governance of members but did not expressly extend tribal jurisdiction to include nonmembers, nor provide a mechanism for asserting civil adjudicative authority over nonmember conduct. (ER 91; 146). Pursuant to the Constitution and Bylaws, the Tribe's Executive Committee (Chairperson, Vice Chairperson, and Secretary) and the Tribe's Community Council (all qualified voters of the Rancheria who are 18 years of age or older), were responsible for, amongst other things, issuing and carrying out ordinances, resolutions, or other enactments, controlling membership, establishing housing and other authorities necessary to the welfare of the Tribe; and vetoing any proposed transaction involving tribal lands or

assets. (ER 149-150). The Tribal Chairperson was responsible for overseeing all tribal matters, “including concerns, conflicts and any other issues.” (ER 153).

In December 2013, approximately nine months *after* Knighton’s employment ended, the Tribe established its Tribal Court and enacted a Judicial Code. (ER 89). The Tribal Court, which included a trial and appellate division, was created “for the purpose of protecting and promoting tribal sovereignty, strengthening tribal self-government, [and] providing for the judicial needs of the Cedarville Rancheria.” (ER 105). Tribal Court proceedings are governed by the Federal Rules of Civil Procedure and Rules of Evidence, and the Tribal Court can apply the laws of the Tribe or any other tribe, as well as state or federal law; issue orders and judgments; and award monetary damages and injunctive relief. (ER 91; 119-120). There is no right to a jury trial and all proceedings are confidential. (ER 118-119).

The Tribe alleges that its Tribal Court has jurisdiction over the immediate lawsuit pursuant to Section 201 *et. seq.* of its Judicial Code. (ER 89). Section 201 provides that the Tribal Court has subject matter jurisdiction over “[a]ll persons outside the exterior boundaries of the Cedarville Rancheria Reservation ... within the jurisdiction of the Rancheria pursuant to federal or tribal law, including all persons whose activity on or off reservation threatens the Rancheria, government or its membership,” and to “[a]ll other persons whose actions involve or affect the Rancheria, or its members, through commercial dealings, contracts, leases or other

arrangements.” (ER 106-107). The Code further provides that the Tribal Court’s judicial power extends to “[a]ll civil causes of action arising at common law including, without limitation, all contract claims (whether the contract at issue is written or oral or existing at law), all tort claims (regardless of the nature), all property claims (regardless of the nature), all insurance claims, and all claims based on commercial dealing with the Band, its agencies, sub-entities, and corporations chartered pursuant to its laws, and all nuisance claims.” (ER 107).

On February 20, 2014, former Tribal Chairperson, Cherie Lash Rhoades, shot and killed four tribal members during a Tribal Court proceeding (ER 91). The shooter and the victims were all linked to the instant dispute. (ER 91-92). As Tribal Chairperson, Ms. Rhoades approved each of the matters and things giving rise to the Tribe’s complaint. (ER 92).

B. Procedural History

On October 2, 2014, the Tribe filed its Complaint in Tribal Court against Knighton and RISE. (ER 92). The lawsuit, captioned *Cedarville Rancheria of Northern Paiute Indians v. Duanna Knighton, et al.*, CED-CI-2014-00002, was only the fifth case to be heard by the Tribal Court. (ER 92). The Tribe’s complaint asserts eight claims against Knighton: (1) fraud and deceit; (2) recovery of unauthorized and excessive pension payments; (3) recovery of unauthorized investment losses; (4) breach of fiduciary duty; (5) aiding and abetting breach of fiduciary duty; (6)

unjust enrichment; (7) common count-account stated; and (8) common count-money had and received. (ER 156). The Tribe alleges that Knighton fraudulently received higher compensation and benefits than she was entitled to, made poor investments on behalf of the Tribe, and breached her fiduciary duty when she involved herself in the sale of a building from RISE to the Tribe. (ER 92).

On October 1, 2014, the Tribal Court issued a restraining order and injunction against Knighton, RISE, and Oppenheimer Funds, Inc., a financial fund manager, freezing funds belonging to Knighton. (ER 92). The Tribal Court, without any briefing nor argument, *sua sponte* declared that it had jurisdiction over Knighton and the claims asserted therein. (ER 92-93). On October 28, 2014, Knighton filed a Rule 12(b)(2) motion challenging the Tribal Court's jurisdiction, which the Tribal Court denied on March 11, 2015. (ER 93). On February 24, 2015, RISE filed a separate Rule 12(b)(2) motion to dismiss. (ER 196).

On April 21, 2015, the parties agreed to stay the lawsuit as to Knighton due to RISE's pending Rule 12(b)(2) motion. (ER 93). The parties further stipulated that Knighton had fully exhausted the Tribal Court procedures for challenging tribal jurisdiction such that she could proceed with a jurisdictional challenge in federal court. (ER 93). On April 29, 2015, the Tribal Court stayed the case for all purposes as to Knighton until it ruled on RISE's motion to dismiss. (ER 93). The Tribal Court also found that denial of Knighton's Rule 12(b)(2) motion was not yet ripe for

federal review because Knighton had not appealed the issue to the Tribal Court of Appeals. (ER 93). On June 30, 2015, the Tribal Court granted RISE's motion to dismiss for lack of personal jurisdiction. (ER 94).

Knighton appealed the Tribal Court's ruling on her Rule 12(b)(2) motion, on July 20, 2015, on the basis that the Tribal Court lacked jurisdiction and the complaint must be dismissed because RISE was an indispensable party whose joinder was no longer feasible. (ER 94). On March 7, 2016, the Tribal Court of Appeals affirmed the Tribal Court's order denying Knighton's Rule 12(b)(2) motion but remanded the indispensable party issue to the Tribal Court to consider first. (ER 94). Knighton filed a Rule 12(b)(7) motion to dismiss for failure to include RISE as an indispensable party. (ER 94). On June 29, 2016, the Tribal Court denied the motion in its entirety, which Knighton appealed to the Tribal Court of Appeals. (ER 94). On September 26, 2016, the Tribal Court stayed the entire case and vacated the appeal pursuant to a stipulation between the parties. (ER 94). The parties further stipulated that Knighton had exhausted her Tribal Court remedies with respect to the lack of jurisdiction and an indispensable party issues. (ER 95).

On October 12, 2016, Knighton filed a complaint for declaratory and injunctive relief against the Tribe, Tribal Court, and Tribal Judge Lenzi on the basis that the Tribe lacks jurisdiction over her and that the Tribe's lawsuit against her cannot proceed due to the Tribe's failure to join RISE as an indispensable party. (ER

9). On December 16, 2016, the Tribe, et al. filed a Rule 12(b)(1) and (6) motion to dismiss alleging, amongst other things, that the Tribal Court had jurisdiction over Knighton under *Montana v. United States*, 450 U.S. 544 (1981). (ER 9). On February 15, 2017, the District Court granted The Tribe, *et al.*'s motion to dismiss based on its finding that under *Water Wheel Camp Rec. Area, Inc. v. Larance*, 642 F.3d 802 (9th Cir. 2011), the Tribe's inherent authority to exclude nonmembers from tribal land gave it both regulatory and adjudicative authority over Knighton. (ER 1). Knighton now appeals that dismissal.

C. Summary of Argument

The Court hears this Motion to Dismiss Pursuant to Rule 12(b)(1) and (6) regarding tribal court jurisdiction *de novo*, and applies the same standards as the District Court. While a tribal court's review of its own jurisdiction may be useful to the reviewing federal court, "federal courts are the final arbiters of federal law, and the question of tribal court jurisdiction is a federal question." *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314 (9th Cir. 1990). As such, federal courts have no obligation to follow a tribal court's ruling regarding jurisdiction. Because the District Court's inquiry in this matter was limited to the issue of tribal jurisdiction, the question before this Court, then, is whether the Cedarville Rancheria of Northern Paiute Indians' Tribal Court has jurisdiction over tort claims brought by the Tribe against Duanna Knighton, a nonmember former employee.

This Court has held that there are two frameworks for evaluating whether a tribe has jurisdiction over a lawsuit involving a nonmember defendant. Under *Montana v. United States*, 450 U.S. 544 (1981), a tribe has no authority over nonmember conduct on non-Indian fee land within its reservation, with two limited exceptions: (1) a tribe may regulate the activity of nonmembers who enter consensual relationships with the tribe; and (2) a tribe may regulate nonmember conduct that threatens or has a direct effect on the tribe's existence or wellbeing. Under *Water Wheel Camp Rec. Area, Inc. v. Larance*, 642 F.3d 802 (9th Cir. 2011), where nonmember activity occurs on tribal land and directly interferes with the tribe's authority to exclude nonmembers and manage its own land, that inherent sovereign authority to exclude gives the tribe regulatory authority over nonmember conduct on tribal land independent of the *Montana* exceptions.

In analyzing location as a threshold factor for determining whether the *Montana* framework applies, the Ninth Circuit has split from the Seventh, Eighth and Tenth Circuit Courts, all of whom interpret the Supreme Court's holding in *Nevada v. Hicks*, 533 U.S. 353 (2001) to mean that *Montana* should be applied to any claim brought against a nonmember in tribal court. Furthermore, such an analysis is inconsistent with this Court's prior rulings in *McDonald v. Means*, 309 F.3d 530 (9th Cir. 2002) and *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1135

(9th Cir. 2006), both of which evaluated tribal ownership of land as one factor amongst many in determining tribal jurisdiction over a nonmember.

Regardless, because this dispute does not arise from conduct that directly interferes with tribal land ownership, and involves conduct that did not exclusively occur on tribal land, location is a factor that must be examined within the *Montana* framework, as opposed to a threshold factor for determining whether the tribe has jurisdiction. Furthermore, because the Tribe has exceeded its authority over Knighton, tribal jurisdiction is improper here under either framework. An Indian Tribe cannot compel a nonmember to submit to the jurisdiction of its tribal court when no such court existed at the time the events giving rise to the dispute occurred. By seeking to adjudicate claims against Knighton under laws and in a forum neither of which exists at the time of her employment, the Tribe is exceeding its authority to regulate her employment through *ex post facto* application of its tribal judicial system and thereby denying Knighton Due Process.

IV. ARGUMENT

A. Standards of Review

This Court reviews questions of trial court jurisdiction (Rule 12(b)(1)) and dismissal for failure to state a claim (Rule 12(b)(6)) *de novo* and applies the same standards as the District Court. *Grand Canyon Skywalk Dev., Ltd. Liab. Co. v. 'SA' Nyu Wa Inc.*, 715 F.3d 1196, 1200 (9th Cir. 2013); *Manzarek v. St. Paul Fire &*

Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008). Factual allegations contained in the pleadings are accepted as true and are to be liberally construed in favor of the nonmoving party. Fed. Rules Civ. Proc. R. 8; *Manzarek*, 519 F.3d at 1031.

While a tribal court's evaluation of a tribal law question is "helpful because other courts might benefit from their expertise," federal courts are not required to follow a tribal court's determination. *FMC v. Shoshone-Bannock Tribes*, 905 F.2d at 1313-14. Particularly in regard to the question of tribal jurisdiction, "federal courts are the final arbiters of federal law, and the question of tribal court jurisdiction is a federal question." *Id.* at 1314. Duanna Knighton's arguments as submitted to the District Court in her Opposition to the Tribe's Motion to Dismiss are therefore equally relevant and applicable to this Court's review. Neither the merits of the Tribe's Complaint as filed in its Tribal Court nor Knighton's defenses thereto were before the District Court; therefore, the only issue presently pending before this Court is whether the Tribal Court has jurisdiction over claims based in tort brought by the Tribe against Knighton, a nonmember former employee.

B. Tribal Jurisdiction Is Improper Under *Water Wheel* Because The Tribe Has Exceeded Its Authority Over Knighton

1. Two distinct frameworks exist for evaluating tribal jurisdiction over a nonmember.

Under Ninth Circuit precedent, two frameworks exist for determining whether a tribe has jurisdiction over a lawsuit involving a nonmember defendant: (1) The two exceptions articulated in *Montana v. United States*, 450 U.S. 544 (1981), and (2) the right of a tribe to exclude non-tribal members from tribal land. *Window Rock Unified Sch. Dist. v. Reeves*, Nos. 13-16259, 13-16278, 2017 U.S. App. LEXIS 14254, *9 (9th Cir. Aug. 3, 2017).

In *Montana*, the Supreme Court held an Indian tribe does not generally exercise jurisdiction over a nonmember on non-Indian fee land within its reservation, except in two limited circumstances: (1) A “tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.”; and 2) The tribe may regulate nonmember conduct within its reservation that “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Mont.*, 450 U.S. at 566. The Court has further held that these exceptions are “limited ones” and “cannot be construed in a manner that would swallow the rule or severely shrink it.” *Plains Commerce Bank*, 554 U.S. at 330.

In *Strate v. A-1 Contractors*, 520 U.S. 438, 442 (1997), which involved a lawsuit in tribal court following a car accident between two nonmembers on a state highway that crossed through reservation land, the Supreme Court held that the

scope of a tribe's adjudicative jurisdiction over nonmembers does not exceed its regulatory jurisdiction. The Court reasoned that "[a]bsent congressional direction enlarging tribal-court jurisdiction," and the two *Montana* exceptions, "the civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally 'does not extend to the activities of nonmembers of the tribe'." *Strate*, 520 U.S. at 453, quoting *Montana*, 450 U.S. at 565. In so holding, the Court reaffirmed the general rule established in *Montana* that a tribe lacks jurisdiction over a nonmember.

In *Nevada v. Hicks*, 533 U.S. 353 (2001), the Supreme Court held that where a state has a competing interest in executing a warrant for an off-reservation crime, the tribe's power to exclude is not alone sufficient to assert regulatory jurisdiction over state officers and therefore *Montana* applies. The Court found that "the general rule of *Montana* applies to both Indian and non-Indian land" and while sometimes dispositive, "ownership status of land...is only one factor to consider" in determining whether a tribe has the authority to regulate the conduct of a nonmember. *Id.* at 360.

The Ninth Circuit has repeatedly held that application of *Montana* to a dispute with a nonmember on tribal land within a reservation is limited to situations where the specific concerns at issue in *Hicks* exist: "where a state has a competing interest in executing a warrant for an off-reservation crime." *Water Wheel Camp Rec. Area*,

Inc. v. Larance, 642 F.3d 802, 813 (9th Cir. 2011). In *Water Wheel*, the Colorado River Indian Tribes filed a lawsuit against Water Wheel Camp Recreational Area in tribal court for eviction, unpaid rent, damages and attorney's fees, following Water Wheel's failure to make payments as required under a lease agreement and refusal to vacate. Both the tribal court and tribal court of appeal found that the tribal court had jurisdiction, with the tribal court of appeal holding that the tribe derived jurisdiction under both *Montana* exceptions as well as its inherent sovereign authority. *Water Wheel* challenged the tribe's jurisdiction in federal court and the district court found that the tribe had jurisdiction under the consensual relationship exception to *Montana*, but not under the tribe's inherent authority to exclude nonmembers from tribal land.

Upon review, the Ninth Circuit held that the tribe had regulatory jurisdiction over Water Wheel independent of *Montana*. In reaching that decision, this Court reasoned that where the actions of a nonmember occur on tribal land, directly interfere with the tribe's ability to exclude and manage its land, and there are no competing state interests at play, the inherent sovereign authority of a tribe to exclude nonmembers from tribal land gave the tribe an independent source of regulatory authority and therefore tribal court jurisdiction over nonmember defendants. The Court found that *Hicks* expressly limited its holding to tribal court jurisdiction over state officers enforcing state law, leaving open the question of tribal

court jurisdiction over nonmember defendants generally. Because the Court did not find those circumstances present in *Water Wheel*, it held that analyzing the scope of tribal jurisdiction under *Montana* was inappropriate. Rather, because the tribe's claims against *Water Wheel* arose from nonmember activity on tribal land and directly interfered with the tribe's inherent authority to exclude and manage its own land, the tribe's landowner status, and the sovereign powers inherent thereto, was sufficient to support regulatory jurisdiction without considering *Montana*.

2. The Ninth Circuit's treatment of location as a threshold question that must be answered before *Montana* can be applied is at odds with the Court's prior rulings in *McDonald* and *Smith* and represents a split from the Seventh, Eighth and Tenth Circuit Courts.

The Ninth Circuit's holding in *Water Wheel* represents a narrow reading of *Hicks*, limiting its application to cases involving "competing state interests," which the Court further limited in its recent decision in *Window Rock Unified Sch. Dist. v. Reeves*, Nos. 13-16259, 13-16278, 2017 U.S. App. LEXIS 14254 (9th Cir. Aug. 3, 2017). Interpreting *Hicks* to mean that tribal jurisdiction over nonmembers must be analyzed under the right-to-exclude framework instead of *Montana* departs from the Court's prior analyses in *McDonald v. Means*, 309 F.3d 530 (9th Cir. 2002) and *Smith v. Salish Kootenai College*, 434 F.3d 1127 (9th Cir. 2006), and signifies a split

from the other circuit courts who have evaluated tribal jurisdiction over nonmembers.

In both *McDonald* and *Smith*, this Court applied the *Montana* framework to questions of tribal jurisdiction over nonmember conduct. In *McDonald*, the Court analyzed a tribal court's jurisdiction over a tort claim brought by a member against a nonmember under the *Montana* framework. 309 F.3d 530. In finding that the tribe retained jurisdiction over the lawsuit, the Court found the ownership status of the land where the events giving rise to the dispute occurred to be dispositive. *Id.* at 537-540. In *Smith*, this Court again held that tribal ownership of the land at issue is only one factor to consider in evaluating tribal jurisdiction over a nonmember. 434 F.3d at 1135.

The Court's recent decisions in *Water Wheel*, *Grand Canyon*, and *Window Rock* signify a break from its application of the *Montana* framework to questions of tribal jurisdiction. As noted by the dissent in *Window Rock*, this Court is the only federal circuit court that has narrowly interpreted *Hicks* "to mean that the *Montana* framework need not be applied to questions of tribal jurisdiction over nonmembers in the absence of competing state interests," an interpretation which the *Window Rock* dissent argues is further narrowed in that case. *Window Rock Unified Sch. Dist. v. Reeves* Nos. 13-16259, 13-16278, 2017 U.S. App. LEXIS 14254, *50 (9th Cir.

Aug. 3, 2017). No case law, from any circuit, supports such a narrow application of *Hicks*. *Id.*

The Eighth and Tenth Circuits have broadly interpreted *Hicks*, repeatedly holding that *Montana* analysis applies to the question of tribal court jurisdiction over a nonmember defendant irrespective of whether the claim arose on tribal land. In *MacArthur v. San Juan Cty.*, 497 F.3d 1057 (10th Cir. 2007), the Tenth Circuit found that *Hicks* “put to rest” the notion that whether *Montana* applies depends on whether the conduct at issue occurred on tribal land. Similarly, post-*Hicks*, the Eighth Circuit has moved toward analyzing tribal jurisdiction based on the membership status of the litigants, with location becoming one of several factors in determining whether *Montana*’s “harm to tribe” exception applies. *See Nord v. Kelly*, 520 F.3d 848 (8th Cir. 2008); *Attorney’s Process and Investigation Servs. v. Sac & Fox Tribe*, 609 F.3d 927 (8th Cir. 2010). *See also* Jacob R. Masters, *Off the Beaten Path? The Ninth Circuit’s Approach to Tribal Courts’ Civil Jurisdiction over Nonmember Defendants*, 38 Am. Indian L. Rev. 187, 204-207 (2013).

In *Stifel v. Lac DU Fambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184 (7th Cir. 2015), the Seventh Circuit rejected the Ninth Circuit’s approach of limiting *Montana* to cases involving non-Indian land and disagreed that land ownership should be considered a threshold or determinative factor. The court held that the Supreme Court’s holding in *Plains Commerce Bank* “leaves no doubt that

Montana applies regardless of whether the actions take place on fee or non-fee land.”
Id. at 207.

In *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014), the Fifth Circuit similarly did not address location as a threshold issue, despite the fact that the events giving rise to the dispute occurred on tribal land. Instead, the court followed the reasoning of the Eighth and Tenth in holding that “[a] tribe’s regulation of nonmember conduct through tort law is analyzed under the *Montana* framework.” *Id.* at 172-73.

The Ninth Circuit’s treatment of location as a threshold question that must be answered before *Montana* can be applied represents a split from at least three other federal appellate courts. The Seventh, Eighth, and Tenth Circuits all interpret *Hicks* to mean that the *Montana* rule should be applied to any claim brought against a non-Indian in tribal court. Under this broader interpretation of *Hicks*, location is a sub factor under the *Montana* exceptions, rather than a threshold question to determine whether the *Montana* framework even applies.

3. The present case is distinguishable from *Water Wheel* and *Grand Canyon* because landowner status is not at the heart of this dispute.

Critical to this Court’s analysis of tribal jurisdiction in both *Water Wheel* and *Grand Canyon* was the fact that the ownership status of the land was directly relevant to those disputes. *Water Wheel* was essentially a landlord tenant dispute involving

an eviction action brought by the tribe against a nonmember business. 642 F.3d at 804. Similarly, *Grand Canyon* involved an eminent domain action brought by the tribe against a third-party developer who sought to build a tourist attraction and related facilities on remote tribal land. 715 F.3d at 1199. Notably, those disputes resulted from nonmember business “activities that interfered directly with a tribe’s inherent powers to exclude and manage its own lands.” *Grand Canyon*, 861 F.3d at *48, quoting *Water Wheel*, 642 F.3d at 814, quotations omitted (M. Christen, dissenting).

In contrast, the present case does not arise from activities that directly interfere with ownership of tribal land, nor does it involve a non-Indian business choosing to physically establish business interests in Indian country. Instead, this lawsuit arises from an employment dispute between a tribe and a former nonmember employee and involves tort and breach of contract claims with no reference to occupancy or use of tribal land.

4. Even applying the right-to-exclude framework, the Tribe exceeded its jurisdiction by subjecting a nonmember former employer to a judicial code and adjudicative forum that did not exist at the time of the events giving rise to this employment dispute.

As discussed above, Ninth Circuit precedent holds that from a tribe’s inherent sovereign powers flow lesser powers, including the power to regulate non-Indians

on tribal land. *Water Wheel*, 642 F.3d at 808, citing *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993). “A tribe’s power to exclude nonmembers from its land necessarily includes the incidental power to regulate because the tribe should be able to set conditions on nonmembers’ entry.” *Water Wheel*, 642 F.3d at 811–12. In all three Supreme Court cases addressing tribal adjudicative jurisdiction over nonmembers (*Strate*, *Hicks* and *Plains Commerce Bank*), the Court has held that a tribe’s adjudicative jurisdiction may not exceed its regulatory jurisdiction. *Id.* at 814. The Court found in each of those cases that the tribes lacked regulatory, and therefore adjudicative, authority. *Id.* While “civil jurisdiction over disputes arising out of [the] activities [of nonmembers] presumptively lies in the tribal courts,” *Strate*, 520 U.S. at 453, “adjudicative jurisdiction is confined by the bounds of a tribe’s regulatory jurisdiction.” *Water Wheel*, 642 F.3d at 814.

Knighton does not dispute that the Tribe had certain **limited** regulatory authority over her employment, as was stated in the Tribe’s Personnel Manual at the time of her employment. (ER 129; 142-144). The Personnel Manual established the disciplinary and grievance procedures for tribal employees and gave employees facing disciplinary action the right to file a grievance with the Tribal Administrator and to appeal certain disciplinary actions after exhausting available administrative remedies. (ER 142-144). If the Tribal Administrator was the subject of disciplinary action, the Tribal Council would oversee the proceedings. (ER 142).

The Tribe's Complaint alleges that Knighton fraudulently received higher compensation and benefits than she was entitled to; made poor investments on behalf of the Tribe, resulting in a financial loss for the Tribe; and breached her fiduciary duty in regard to the sale and purchase of the Tribal Administration building. Each of the actions for which the Tribe complains were carried out by Knighton in the scope and course of her employment as Tribal Administrator and were approved by Tribal leadership. If the Tribe took issue with Knighton's pay or related benefits or her business decisions as Tribal Administrator, then the appropriate way to address those disputes was through the procedures established in the Personnel Manual, such as through disciplinary action and/or termination. Instead, it was not until October 2014, after establishing a Constitution and Bylaws (2011) and Tribal Court and Judicial Code (December 2013), that the Tribe sought to pursue legal action against Knighton, more than a year and a half after her resignation.

By establishing a Judicial Code and Tribal Court *nine months after Knighton's employment ended*, the Tribe is seeking to exercise significantly greater adjudicative authority over Knighton than it was capable of at the time of her employment and the events giving rise to this dispute. The Tribe's adjudicative authority over Knighton was previously limited to its authority to regulate her employment: through the disciplinary procedures established in the Tribe's Personnel Manual, which, in the case of a Tribal Administrator, involved proceedings before the Tribal

Council. In contrast, the Tribal Court can issue orders and judgments, award monetary damages and injunctive relief, can apply the laws of the Tribe or any other tribe and exercises judicial power over “[a]ll civil causes of action arising at common law,” including, all contract claims, tort claims, property claims, insurance claims, nuisance claims, and all claims based on commercial dealing with the Tribe. (ER 107, 118-120).

Furthermore, the Tribe’s Judicial Code greatly expands the scope and territory of its jurisdiction to include “[a]ll persons outside the exterior boundaries of the Cedarville Rancheria Reservation ... within the jurisdiction of the Rancheria pursuant to federal or tribal law, including all persons whose activity on or off reservation threatens the Rancheria, government or its membership,” to “[a]ll other persons whose actions involve or affect the Rancheria, or its members, through commercial dealings, contracts, leases or other arrangements,” and to “existing and future lands outside the boundaries owned or controlled by the Rancheria for its benefit, the benefit of its members and the benefit of other Indian persons.” (ER 106-107).

While the Supreme Court has repeatedly held that where a tribe lacks regulatory authority it similarly lacks adjudicative authority, the Court has not yet considered the question of adjudicative authority where regulatory jurisdiction exists. By suing Knighton in a tribal adjudicative forum (Tribal Court) and under a

governing code of law (Judicial Code) that did not exist at the time of Knighton's employment, and that greatly expands the breadth of its judicial powers and the scope of its jurisdiction, the Tribe is now seeking to internally adjudicate claims against Knighton that it could not have pursued prior to the creation of its Tribal Court and Judicial Code.

The District Court's finding that the Tribe is entitled to adjudicate its claims against Knighton either before its Tribal Court or Tribal Council ignores the fact that the Tribal Council's adjudicative authority over Knighton cannot exceed the Tribe's regulatory jurisdiction over her at the time of her employment. As established in its Personnel Manual, any violation of tribal regulations by Knighton would have to be adjudicated through the administrative procedures governing her employment. While those procedures could involve proceedings before the Tribal Council, the Tribal Council's judicial powers are limited to those disciplinary actions enumerated in the Personnel Manual: "reprimand, suspension, demotion, and dismissal." (ER 134). As such, the District Court's finding that the Tribe's adjudicative authority extends to its Tribal Court and the Judicial Code, improperly expands the scope of the Tribe's adjudicative authority over Knighton well beyond the regulatory authority that existed at the time of her employment and well beyond what Knighton could have reasonably foreseen or consented to.

C. Tribal Jurisdiction Is Improper Under *Montana* Because The Tribe Has Exceeded Its Authority Over Knighton

1. The right-to-exclude framework is inappropriate here because the conduct giving rise to this dispute did not involve possession or use of tribal land nor occur exclusively on tribal land nor did possession or use of tribal land.

This Court has repeatedly acknowledged that where nonmember conduct occurs off the reservation, it must be analyzed under *Montana*. *Window Rock*, Nos. 13-16259, 13-16278, 2017 U.S. App. LEXIS 14254 at *11. Here, the District Court held that under *Water Wheel*, the Tribe lacks authority to regulate non-Indian conduct outside the reservation. (ER 12, fn. 18). The Court further held that the Tribe did not have authority to regulate a nonmember at the tribal headquarters because it was located outside the reservation. (ER 12, fn. 18). While the District Court found that the Tribe failed to allege where the conduct giving rise to the dispute occurred, both the Tribal Court and Tribal Court of Appeals found that at least some of Knighton's duties and actions giving rise to this dispute were carried out at the tribal headquarters building and not on tribal trust land. (ER 12, fn. 18; 182). The Tribal Court concluded that because Congress had not ratified the Tribe's Constitution at the time the dispute occurred, the tribal administrative building was not tribal land at that time and therefore the Tribe did not have jurisdiction. (ER 202).

Even under the Ninth Circuit’s interpretation of *Hicks* as applying *Montana* only to non-Indian land, because the Tribe has failed to allege where the conduct at issue occurred, and in light of the Tribal Court and District Court’s findings that the Tribal Administrative Office did not constitute tribal land, it cannot be assumed that the conduct giving rise to this dispute occurred exclusively on tribal land. Unlike *Water Wheel* and *Grand Canyon*, where this Court applied the right-to-exclude framework to the question of tribal jurisdiction over a nonmember, the immediate action does not involve use of tribal land for a nonmember business venture or any other activity that directly interferes with tribal land ownership. Because there has been no allegation by the Tribe that the conduct at issue occurred exclusively on tribal land, and this action is not the result of a dispute regarding possession or use of tribal land, analysis under the *Montana* framework is appropriate.

2. The first *Montana* exception does not apply because the Tribe did not establish its tribal court or judicial code until after Knighton’s employment ended.

Under the first *Montana* exception, it is presumed that a tribe cannot regulate the activities of a nonmember unless there is a consensual relationship. “A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” *Mont. v. United*

States, 450 U.S. at 565. Because nonmembers “have no say in the law and regulations that govern tribal territory,” those laws may be fairly imposed “*only if* the nonmember has consented, either expressly or by his actions.” *Plains Commerce Bank*, 554 U.S. at 337 (emphasis added). It is the scope of the consensual relationship, then, that defines the extent of the tribe’s regulation. “A nonmember’s consensual relationship in one area thus does not trigger tribal civil authority in another—it is not in for a penny, in for a Pound.” *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001) (citation omitted). Regulation that exceeds such consent runs the risk of “subjecting nonmembers to tribal regulatory authority without commensurate consent” and thereby threatens the nonmember’s right to due process. *Plains Commerce Bank*, 554 U.S. at 337.

In the employment context, “consent” to tribal jurisdiction requires much more than consent to be employed by a tribe. *Atkinson Trading Co. v. Manygoats*, No. CIV 02-1556-PCT-SMM, 2004 U.S. Dist. LEXIS 31789, *24-25 (D. Ariz. Mar. 16, 2004). It requires evidence of the employee’s “consent to jurisdiction, either expressed, or implied by the parties’ behavior . . . Jurisdiction may not be assumed.” Courts “may not simply use the plain meaning definition of the word consensual,” but instead must “determine whether the relationship was consensual as contemplated by the Supreme Court when it created the *Montana* exceptions.” *Id.*

This Court has likened the “consensual relationship” analysis under the first *Montana* exception to an analysis of due process in the context of personal jurisdiction. *See Smith*, 434 F.3d at 1138. Jurisdiction is only found if traditional notions of fair play and substantial justice are met. *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987). The Supreme Court has “emphasized the need for predictability to the legal system so that a defendant can reasonably anticipate being haled into court.” *Id.*, quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (internal quotation marks omitted). Similarly, the Court echoed that same need for “predictability to the legal system” in the context of tribal jurisdiction in *Plains Commerce Bank*, 554 U.S. at 337, where it held that a nonmember can only meaningfully consent to the “jurisdictional consequences” of a consensual relationship that are *reasonably foreseeable*.

Because Knighton did not “meaningfully consent” to the adjudicatory authority that the Tribe now seeks to exercise over her, requiring her to submit to the Tribal Court’s jurisdiction violates her Due Process rights. The Tribe’s judicial system, including its increased remedial measures and broadened geographic reach, did not exist during her employment. Without notice of the current regulations as codified in the Tribe’s Judicial Code, Knighton was not provided with an opportunity to agree to or bargain for such as a term of employment. Furthermore, she could not “reasonably anticipate being haled into [a tribal] court” that did not

exist until after her employment ended. Instead, any dispute between the Tribe and Knighton which the Tribe seeks to adjudicate internally is subject to the disciplinary and grievance procedures enumerated in its Personnel Manual. Alternatively, the Tribe may pursue its tort claims in State or Federal Court. Permitting the Tribe to pursue claims against Knighton that far exceed its limited judicial authority over her would impermissibly allow the Tribe to impose new regulations on Knighton *ex post facto* and confer jurisdiction to a court which did not previously exist.

3. The second *Montana* exception does not apply because the conduct by Knighton that the Tribe alleges “directly imperiled the Tribe” is vague, attenuated, and was approved by tribal leadership.

Under the second *Montana* exception, a tribe retains no civil authority over the conduct of nonmembers unless “that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Plains Commerce Bank*, 554 U.S. at 320, citing *Montana*, 450 U.S. at 566. Despite its broad phrasing, the second *Montana* exception has been narrowly construed by the courts.

Read in isolation, the *Montana* rule's second exception can be misperceived. Key to its proper application, however, is the Court's preface: Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. . . . But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations.

Strate, 520 U.S. at 459, citing *Montana*, 450 U.S. at 564 (internal quotation marks omitted). Jurisdictional analysis requires an examination of the specific conduct a tribe's legal claims seek to regulate. “Each claim must be analyzed individually in terms of the *Montana* principles to determine whether the tribal court has subject matter jurisdiction over it.” *Attorney's Process & Investigation Servs. v. Sac & Fox Tribe*, 609 F.3d at 930.

For the second exception to apply, the conduct alleged “must do more than injure the tribe, it must imperil the subsistence of the tribal community.” *Plains Commerce Bank*, 554 U.S. at 341 (internal quotation marks omitted). In *Cty. of Lewis v. Allen*, 163 F. 3d 509, 515 (9th Cir. 1998), the court held that finding tribal jurisdiction based only on a tribe’s generalized concern for the safety of its members would run the risk of the exception swallowing the rule: “virtually every act that occurs on the reservation could be argued to have some political, economic, health or welfare ramification to the tribe.” Similarly, in *Plains Commerce Bank*, 554 U.S. at 320, the sale of Indian-owned fee land to a third party was found insufficient to establish tribal jurisdiction because it did not produce “catastrophic consequences” for the tribe.

At least one court has found that employment disputes do not fall under the second *Montana* exception. In *Atkinson Trading Co. v. Manygoats*, No. CIV 02-1556-PCT-SMM, 2004 U.S. Dist. LEXIS 31789,*31 (D. Ariz. Mar. 16, 2004), the

court held that “while employment matters concerning tribal members are certainly related to the economic security and welfare of the tribe, they do not have a substantial impact on the tribe as a whole.”

In its Motion to Dismiss, the Tribe argues that *Attorney's Process* holds that under *Montana*’s second exception, a tribe is “directly imperiled” where conversion of tribal funds directly arises from a nonmember defendant’s conduct. (ER 66). The Tribe mischaracterizes the court’s holding. In *Attorney’s Process*, the Eighth Circuit found that tribal court jurisdiction under *Montana*’s second exception applied to trespass and other related tort claims following a raid on tribal property by a nonmember business. The Court concluded that a physical attack and seizure of property on tribal land “threatened the political integrity, the economic security, and the health and welfare" of the Tribe.” 609 F.3d at 940 (internal quotations omitted). However, because the tribe’s claim for conversion of tribal funds *did not arise directly* from the raid but rather from a prior business contract, and the tribe failed to allege that the business’s receipt or retention of those funds occurred on tribal land, the court declined to find tribal court jurisdiction over the conversion claim under *Montana*’s second exception and remanded the conversion claim to the district court to determine whether the first *Montana* exception applied. *Id.* at 940-41.

In alleging that Knighton engaged in financial mismanagement, fraud and deceit, the Tribe has ignored the key fact that Knighton served as Tribal

Administrator *at the behest of* the Tribe's Executive Board, who oversaw and had ultimate decision-making authority over all decisions involving the Tribe's finances. If the Tribe truly believed the tribal building purchased from RISE was a fraudulent transaction, it should have moved for rescission of the contract, as rescission would have placed the Tribe back into its original position and it would have sustained no alleged loss. Instead, the Tribe placed the property in trust. Like the conversion claim in *Attorney's Process*, the Tribe's allegations of fraud and conversion of tribal funds arise from contractual agreements, not conduct that would produce "catastrophic consequences" or "imperil the subsistence of the tribal community." Because Knighton's actions and the harm claimed are too attenuated and nonspecific to find that her conduct "directly imperiled" the economic well-being of the Tribe, and did not occur exclusively on tribal land, the Tribe cannot meet its burden to establish jurisdiction under the second *Montana* exception.

V. CONCLUSION

For the reasons stated above, Plaintiff Duanna Knighton respectfully requests that this Court reverse the District Court's Order granting Defendants Cedarville Rancheria of Northern Paiute Indians, et al.'s Motion to Dismiss.

Dated: September 20, 2017

Respectfully submitted,

MAIRE & DEEDON

/s/ Patrick L. Deedon
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STATEMENT OF RELATED CASES

Appellee, DUANNA KNIGHTON, is unaware of any related cases pending in this Court.

Dated: September 20, 2017

MAIRE & DEEDON

/s/ Patrick L. Deedon
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

This brief contains 7,300 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: September 20, 2017

MAIRE & DEEDON

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 20th day of September 2017, I caused this Opening Brief of Appellant to be filed electronically with the Clerk of the Court using the EM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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