IN THE

Supreme Court Of The United States

BREAKTHROUGH MANAGEMENT GROUP, INC.,

Petitioner,

v.

CHUKCHANSI GOLD CASINO AND RESORT, *ET AL.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Marc F. Pappalardo*

Pappalardo Law Group LLC
1919 14th Street, Suite 510
Boulder, CO 80302
(303) 250-1507
Marc@PappalardoLawGroup.com
*Counsel of Record

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QUESTIONS PRESENTED

1. In the absence of any congressional legislation, whether a business enterprise that performs a non-government function is entitled to tribal immunity for actions that occur outside of a reservation when a corporate charter provides that the business is a "separate entity" from the tribe and that the tribe shall not be liable for any judgment entered against the business?

2. In determining whether a business enterprise is subject to tribal immunity, whether a dispositive factor should be if the tribe will be liable for a judgment entered against the enterprise when the justification for the creation of the immunity doctrine was to protect the governmental person that is a sovereign from the inconvenience from suit.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 14.1(b), the following lists all of the parties appearing here and before the United States Court of Appeals for the Tenth Circuit:

The petitioner here and appellee/cross-appellant below is Breakthrough Management Group, Inc.

The respondents here and the appellant/cross-appellee below are Chukchansi Gold Casino and Resort, the Chukchansi Economic Development Authority and Ryan Stanley.

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 29.6, the Petitioners state as follows:

Breakthrough Management Group, Inc. is not a publicly traded company and has no parent company.

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JURISDICTION

The Court of Appeals entered its judgment on December 27, 2010. The Court of Appeals denied a rehearing en banc on February 8, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 8, Clause 3 of the United States Constitution:
   The Congress shall have Power...To regulate Commerce ... with Indian Tribes....

2. Article I, Section 1, of the United States

Constitution:
All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

3. The Copyright Act, 17 U.S.C. § 101, *et. seq.* and the Lanham Act, 15 U.S.C. § 1051, *et. seq.*

STATEMENT OF THE CASE

This is one of the most important tribal immunity cases ever to reach this Court. A business entity with strictly a non-governmental, commercial purpose engaged in repeated acts of copyright and trademark infringement off the reservation in an effort to avoid paying over $1,000,000 in license fees. Although formed by the Picayune Rancheria of the Chukchansi Indians (the "Tribe"), the business' corporate charter provides that it is a "separate entity" from the Tribe, that the tribe will never be liable for the business' liabilities, and that "for all purposes" the assets and revenues of the business shall not be considered those of any "Tribal Party" (which means the Tribe and its subdivisions and agencies). The Tribe also removed language in the corporate charter so that entity that owned the business in question was no longer "a body corporate and politic and instrumentality of the" Tribe, which the chairman of the Tribe testified was done because the entity was a "business." The Tenth Circuit improperly expanded the concept of immunity to

allow this separate business entity to enjoy immunity.

By refusing to hold this separately-chartered, business entity accountable for its undeniable acts of copyright and trademark infringement that occurred off the reservation, the Tenth Circuit radically and unjustifiably expanded *Kiowa* to a new set of progeny never before contemplated by this Court or Congress. *Kiowa* merely held that "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." *Kiowa Tribe of Okla. v. Manufacturing Tech., Inc.*, 523 U.S. 751, 760 (1998). *Kiowa* is silent on the issue of whether and under what circumstances a separate business enterprise, with its own corporate personhood, is entitled to assert a tribe's immunity from suit.

Congress is also silent on the issue and has never stated any intention of extending tribal immunity to business enterprises that are separate from a tribe. The Indian Commerce Clause delineates that Congress has the exclusive power "to regulate Commerce . . . with Indian Tribes," which includes granting immunity to tribe-owned business enterprises. This power is righfully vested in Congress, and Congress alone should decide if and under what circumstances a commercial enterprise owned by a tribe may enjoy immunity.

Judicial lawmaking on this issue has perilous

consequences. The Tenth Circuit's expansion of tribal immunity to business entities, for example, effectively created two standards for businesses: (1) tribe-owned business enterprises need not comply with the laws of this Nation and (2) all other entities engaged in commercial activities must adhere to those laws, including business entities owned by foreign sovereigns. This dichotomy creates a hidden minefield for the unsuspecting. Tribal "immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." 523 U.S. at 758. Because the Tenth Circuit's decision failed to create a clear test for immunity, one cannot accurately predict whether or not an entity possesses immunity.

If tribal immunity is judicially expanded to tribe-owned business enterprises absent Congressional legislation, this Court should adopt a test that, at a minimum, precludes any business enterprise from enjoying immunity if the tribe will not be liable for a judgment against the enterprise. Sovereigns have been granted immunity to save them from the "inconvenience" of lawsuits. *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004). It does not thwart the purpose of protecting a tribal sovereign from suit if immunity is denied to a commercial enterprise with the fundamental hallmark of corporate personhood (*i.e.* a liability shield for its owner). Therefore, separate corporate persons that engage in business should not enjoy tribal immunity.

Tribal immunity should only be extended to those situations where the tribe is the real party in interest by virtue of being directly liable or bound by a judgment entered against an enterprise.

The Alaska Supreme Court in *Runyon* adopted such an approach through a two-pronged analysis. *Runyon v. Association of Village Council Presidents*, 84 P.3d 437, 440 (Alaska 2004). If a tribe will not be liable or bound by a judgment entered against an enterprise, immunity is *per se* inapplicable. If, however, a judgment might reach the tribe's assets, a *Runyon* analysis then considers factors concerning the amount of control the tribe exerts on the entity and whether the enterprise is engaged in commercial or governmental work. *Id.* at 441 (footnote omitted).

The Tenth Circuit rejected the *Runyon* approach in favor of a subjective five-factor analysis that incorrectly focuses on goal of fostering the economic development and self-sufficiency of a tribe—as opposed to avoiding the inconvenience to a sovereign to a suit. As a result, the Tenth Circuit's approach has the proclivity to grant immunity to practically any tribe-owned business. The subjectivity inherent in the Tenth Circuit's multi-factored test also creates uncertainty around the existence of immunity and, consequently, will produce a detrimental impact on commerce. It is imperative that this Court resolve this uncertainty by preventing the improper expansion of tribal immunity.

Review is also warranted in this case because

there are direct conflicts between the Courts of Appeals and the highest courts of many States. The Eighth, Ninth, and Tenth Circuits and the highest courts in Alaska, Arizona, Colorado, New Mexico, and New York have *each* adopted a different test for determining whether and when business enterprises should enjoy tribal immunity. Indeed, the Tenth Circuit recognized that the analysis employed by the various courts is "rarely uniform." *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1181 n. 10 (10th Cir. 2010). This Court needs to resolve the significant uncertainty concerning immunity of tribe-owned enterprises engaged in commerce.

STATEMENT OF FACTS

Trademark and Copyright Infringement

The Chukchansi Gold Resort and Casino ("Resort") and Chukchansi Economic Development Authority ("Authority") violated copyright and trademark laws. The Resort illegally downloaded from servers located in Colorado (off the reservation) Breakthrough Management Group, Inc.'s ("BMG") internet based, online educational ("eLearning") application. The eLearning application plays on a computer like a movie. After the works were illegally downloaded, the Resort made the following pirated version of BMG's eLearning "movie": (i) the audio portion consisted of a Director of the Resort reading a verbatim version of the script BMG's

instructor read in BMG's work and (ii) the visual portion consisted of the exact images that were displayed in the background of BMG's work, with the exception that BMG's trademark and copyright notices were replaced with the Resort's trademark. (Aplee. Supp. App. 1-10.) Although it purchased only two single-person license for BMG's eLearning applications, the Resort used the pirated works to train approximately 2/3 of its 1300 employees. (*Id.* at 5.)

Charter Change to a "Business"

In an ordinance dated July 13, 2002, Section 4(b) of the Authority's charter was amended to replace the language that: "[t]he Chukchansi Economic Development Authority is and shall be considered a body corporate and politic and instrumentality of the Picayune Rancheria of Chukchansi Indians (the 'Tribe')" with language stating it was an "unincorporated enterprise of the Tribe...." (Aplt. App. 135.) The Chairman of the Tribe and head of the Authority testified that this change was intended by the Tribe to mean that the Authority was a "business." (Aplee. Supp. App. 140.) The sole purpose of that "business" is to own and operate the Resort. (Aplt. App. 129, § 5.) Two weeks after the "unincorporated enterprise" change was made to the charter, that section was changed again to state in two sections that it was a "separate entity," as well as to state that the Tribe did not own the Resort's assets and to immunize the Tribe from any liability

of the Authority. (*Id.* 138-39.)

The Authority as a "Separate Entity"

The Chairman of the Tribe testified that the Tribe does not own the assets or the revenues from the Resort—the Authority does. (Aplee. Aplt. App. 133-34.) As part of the July 30, 2002 amendment to Section 4(b) of the Authority's Charter, language was added to state "[f]or all other purposes [other than federal and state income tax emption listed in the prior sentence] of the [Resort], its ownership and operation, the Authority shall be considered a separate entity, with the rights and powers herein granted." (Aplt. App. 139.) Section 4(b) was also changed on July 30th to state that "for all purposes" the Resort's assets shall not be considered those of the Tribe and to grant the Authority the right of "use and access over land controlled or owned by or on behalf of a Tribal Party [which includes the Tribe]" for the purpose of operating the Resort. (*Id.*) This grant of right to use property would be unnecessary if the Authority were part of the Tribe. The distinctiveness between the Authority and the Tribe is further supported by the Section 4(b) amendment stating that monies transferred from the Authority to the Tribe would "upon such transfer no longer constitute Authority assets." (*Id.*) Additionally, the Authority and Resort owned two liability insurance policies which insulated Tribal assets from judgment. (Aplee. Supp. App. 58-73, 75, 80.)

The July 30th amendment to the Authority's charter also states was a separate entity by providing that "the Authority shall constitute a separate entity, and no other Tribal Party [defined to include the Tribe] shall be obligated thereon...." (Aplt. App. 139.) It was also amended to provide that "[n]o liability or obligation of the Tribe... shall be a liability or obligation of the Authority" and that "no Authority Assets shall be considered owned by the Tribe, and no assets, liabilities...of the Tribe... shall be considered those of the Authority." (*Id.*) Finally, over a year after the filing of this suit, the Tribe enacted a Revenue Allocation Ordinance mandating an annual $1,000,000 payment from the Authority to the Tribe. (Aplt. App. 148-156.) Such a mandate would be unnecessary if the Authority was the same person as the Tribe.

The Resort

The Authority has conceded that it, not the Tribe, owns the assets of and revenue from the Resort. (Aplee. Supp. App. 133-34.) But the Chairman of the Tribe and the Authority was unsure if the Authority owns the Resort as a separate entity or as part of the Authority. (*Id.* at 143-44.) The Resort, however, entered into a contract in the name of "Chukchansi Gold Casino" (*Id.* at 30) and paid BMG with checks drawn on the name of "Chukchansi Gold Resort and Casino" (*Id.* at 43). Underscoring a lack of tribal control, twelve of fifteen Directors of the Resort were not members of the Tribe, and no members of the

Tribal Council were Directors of the Resort. (Aplt. App. 39-40.) The Resort's Chief Financial Officer, Controller, two Vice Presidents, General Manager and Assistant General Manager were also not members of the Tribe. (*Id.*)

Off Reservation Activity

The infringement occurred in Colorado when the Respondents illegally accessed and downloaded the copyrighted works from servers located there. The remainder of the infringing acts occurred on fee-simple land (*i.e.* not "Indian Lands") in California. The United States government entered into a written agreement with the County of Madera wherein the federal government agreed that it would not take the land where the Resort is located into trust until a property tax dispute with the County was resolved. (Aplee. Supp. App. 86 ("Tribe holds title to the land in fee simple"), 55.) The property tax dispute arose between because the County demanded property taxes since the Resort property was not located on a reservation. (*Id.*) Approximately one year after BMG's lawsuit was filed, tax dispute was settled and the Resort property was taken into trust by the Federal government. (*Id.*)

Proceedings Below

BMG sued the Respondents for among other things copyright and trademark infringement. In

response to a motion to dismiss, BMG asserted that the Respondents had no immunity and, if they did have immunity, any immunity was waived by virtue of entering into a license agreement where the Resort and/or the Authority consented to the jurisdiction of Colorado's courts in accordance with *C & L Enterp., Inc. v. Citizen Band Potowatomi of Okla.*, 532 U.S. 411 (2001). The trial court held that, unlike the arbitration clause at issue in *C & L*, an agreement to litigate disputes in Colorado in a contract does not constitute a waiver of immunity. The trial court held an evidentiary hearing to determine whether the Resort and the Authority were entitled to immunity under the *Johnson v. Harrah's Kansas Casino Corp.*, No. 04-4142-JAR, 2006 WL 463138 (D. Kan. Feb. 23, 2006), which in turn adopted the test of Alaska's Supreme Court in *Runyon*. Following the evidentiary hearing, the trial court determined that a judgment against the entities would not produce financial liability for the Tribe or otherwise imperil the Tribe's assets. Consequently, the Resort and Authority were not entitled to tribal immunity and defendant's motion to dismiss was denied.

On appeal from the denial of the motion to dismiss, the Tenth Circuit reversed the District Court's order and created its own test. In doing so, the Tenth Circuit reinforced a direct conflict between the Tenth Circuit and other courts.

ARGUMENT

I. THIS CASE RAISES THE CRITICALLY IMPORTANT QUESTION OF WHETHER AND UNDER WHAT CIRCUMSTANCES BUSINESS ENTERPRISES, INCLUDING SEPARATE CHARTERED CORPORATE PERSONS, SHOULD BE ENTITLED TRIBAL IMMUNITY FOR COMMERCIAL ACTIVITIES THAT OCCUR OUTSIDE OF THE RESERVATION.

It is imperative that the Court establish whether separately chartered tribe-owned business enterprises are entitled to immunity when they conduct business outside of a reservation. The Tenth Circuit has effectively granted tribe-owned business entities a license to violate all laws without risk of civil liability, including the ability to infringe on U.S. intellectual property rights. In doing so, the court expanded immunity to a new class of persons, despite the fact that grants of immunity are solely within the purview of Congress. U.S. CONST. art. I, § 8, cl. 3. Tribal immunity was "developed almost by accident" by the Court and without "a reasoned statement of doctrine." *Kiowa*, 523 U.S. at 756-57. Since the doctrine was first recognized, this Court has at times questioned the wisdom of perpetuating that immunity. *Kiowa*, 523 U.S. at 758 ("[t]here are reasons to doubt the wisdom of perpetuating the doctrine"); *Puyallup Tribe, Inc. v. Department of Game of Wash.*, 433 U.S. 165, 175-76 (1977) (Blackmun, J. dissenting) (stating he "entertain[ed]

doubts, however, about the continuing vitality in this day of the doctrine of tribal immunity" and expressed how he was "of the view that that doctrine may well merit re-examination in an appropriate case"). Against this backdrop of doubt, the Tenth Circuit expanded the doctrine by applying it to separately-chartered, business entities. There is simply no justification for conferring immunity on tribe-owned business entities when business entities owned by the federal government or a foreign sovereign only have immunity if express Congressional legislation indicates as such. *Keifer & Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381, 388-89 (1939).

If this Court, however, believes that expanding immunity is appropriate, it is critically important that this Court reject the test utilized by Tenth Circuit. The Tenth Circuit's test grants immunity to separate corporate persons—like for-profit corporations formed under State or tribal law—and has the penchant to grant immunity to every tribe-owned business enterprise. There is no rational justification for expanding immunity to separate business entities, especially those with a corporate charter shielding their owners from liability. Furthermore, awarding every tribe-owned business enterprise immunity is dangerous to society.

A. Conferring Immunity To Tribe-Owned Enterprises In The Absence Of Congressional Legislation Will Have Perilous Consequences To Society.

Federal-recognized tribes, as governmental persons, enjoy tribal immunity absent congressional action or a waiver of immunity. This Court held that "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they [the contracts] were made on or off a reservation." *Kiowa*, 523 U.S. at 759. *Kiowa* is silent, however, on whether business enterprises directly or indirectly owned by a tribe, including separate corporate persons, may enjoy immunity when they conduct business outside of the reservation. In *Kiowa*, suit was brought against the Tribe itself—not a separate business enterprise. Business entities that are separate from a Tribe and that are performing a non-governmental function outside of the reservation should not be accorded any immunity from suit.

A business entity/corporation is considered an artificial person, distinct from its owners/shareholders. *Cook Cnty., Ill. v. United States*, 538 U.S. 123, 126 (2003). Absent express legislation from Congress, any artificial person created by a tribe should not be afforded immunity

from suit for its commercial activities.[1] In fact, this Court has previously recognized that a federally-chartered business enterprise does not automatically possess the immunity that the federal government enjoys.[2] *Keifer & Keifer*, 306 U.S. at 388-89.

Here, the Tribe unambiguously stated its intent to separate itself from the Authority by identifying the Authority as a "separate entity" in two sections of its charter. (Aplt. App. 139, "Amendment to Section 4" and "Addition to Section 15" of the charter.) The corporate charter states that "for all purposes" the Resort's assets shall not be considered those of the Tribe (Aplt. App. 139, "Amendment to Section 4") and that none of the Authority's liabilities shall be a liability of the Tribe (Aplt. App. 139, "Addition to Section 15".) According to the Chairman of the Tribe, the Tribe does own the Resort and the Resort's owner, the Authority, is

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[1] The Tenth Circuit's decision creates an anomalous situation. Entities owned by the federal government and foreign sovereigns do not automatically have immunity in the absence of express Congressional legislation, but tribal commercial entities do.

[2] While Congress may endow a federally-chartered corporation with immunity, a tribe has no such power in this jurisdiction. A sovereign has no power to cloak itself, let alone its business entities, with immunity outside of its own jurisdiction. *Nevada v. Hall*, 440 U.S. 410, 416-17 (1979). Tribal immunity "is a matter of federal law" – not tribal law. *Kiowa*, 523 U.S. at 756 (citations omitted).

"business."The charter even grants the Authority the right of "use and access over land controlled or owned by or on behalf of a Tribal Party [which includes the Tribe]" for the purpose of operating the Resort; a grant that would be unnecessary if the Authority were part of the Tribe. (Aplt. App. 139, "Amendment to Section 4".) Finally, the fact that the Tribe enacted an ordinance requiring the Authority to pay the Tribe the $1,000,000 "Minimum Guaranteed Monthly Payment" also establishes that the Authority is a separate person from the Tribe. No ordinance requiring payment by the Authority to the Tribe would be necessary if the Authority were part of the Tribe

By expanding the tribal immunity doctrine to this separate entity, the Tenth Circuit opened Pandora's Box. With over 300 federally recognized tribes sending tribal corporations into this Nation to conduct business, the potential impact is astounding. *See* David LaSpaluto, Comment, *A 'Striking Anomalous,' 'Anachronistic Fiction': Off-Reservation Sovereign Immunity for Indian Tribal Commercial Enterprises*, 36 SAN DIEGO L. REV. 743, 755-56 (1999). Fictionalized and apocalyptic predictions are unnecessary because case law evidences the great dangers that face our society when tribal immunity is extended to tribe-owned business enterprises. *See e.g., State v. Cash Advance & Preferred Cash Loans*, 242 P.3d 1099 (Colo. 2010); *Dixon v. Picopa Constr. Co.*, 772 P.2d 1104 (Ariz. 1989); *McNally CPS's & Consultants, SC v. DJ Hosts, Inc.*, 692 N.W.2d 247

(Wis. Ct. App. 2004). In *McNally*, a Wisconsin corporation chose not to pay its accountants, asserting tribal immunity because its sole shareholder was a tribe. In *Cash Advance*, two tribe-owned corporations incorporated under Nevada law provided "payday" loans exclusively outside of the reservation. These Nevada corporations invoked immunity when Colorado Attorney General's office investigated them for ignoring usury and predatory lending laws. *Cash Advance*, 242 P.3d at 1099; *State v. Cash Advance and Preferred Cash Loans*, 205 P.3d 389, 395 (Colo. Ct. App. 2008) (indicating the state of formation); *Ameriloan v. Superior Ct.*, 86 Cal. Rptr.3d 572 (Cal. Ct. App. 2009) (reflecting similar activities in California by an different tribe-owned entity owned). In *Dixon*, a tribe-owned construction company operating outside of the reservation asserted immunity when one of its trucks caused an accident off the reservation. *Dixon*, 772 P.2d at 1106. Petitioner's case further illustrates the far-reaching implications of clothing tribe-owned enterprises with immunity; where the tribe-owned businesses engaged in blatant copyright and trademark infringement off the reservation.

The dangers of immunity amplify as many tribes, like the Tribe in this case, make hundreds of millions of dollars a year in business activities and diversify their business holdings. Mathew Fletcher, Keynote Address, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759, 782 (2004) (noting

that tribe-owned business enterprises have expanded their commercial activities into "energy, banks, hotels, ski-resorts, meat processing plants, and cement factories"). What if last year's disaster in the Gulf of Mexico were caused on one the oil drilling platforms that tribes own? The Tenth Circuit's expansion of tribal immunity is as perilous as expanding immunity to business enterprises owned by foreign sovereigns. Chief Justice John Marshall remarked how "dangerous to society" immunity would be if it were granted to foreign sovereigns who "spread themselves through another as business or caprice may direct. . . ." *Schooner Exch. v. M'Faddon*, 11 U.S. 116, 144 (1812). As Chief Justice Marshall wrote for the Court, "[a] prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual. . . ." *Id.* at 145. Like the prince, tribe-owned business enterprise that engages in interstate commerce should be considered as having "assum[ed] the character of a private individual" without any immunity. *Id.*

Furthermore, no policy goals support providing immunity from suit in this case. Respondents may argue the benefits of immunity in promoting economic development by the tribes and self-sufficiency despite the fact that immunity was granted for a different purpose: avoiding the

inconvenience of suit. Nonetheless, Respondents cannot articulate how compelling a separate business entity operating outside of a reservation to comply with U.S. copyright and trademark laws will harm the Tribe by impacting its economic development or cause it to be less self-sufficient. This Court previously rejected an analogous effort to define the nature of a tribal enterprise based on using the enterprise's revenues to meet a policy goal. *See Mescalero Indian Tribe v. Jones*, 411 U.S. 145, 150-53 (1973). Specifically, the Court in *Mescalero* held:

> We also reject the broad claim that the Indian Reorganization Act of 1934 rendered the Tribe's off-reservation ski resort a federal instrumentality constitutionally immune from state taxes of all sorts. ***
>
> The Indian Reorganization Act of 1934 neither requires nor counsels us to recognize this tribal business venture as a federal instrumentality. Congress itself felt it necessary to address the immunity question and to provide tax immunity to the extent it deemed desirable. There is, therefore, no statutory invitation to consider projects undertaken pursuant to the Act as federal instrumentalities generally and automatically immune from state taxation. As was true in the case before us, a tribe taking advantage of the Act might generate

> substantial revenues for the education and the social and economic welfare of its people. So viewed, an enterprise such as the ski resort in this case serves a federal function with respect to the Government's role in Indian affairs. But the "mere fact that property is used, among others, by the United States as an instrument for effecting its purpose does not relieve it from state taxation."

411 U.S. at 150-53 (internal citations omitted). While *Mescalero* is a tax case, it is important to note that this Court previously held that "[i]mmunity of corporate government agencies from suit and process, and their incidents, is less readily implied than immunity from taxation." *Federal Land Bank of St. Louis v. Priddy*, 295 U.S. 229, 235 (1935).

There is simply no justification for the Tenth Circuit's radical expansion of tribal immunity to separate commercial enterprises. While traditional governmental functions are protectable, the operation of a hotel, spa, many restaurants and even gaming are not traditional government purposes. The Tenth Circuit's decision would allow business entities, like Respondents in this case, to expand into the business of manufacturing and selling counterfeit patented drugs, copyrighted movies, and sneakers with a trademarked logo without having to risk facing a civil suit. Therefore, review of this case is not only appropriate, but necessary.

B. If It Is Appropriate To Grant Immunity To Certain Business Enterprises Without Congressional Action, Then The Proper Test Must Refrain From Granting Immunity To Business Entities That Are Separate Persons For Liability Purposes Because The Policy Goal That Might Justify The Expansion Of Immunity Is Not Present.

Any expansion of tribal sovereign immunity must be confined to only meet the goals that justified the initial creation of the doctrine. The purpose behind granting immunity to foreign sovereigns is the same as the purpose behind extending immunity to tribes because they both originate from the status as sovereigns or quasi sovereigns. *Kiowa*, 523 U.S. at 757 (noting "[a]s sovereigns or quasi sovereigns, the Indian Nations enjoy[] immunity"). The purpose behind sovereign immunity is to provide "some present protection from the inconvenience of suit ...." *Altmann*, 541 U.S. at 696 (citation and internal quotation omitted). Traced back to its origins, the purpose of tribal immunity and its counterpart, foreign sovereign immunity, was *not* to promote the economic development of the tribes/sovereigns or their commercial enterprises. *See Turner v. United States*, 248 U.S. 354 (1919); *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940). The Tenth Circuit erroneously transposed the purposes of various federal laws that may be aimed at increasing the economic development of tribes with the purpose that immunity was initially created

for sovereigns (protection from the inconvenience of suit).

Given that the only purpose behind granting sovereign immunity to tribes is to protect the tribes "from the inconvenience of suit," any test to determine the applicability of tribal immunity to an enterprise must be limited to only meet that purpose. *Altmann*, 541 U.S. at 696. Alaska's Supreme Court in *Runyon* adopted a test that focuses on this purpose to protect sovereigns from the inconvenience of suit by initially focusing on whether "the real parties in interest to [the] lawsuit" are tribes. *Runyon*, 84 P.3d at 441. In *Runyon*, the court held that "if a judgment against it [the enterprise] will not reach the tribe's assets or if it lacks the power to bind or obligate the funds of the [tribe], it is unlikely the tribe is the real party in interest." *Id.* at 440 (internal quotation and footnote omitted). Thus, if the tribe is not liable for a judgment or legally bound by a judgment, the enterprise is not subject to immunity because the tribe is not the real party in interest. If a judgment might reach the tribe's assets, a *Runyon* analysis would then look at "other factors, relating to how much control the tribe exerts or whether the entity's work is commercial or governmental...." *Id.* (footnote omitted).

In contrast, the Tenth Circuit fashioned a test to determine the applicability of immunity that erroneously focuses on furthering the purpose of

promoting the economic development and self-sufficiency of tribes.[3] As a result, the Tenth Circuit's test has the propensity to grant immunity on practically any and every tribe-owned business. The Tenth Circuit's test focused on: "(1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe's intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entities." *Breakthrough Mgmt. Grp., Inc.*, 629 F.3d at 1187 (footnote omitted).

The Tenth Circuit's multi-factored test will also prevent uniformity in application, as is illustrated by the fact that all five factors could and should have been construed against a finding of immunity. For example, the first factor, the method of creation, weighs against a finding of immunity. The Resort

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[3] The Tenth Circuit justified its admitted "broad interpretation of tribal sovereign immunity" to include tribal business enterprises by describing how immunity "can trace its origins to Congress' desire to promote the goal of Indian self-government, including the overriding goal of encouraging tribal self-sufficiency and economic development." *Breakthrough Mgmt.*, 629 F.3d at 1187; *but see Mescalero*, 411 U.S. at 150-53 (refusing to equate the nature of an enterprise with the policy goals that are met by the enterprise's revenues). The Tenth Circuit extensively analyzed the relationship between tribal sovereignty and economic development. 629 F.3d at 1183-85.

produced no charter or ordinance indicating that the Resort was intended to have immunity.[4] With respect to the Authority, the Tribe passed an Ordinance that provides "for all purposes" none of the Resort's assets or revenues shall be considered to be owned by the Tribe. The corporate charter of the Resort's owner, the Authority, was even amended to prevent the Authority from being "considered a body corporate and politic and instrumentality of the Picayune Rancheria of the Chukchansi Indians." The mere fact that the Resort's owner (the Authority), and possibly the Resort itself, was created as a "separate entity" apart from the Tribe with a corporate liability insulation for its owner against supports a finding of no immunity.

The second factor, the Resort's purpose, also justifies not extending immunity to the Resort. The Chairman of the Tribe testified that it was a "business." Running a 492-room resort, with a spa, shopping and gaming is not a governmental purpose. The Authority's purpose is limited to managing the Resort, and thus, it also has a non-governmental purpose. The third factor, the structure, management, and ownership of the Resort, also does

[4] Again, neither the Tribe, the Authority or the Resort have answered the question of whether the Resort was a separate entity at the time of the acts of infringement. 629 F.3d at 1193 n. 15.

not justify the grant of immunity. The Resort conceded that the Resort's General Manager, Assistant General Manager, all of its Vice Presidents, its CFO, Controller, and twelve of its fifteen Directors were *not* members of the Tribe. More importantly, none of these people were Tribal Council members.

The fourth factor, whether the Tribe intended the Resort or the Authority to have immunity, should never be used in any analysis. This factor is at odds with the fact that only Congress can confer immunity on an entity—regardless of the Tribe's actual or stated intent. Further, a grant of tribal immunity should not hinge on inclusion of a self-serving statement in a charter reflecting an intention of immune. The existence of insurance indicates there was an express intent for the Resort to be immune because insurance is unnecessary if the Resort had immunity. *Dixon*, 772 P.2d at 256 (stating that the purchase of general liability insurance covering the entity's negligence insulates the Tribe's assets from entity's debts).

The fifth factor concerning the financial relationship between the Tribe and the Resort also does not support a grant of immunity. The Tribe's Ordinance provides that "for all purposes" none of the Resort's assets and revenues are those of the Tribe or any agency or division of the Tribe or Tribal Party.

In short, this case raises critically important

questions that warrant review.

II. THE DECISION BELOW CREATES A DIRECT CONFLICT WITH THE CONSTITUTION BECAUSE ONLY CONGRESS CAN GRANT IMMUNITY TO SEPARATELY CHARTERED BUSINESS ENTITIES.

The Tenth Circuit's decision to expand tribal immunity to business enterprises creates a direct conflict with the mandates of the Indian Commerce Clause and the separation of powers contained in the U.S. Constitution. The Court has consistently described Congress' powers to legislate matters concerning Indian tribes as "plenary and exclusive." *United States v. Lara*, 541 U.S. 193, 200 (2004); *see also Negonsot v. Samuels*, 507 U.S. 99, 103 (1993); *Washington v. Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463, 470-71 (1979). The Indian Commerce Clause is traditionally identified as one source of Congress' exclusive powers to legislate tribes. *Lara*, 541 U.S. at 200. This Court has said that the "central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989).

Only Congress has the power to grant tribal immunity to separate business entities created by a

tribe.[5] U.S. CONST., art. 1, § 8, cl. 3; *c.f. Keifer & Keifer*, 306 U.S. at 388-89 (holding that a federally chartered corporation is not immune absent an explicit expression of intent by Congress). Congress has never expressly granted immunity to business enterprises owned by tribe, let alone corporate persons. As a result, these enterprises have no immunity unless and until an act is passed by Congress granting immunity to these enterprises. Indeed, Congress expressly contemplated in the IGRA that management companies, like the Authority, might manage gaming facilities. 25 U.S.C. § 2711. If Congress intended these management companies to be immune, whether it be all management companies or just those owned by tribes, then the IGRA would have expressly granted immunity to these enterprises. *Northwest Airlines*, 451 U.S. at 97 ("the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt"). No Congressional legislation grants tribal immunity to

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[5] Although "the Court has taken the lead in drawing the bounds of tribal immunity," Congress has begun to address the subject. *Kiowa*, 523 U.S. at 759. This Court has recognized that "once Congress address a subject previously governed by federal common law, the justification for lawmaking by the federal courts is greatly diminished." *Northwest Airlines, Inc. v. Transportation Workers Union of Am., AFL-CIO*, 451 U.S. 77, 95 n. 34 (1981).

any artificial corporate person created under tribal law. *Zuber v. Allen*, 396 U.S. 168, 185 (1969) (noting that "[l]egislative silence is a poor beacon to follow in discerning the proper statutory route").

Although the Tribe itself possesses immunity, the Tribe had no ability to convey any immunity to business entities it may create under its law because only Congress has such power.[6] A sovereign has no power to bestow sovereign immunity on itself outside of its own jurisdiction. *Nevada*, 440 U.S. at 416-17 (1979); *Kiowa*, 523 U.S. at 760-61 (Steven, J. dissenting) ("[t]he Sovereign's claim to immunity in the court's of a second sovereign, however, normally depends on the second sovereign's law"). In sum, the decision below creates a conflict with the U.S. Constitution because only Congress, not the Tenth Circuit, has the power to grant immunity to business entities.

[6] Given that only Congress can confer immunity to tribe-owned business enterprises and to artificial persons created by tribes, it is irrelevant whether the tribe included self-serving language in the enterprise's charter that indicates an intention for that separate person to be immune.

III. FEDERAL AND STATE COURTS CONFLICT ON THE TEST FOR DETERMINING THE APPLICABILITY OF TRIBAL IMMUNITY FOR SEPARATELY CHARTERED BUSINESS ENTITIES.

Without Congressional direction, courts have crafted various and divergent tests to determine whether business enterprises are subject to tribal immunity.[7] As the Tenth Circuit aptly noted, "[a]lthough the subordinate economic analysis has been widely adopted, its implementation is rarely uniform." *Breakthrough Mgmt.*, 629 F.3d at 1181, n. 10 (*quoting Somerlott v. Cherokee Nation Distribs. Inc.*, No. CIV-08-429-D, 2010 WL 1541574, at *3 (W.D. Okla. Apr. 16, 2010)) (citations omitted); *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 293 (Minn. 1996) (stating that "the demarcation between those business entities so closely related to tribal government interest as to benefit from the tribe's

[7] Many of these decisions do not indicate and/or are not concerned with whether the enterprise in question is an artificial person or has a charter that otherwise makes it separate from the tribe. *See e.g.*, *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 358 (2d Cir. 2000) (copyright infringement case against a museum that was a Connecticut corporation: "[i]t may be that the district court will conclude, upon further analysis, that the museum is an agency of the Tribe and, as such, is entitled to benefit from the Tribe's immunity").

sovereign immunity and those so far removed as to be treated as mere commercial enterprises is not as clear"). Four different types of tests have emerged from the Courts of Appeals and the highest State courts: (i) a multi-factored approach without emphasis on any factors, (ii) a per se rule for recognizing immunity (iii) a multi-factor approach with heighted weighting for certain factors, and (iv) a two-stage approach that first considers as a dispositive factor whether the tribe will be liable for the judgment and then, depending on the results of the first stage, employs a multi-factored approach. Even within those jurisdictions that adopt a multi-factored approach, there is little agreement as to what factors should be considered, and even less analysis as to why certain factors should or should not be included in a test. When analysis of the factors is provided, courts disagree about the legality of certain factors.

With a growing number of tribe-owned businesses active in commerce today, individuals must be able to assess an enterprise's immunity without judicial determination. However, the undeniable conflict among this Nation's courts and the subjective nature of the tests employed by courts has created uncertainty in commerce concerning an entity's immunity. This creates the potential for inconsistent results in different jurisdictions involving the same business enterprise. Consequently, it is imperative that this Court review and resolve this important issue.

A. The Eighth, Ninth And The Tenth Circuits And The Supreme Courts Of Arizona, Colorado, Minnesota Have Adopted Differing Multi-Factored Approaches That Do Not Emphasize Any Factor.

The Eighth, Ninth and the Tenth Circuits and the Supreme Courts of Arizona, Colorado, and Minnesota have adopted various multi-factored approaches that do not emphasize any particular factor. *Compare Hagen v. Sisseton-Wahpeton Cmty. College*, 205 F.3d 1040, 1043 (8th Cir. 2000), *with Cook v. AVI Casino Enter., Inc.*, 548 F.3d 718, 725-26 (9th Cir. 2008), *with Breakthrough Mgmt.*, 629 F.3d at 1181 (10th Cir. 2010), *with Gavle*, 555 N.W.2d at 293 (Minn. 1996), *with Dixon v. Picopa Const Co.*, 772 P.2d 1104, 1109-11 (Ariz. 1989), *with Cash Advance*, 242 P.3d at 1110 (Colo. 2010). Specifically, the Eighth Circuit considered whether an enterprise was "chartered, funded and controlled by the tribe," holding that the enterprise was entitled to immunity. *Hagen*, 205 F.3d at 1043. In contrast, the Ninth Circuit considered three different factors to evaluate "whether the entity acts as an arm of the tribe[.]" *Cook*, 548 F.3d at 725-26. The Ninth Circuit looked at whether "the tribe authorized the casino through a tribal ordinance interstate gaming contract, [whether] the economic advantages created by the casino inure[d] to the benefit of the Tribe, and [whether] [i]mmunity of the casino directly protect[ed] the sovereign Tribe's treasury." *Id.* (internal quotations omitted).

Minnesota's Supreme Court focused on an entirely different set of factors, including: (1) whether the entity has a governmental or commercial purpose, (2) whether the tribe and the business entity are closely linked in governing structure and other characteristics, and (3) whether federal policies intended to promote Indian tribal autonomy are furthered by the extension of immunity to the business entity. *Gavle*, 555 N.W.2d at 294.

Arizona's Supreme Court considered six factors when deciding an enterprise's immunity: (i) whether "the tribal government . . . manage[s] the corporation," (2) "the [presence]of general liability insurance," (3) "the ordinance's express declaration that the Community formed Picopa [the enterprise] solely for business purposes," (4) whether the enterprise "was . . . formed to aid the Community in carrying out tribal government functions," (5) whether the enterprise satisfied a de jure or de facto corporation test, and (6) the policies behind the immunity doctrine. *Dixon*, 772 P.2d at 1109-11. Surprisingly, some of these factors were not considered by the Eighth or Ninth Circuits, or Minnesota's Supreme Court.

In 2010, Colorado's Supreme Court recognized the fractured state of the immunity analysis and the potential for "variance among the numerous state and federal courts[.]" *Cash Advance*, 242 P.3d 1109-11. After its analysis, Colorado's Supreme Court adopted its own test: "(1) whether the tribes created the entities pursuant to tribal law; (2) whether the

tribes own and operate the entities; and (3) whether the entities' immunity protects the tribes' sovereignty." *Id.* at 1111.

The Tenth Circuit in this case also chose to craft its own unique test, which conflicts with the tests utilized by the Eighth and Ninth Circuits and the Supreme Courts of Arizona, Colorado, and Minnesota. The Tenth Circuit stated that "[a]t this time there is no need to define the *precise* boundaries of the appropriate test to determine if a tribe's economic entity qualifies as a subordinate economic entity to share in a tribe's immunity." *Breakthrough Mgmt.*, 629 F.3d at 1187 (emphasis in original). The court then held that five factors should be considered in this case, including a factor (the fourth factor) that the other Circuits did not consider: "(1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control a tribe has over the entities; (4) the tribe's intent with respect to sharing sovereign immunity, (5) the financial relationship between the tribe and the entities." 629 F.3d at 1181 (footnote omitted). Some of these factors are at odds with other courts and the Constitution.

Colorado's Supreme Court believes that considering the entity's purpose (Tenth Circuit's second factor) "contradict[s] Supreme Court precedent...." *Cash Advance*, 242 P.3d at 1111. And the fourth factor, the tribe's intent regarding enterprise immunity, contradicts the plenary power of Congress under the Indian Commerce Clause of

the Constitution. Because the Constitution recognizes Congress's express intent—not a tribe's intent—this factor is irrelevant.

B. Washington And New Mexico Have Created A *Per Se* Extension Of Tribal Immunity To Any Business Enterprise Owned By A Tribe.

The Washington and New Mexico Supreme Courts rejected the multi-factored approach in favor of a per se rule that all tribe-owned business enterprises are immune. Washington's Supreme Court set a bright-line rule that "[t]ribal law corporations are assumed to be a subdivision of the tribal government[.]" *Wright v. Colville Tribal Enter. Corp.*, 147 P.3d 1275, 1279 (Wash. 2006). Noting that "[u]ncertainty is the enemy of contract," the court rejected an 11-factor test because a multi-factored approach "makes it impossible for non-Indians contemplating a business transaction with a tribal corporation. . . to know whether tribal sovereign immunity protects a particular tribal corporation without a judicial determination." *Id.* at 1279, n. 3. In preferring a bright-line rule, the court avoided the subjectivity and uncertainty of a multi-factor test.

Similarly, New Mexico, without analysis or explanation, implied that all business enterprises owned by the tribe have tribal immunity. *Padilla v. Pueblo of Acoma*, 754 P.2d 845, 849 (N.M. 1988). Because the entity in *Padilla* was an unincorporated association registered to do business in New Mexico,

the court found that, "[s]imply put, it is a subordinate economic organization of the tribe." *Id.* While there is no question that tribes themselves are entitled to immunity from suit, awarding all separately chartered entities that same immunity extends the scope of tribal immunity far beyond what this Court and Congress intended.

C. New York's Highest Court Utilizes A Multi-Factored Approach That Provides Greater Weight To Certain Factors.

New York's highest court used a third type of approach: a multi-factored approach with greater weight placed on certain factors. *Ransom v. St. Regis Mohawk Edu. & Comm. Fund Inc.*, 658 N.E. 2d 989, 993 (N.Y. 1995). The *Ransom* court recognized that the "vulnerability of the tribe's coffers in defending a suit against the [entity] indicates that the real party in interest is the tribe." *Id.* Closely aligning with Alaska's decision in *Runyon*, courts in New York may consider a variety of factors, but they place great emphasis on "whether the corporate entity generates its own revenue, whether a suit against the corporation will impact the tribe's fiscal resources, and whether the 'sub-entity has the power to bind or obligate the funds of the [tribe].'" *Id.* at 992 (citation omitted).

D. Alaska's Supreme Court Utilizes A Two-Part Approach That Uses As A Dispositive Factor Whether The Tribe Will Be Liable For The Judgment.

The trial court in this case adopted the approach that Alaska's Supreme Court favored in *Runyon*. *Runyon* properly recognized the central focus for the test needs to be whether the tribe is the real party in interest. *Runyon*, 84 P3d at 440-41. Accordingly, *Runyon* used a two part analysis in which an enterprise will not have immunity "if a judgment against it will not reach the tribe's assets or if [the judgment] lacks the power to bind or obligate the funds of the" tribe. *Id.* (citation and internal quotations omitted). If that dispositive factor is not satisfied, then the court will engage in a multi-factored approach concerning to the level of control the tribe exerts over the entity and whether the entity's work is commercial or governmental in nature. *Id.*

This test accurately reinforces a purpose of sovereign immunity, protecting a sovereign from the inconvenience of suit, while also awarding immunity to only those enterprises that further the purpose behind the initial creation of the immunity doctrine. By evaluating as a threshold issue whether the tribe will be liable for or bound by a judgment, the court recognized that a tribe is not one of the "real parties in interest" when the tribe conducts business under a charter insulating the tribe from the liabilities of its entity. This test also precludes artificial persons,

like business entities formed under state and tribal law, from cloaking themselves in immunity.

It is readily apparent from the divergent and conflicting approaches that the various courts have taken, review is urgently needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Marc F. Pappalardo
Pappalardo Law Group LLC
1919 14th Street, Suite 510
Boulder, CO 80302
(303) 250-1507
Marc@PappalardoLawGroup.com

Counsel of Record for Petitioner
Breakthrough Management Group, Inc.

APPENDICES

United States Court of Appeals,
Tenth Circuit.
BREAKTHROUGH MANAGEMENT GROUP, INC.,
Plaintiff–Appellee–Cross–Appellant,
v.
CHUKCHANSI GOLD CASINO AND RESORT;
Chukchansi Economic Development Authority, Defendants–Appellants–Cross–Appellees,
and
Ryan Stanley, Defendant–Appellant–Cross–Appellee.

Nos. 08–1298, 08–1305, 08–1317.
Dec. 27, 2010.

Background: Provider of business management training and consulting services brought action against tribe's Economic Development Authority and its Casino, alleging that defendants paid for single-person license for one of provider's online training programs and then recorded and used portions of program without permission to train more than one employee. The United States District Court for the District of Colorado, Marcia S. Krieger, J., 2007 WL 2701995,granted dismissal in part and, 2008 WL 3211286, denied reconsideration. Casino and its owner and operator appealed.

Holdings: The Court of Appeals, Holmes, Circuit Judge, held that:
(1) District Court did not abuse its discretion in denying provider's request for limited jurisdictional discovery to resolve issue of tribal sovereign immunity;
(2) District Court did not abuse its discretion in pre-

venting provider from calling what it deemed to be necessary witnesses to resolve issue of tribal sovereign immunity at evidentiary hearing:
(3) method of creation of Authority and Casino weighed in favor of conclusion that entities were subordinate economic entities which shared in tribe's sovereign immunity;
(4) purpose of Authority and Casino weighed in favor of granting entities tribal sovereign immunity;
(5) structure, ownership, and management of Authority and Casino weighed both for and against conclusion that entities were subordinate economic entities which shared in tribe's sovereign immunity;
(6) tribe clearly intended for Authority and Casino to share in tribal sovereign immunity;
(7) financial relationship between tribe, Authority and Casino weighed in favor of entities' tribal sovereign immunity; and
(8) overall purposes of immunity would be served by conclusion that Authority and Casino shared in tribe's sovereign immunity.

Reversed and remanded.

*1176 Marc F. Pappalardo of Breakthrough Management Group, Inc., Longmont, CO, for Plaintiff–Appellee–Cross–Appellant.

Michael A. Robinson of Fredericks Peebles & Morgan LLP, Sacramento, CA, for Defendants–Appellants–Cross–Appellees Chukchansi Gold Casino and Resort and Chukchansi Economic Development Authority.

Lenden F. Webb of Law Offices of Lenden F. Webb, Fresno, CA, for Defendant–Appellant–Cross–

Appellee Ryan Stanley.

Before MURPHY, HOLMES, Circuit Judges, and ARMIJO, District Judge.*

FN* The Honorable M. Christina Armijo, District Judge, United States District Court for the District of New Mexico, sitting by designation.

HOLMES, Circuit Judge.

This appeal asks us to explore the relationship between an Indian tribe and the economic entities created by the tribe, and to determine how close that relationship must be in order for those entities to share in the tribe's sovereign immunity. Plaintiff Breakthrough Management Group, Inc. ("BMG"), a provider of business management training and consulting services, filed suit in the United States District Court for the District of Colorado in August 2006. BMG alleged that the Chukchansi Gold Resort & Casino ("the Casino") had paid for a single-person license for one of BMG's online training programs and then recorded and used portions of that program without permission to train more than one employee. Because the Casino is operated for the benefit of a federally recognized Indian tribe, the Picayune *1177 Rancheria of the Chukchansi Indians ("the Tribe"), BMG brought federal and state-law claims against the Tribe, the Chukchansi Economic Development Authority ("the Authority"), which owns and operates the Casino, the Casino, and several individual defen-

* The Honorable M. Christina Armijo, District Judge, United States District Court for the District of New Mexico, sitting by designation.

dants. The defendants filed various motions to dismiss, arguing that they were protected from BMG's suit by the doctrine of tribal sovereign immunity and that the district court should dismiss the complaint for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1).

The district court granted the Tribe's motion to dismiss, holding that the Tribe was entitled to sovereign immunity and had not clearly waived that immunity by entering into licensing agreements with BMG that contained forum-selection clauses. The court denied Defendant Ryan Stanley's motion to dismiss, concluding that sovereign immunity did not extend to him because he had been sued in an individual rather than an official capacity. After an evidentiary hearing, the court also denied the Authority and the Casino's motion to dismiss, concluding that they were not entitled to share in the Tribe's sovereign immunity because any judgment imposed against them would not imperil the Tribe's monetary assets.

This appeal followed. The Authority and the Casino have appealed the district court's denial of their motion to dismiss for lack of subject matter jurisdiction (Appeal No. 08–1298), and Mr. Stanley has done likewise (Appeal No. 08–1305). BMG has filed a cross-appeal that raises an alternative ground for affirmance of the district court's order—*viz.,* that the Authority and the Casino, and by extension Mr. Stanley, have waived any immunity that they may otherwise enjoy by entering into BMG's licensing agreements (Appeal No. 08–1317). We have jurisdiction over Defendants' interlocutory appeals under 28

U.S.C. § 1291 and the collateral order doctrine,[1] but we **DISMISS** BMG's cross-appeal for lack of jurisdiction. For the reasons discussed below, we **REVERSE** the district court's orders denying the Authority and the Casino's motion to dismiss and the motion to dismiss of Mr. Stanley and **REMAND** for further proceedings consistent with this opinion.

BACKGROUND

BMG is a Colorado Corporation that provides online business management training and consulting services. BMG alleges that employees at the Casino copied and distributed materials from one of BMG's training programs without authorization. The Casino, which operates for the financial benefit of the Tribe, had paid for a single-person license, but allegedly had recorded and used portions of the program without permission to train a large group of employees. Based on these allegations, BMG brought suit against the Tribe,[2] the Authority, the Casino, the former general manager of the Casino, Mr. Stanley, and two other Casino employees. BMG asserted claims for federal copyright infringement, trademark infringement, and violation of the Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C.

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[1] A district court's order denying a motion to dismiss involving a claim of tribal sovereign immunity is an immediately appealable collateral order. *Osage Tribal Council ex rel. Osage Tribe of Indians v. U.S. Dep't of Labor,* 187 F.3d 1174, 1179–80 (10th Cir.1999).

[2] The Picayune Rancheria of the Chukchansi Indians of California is a federally recognized Indian tribe. *See* Indian Entities Recognized & Eligible To Receive Services From the United States Bureau of Indian Affairs, 67 Fed.Reg. 46,328, 46,330 (July 12, 2002). The parties also have stipulated to that fact.

§ 1962, as well as state common law claims for conversion, misappropriation,*1178 breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, unfair competition, and violation of the Colorado Consumer Protection Act, Colo.Rev.Stat. Ann. §§ 6–1–101 to –115 (West 2010).

All of the defendants filed motions to dismiss, arguing in relevant part that dismissal was warranted under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction under the doctrine of tribal sovereign immunity. BMG opposed the motions. BMG also moved to convert the motions into Rule 56 motions for summary judgment and, in the alternative, for leave to conduct limited discovery on the issue of tribal sovereign immunity.

In a September 12, 2007, Opinion and Order, the district court granted the Tribe's motion to dismiss. The court determined that the Tribe "indisputably enjoys sovereign immunity," Aplts. App. at 21, and rejected BMG's argument that the Tribe had waived its immunity by entering into two licensing agreements with BMG that contained forum-selection clauses.[3] The court held that a contractual provision agreeing to arbitrate disputes could constitute a waiver of sovereign immunity when (1) there is an agreement to submit disputes to a body for adjudication, as well as (2) an agreement as to what particular body will hear such disputes. But the court found that those requirements were not satisfied in this

[3] The court assumed without deciding that the Tribe could be held to the terms of the licensing agreement, which was entered into by BMG and an agent of the Casino.

case.

The court reasoned that the Tribe did not expressly agree to submit any dispute for adjudication, it merely agreed *where* such adjudication would take place if it were to occur.[4] The court explained that

> the parties' agreement here speaks only to *where* a suit may be brought, but it does not expressly or impliedly address *whether* a suit may be brought....
>
> At first blush, it seems awkward to read a contract to specify *where* disputes may be resolved, but not to read it as providing *whether* disputes may be resolved. However, any awkwardness in this interpretation vanishes when one recognizes the peculiar circumstances of this case. Here, unlike the ordinary citizen that [BMG] typically enters into contracts with, the Tribe possesses a special cloak of immunity from suit. Thus, language in [BMG's] standard contract that would be sufficient to bind ordinary citizens to a particular dispute-resolution mechanism is not necessarily sufficient to bind the Tribe.

Id. at 20. The court concluded that, because BMG did not negotiate the terms of the contract with the Tribe, "it should not be surprising that the standard

[4] As the district court recounted, the forum-selection provision stated that "the sole and exclusive *venue* for any and all disputes involving ... this Agreement shall be the state and federal courts located within the state of Colorado." Aplts. App. at 20 (internal quotation marks omitted).

terms of [the licensing agreement] yield seemingly awkward results in this peculiar factual circumstance." *Id.* at 21.

The court did not rule on the Authority and the Casino's motion to dismiss in the September 12, 2007, Opinion and Order because it could not determine from the pleadings whether the Authority and the Casino "enjoy[ed] a connection to the Tribe close enough to enjoy the Tribe's own immunity." *Id.* at 23. The court therefore scheduled an evidentiary hearing on that motion and denied as moot BMG's motion to convert the motions to dismiss into Rule 56 motions for summary judgment. The court also denied BMG's request*1179 "to specifically authorize discovery in advance of this hearing," holding that, if the Authority and the Casino were entitled to immunity, such discovery would "chip away at the benefits of ... immunity." *Id.* at 23 n. 8. But "[t]o ensure that both sides have a full and fair opportunity to examine the relevant documents and prepare their case," the district court ordered them to exchange copies of all exhibits ten days before the evidentiary hearing and held that the parties could subpoena any other documents up to three days prior to the hearing.[5] *Id.*

In that same order, the district court denied Mr. Stanley's motion to dismiss, finding that, because BMG was asserting claims against Mr. Stanley in his individual rather than official capacity, he was not entitled to tribal sovereign immunity. The court also

[5] Although the district court referred only to the parties' ability to subpoena documents, it indicated at the evidentiary hearing that the parties also could subpoena witnesses pursuant to Federal Rule of Civil Procedure 45.

granted the motion to dismiss for lack of personal jurisdiction brought by two employees of the Casino, Jeff Livingston and Vernon D'Mello. They are not parties to this appeal.

The district court held an evidentiary hearing on the Authority and Casino's motion to dismiss on October 23, 2007. At the hearing, the parties stipulated to the admission of approximately seventy-one exhibits "for the sole purpose of whether the *Johnson* ... test is met and not for any other issues, such as whether there has been a waiver of immunity." Aplee. Supp.App. at 99–100 (Tr., Evidentiary Hr'g, dated Oct. 23, 2007). The court also heard testimony from Dustin Graham, the chairperson of the Tribal Council. After the hearing, the parties filed a stipulation detailing the agreed-upon facts.

In an August 5, 2008, Opinion & Order, the district court evaluated the relationship between the Tribe and the Authority and the Casino under a ten-factor test articulated in an unpublished district court opinion, *Johnson v. Harrah's Kansas Casino Corp.,* No. 04–4142–JAR, 2006 WL 463138 (D.Kan. Feb.23, 2006). Under *Johnson,* there is a threshold financial-liability inquiry that must be satisfied before a court will consider other factors measuring the closeness of the relationship between a tribe and its economic entities. As applied here, the inquiry is "whether the Tribe will be financially liable for legal obligations incurred by the Casino and the Authority." Aplts. App. at 45. Based on that threshold inquiry, the district court in this case denied the motion to dismiss.

Specifically, the court found that the Authority was governed by a board with identical membership to the Tribe's governing Council. The court further found that the Authority owns and operates the Casino. But the court nevertheless concluded that the Authority and the Casino were "non-Indian entities" that were not entitled to invoke the Tribe's sovereign immunity because a judgment against them "w[ould] not result in direct financial liability for the Tribe or otherwise imperil the Tribe's assets." *Id.* at 47. Even though the court found that the Casino's revenues go solely to the Authority and that the Authority then gives that money to the Tribe, the court found that the Tribe's *right to receive* profits would not be threatened by a judgment, only the *amount* of profits would be adversely affected.

The court reached that conclusion based on "evidence indicat[ing] that the Authority is obligated to pay over to the Tribe at least $1 million per month, regardless of its actual revenues." *Id.* at 46. Therefore, "should the actual profits fall short, the Authority will borrow or run a deficit *1180 to ensure that the Tribe receives that which it is entitled to." *Id.* at 47. Thus, the court concluded, "the judgment would neither deprive the Tribe of its asset—the right to receive profits—nor its guaranteed minimum payment." *Id.* at 48. The court also found that the Authority was created to serve as a non-immune entity for creditors so that they would be more willing to lend money to the Tribe. The district court accordingly denied the Authority and the Casino's motion to dismiss. These interlocutory appeals timely followed.

DISCUSSION

The Authority and the Casino[6] argue that the district court erred in denying their motion to dismiss. They urge us to find that they qualify as subordinate economic entities entitled to tribal sovereign immunity because

> [a]n unincorporated entity created by and wholly owned by a federally recognized Indian tribe for the sole purpose of promoting tribal interests through the ownership and operation of a Class III Indian gaming facility on behalf of the ... Indian tribe is ... an Indian entity. [T]o protect critical tribal and federal interests such an entity, [the Authority,] as well as the Class III Indian gaming facility[, the Casino],

[6] Mr. Stanley is also a party to this appeal. Although the district court rejected Mr. Stanley's motion to dismiss based on its conclusion that he had been sued in his individual capacity rather than in an official capacity, that distinction is not at issue on appeal. The parties now agree that Mr. Stanley was acting in the course and scope of his employment at the Casino and, consequently, whatever immunity is enjoyed by the Authority and the Casino is shared by Mr. Stanley. *See Burrell v. Armijo,* 603 F.3d 825, 832 (10th Cir.2010) ("Tribal sovereign immunity generally extends to tribal officials acting within the scope of their official authority. On the other hand, a tribe's sovereign immunity does not extend to an official when the official is acting as an individual or outside the scope of those powers that have been delegated to him." (citation omitted) (internal quotation marks omitted)); *Dry v. United States,* 235 F.3d 1249, 1253 (10th Cir.2000) ("Due to their sovereign status, suits against ... tribal officials in their official capacity 'are barred in the absence of an unequivocally expressed waiver by the tribe or abrogation by Congress.' " (quoting *Fletcher v. United States,* 116 F.3d 1315, 1324 (10th Cir.1997))). Because the parties agree that Mr. Stanley's entitlement to immunity is derivative of any immunity enjoyed by the Authority and the Casino, for ease of reference we will discuss only the Authority and the Casino.

must be allowed to invoke tribal sovereign immunity from suit.

Aplts. Opening Br. at 9. They ask us to reject the *Johnson* test employed by the district court and instead urge us to consider the factors we recently applied in *Native American Distributing v. Seneca–Cayuga Tobacco Co.*, 546 F.3d 1288 (10th Cir.2008)—that is, in particular, the manner in which the entity was created, the purposes the entity was intended to fulfill, and whether the tribe intended for the entity to have immunity. The Authority and the Casino argue that the evidence clearly demonstrates that they were created to serve the Tribe's interests in economic development, self-sufficiency, and self-governance, and that the Tribe intended for them to share in its immunity from suit. The Authority and the Casino maintain that, because all revenues generated by the Casino go to the Tribe through the Authority, and are used exclusively for tribal purposes, any "reduction in revenues [that would be caused by a judgment against the Casino or the Authority would] ha[ve] a direct [adverse] impact on the Tribe and its ability to provide for its economic development, self-sufficiency and welfare of its government and members." Aplts. Opening Br. at 23. And, finally, they argue that the Authority and the ***1181** Casino did not waive their immunity by entering into the relevant contracts with BMG.

BMG argues that the Authority and the Casino cannot share in the Tribe's sovereign immunity because those entities are too far removed from the Tribe. BMG bases its argument on the following contentions: the Tribe is not liable for a judgment

against those entities; the Authority's corporate charter provides that the Authority is a separate entity from the Tribe; the Casino's charter provides that the Tribe is not liable for its actions and that it is owned by the Authority, not the Tribe; and the Authority and the Casino's liability insurance will cover any judgment against them, thereby protecting the Tribe's assets. BMG argues that we should apply the *Johnson* factors used by the district court to determine whether the Authority and the Casino may share in the Tribe's sovereign immunity and disputes the applicability of *Native American Distributing*.

BMG also argues that, if we determine that the Authority and the Casino are entitled to tribal sovereign immunity, we should nevertheless hold that they waived such immunity by agreeing to litigate any disputes in Colorado courts as part of BMG's licensing agreements. Finally, BMG maintains that if we do not affirm the district court's denial of the motions to dismiss, we should direct the district court on remand to allow BMG to conduct jurisdictional discovery and call witnesses on the issue of tribal sovereign immunity.

For the reasons discussed below, we conclude that the district court applied the incorrect legal standard—the district court erroneously treated the financial impact on a tribe of a judgment against its economic entities as a threshold inquiry. Our precedent demonstrates that there is no threshold determination to be made in deciding whether economic entities qualify as subordinate economic entities entitled to share in a tribe's immunity. Rather, we should look to a variety of factors when examin-

ing the relationship between the economic entities and the tribe, including but not limited to: (1) their method of creation; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) whether the tribe intended for the entities to have tribal sovereign immunity; (5) the financial relationship between the tribe and the entities; and (6) whether the purposes of tribal sovereign immunity are served by granting immunity to the entities.

We conclude that, under these factors, the Authority and the Casino have a sufficiently close relationship to the Tribe to share in its immunity. Because the district court wrongly concluded that the Authority and the Casino were not subordinate economic entities entitled to tribal sovereign immunity, and consequently did not reach the issue of whether the Authority and the Casino waived their immunity from suit through licensing agreements with BMG, we remand for the district court to address that question in the first instance. However, for reasons that we discuss below, we do not direct or require the district court to permit jurisdictional discovery in connection with such further proceedings.

I. *The Authority and the Casino's Appeal*

A. Standard of Review

Our inquiry into whether the Authority and the Casino are subordinate economic entities that share in the Tribe's immunity from suit involves a mixed question of law and fact. This case presents a legal issue—the appropriate test to determine whether

economic entities associated with a tribe may share in the tribe's immunity. *1182 It also presents a factual issue—involving the application of that test to the relationship between the Tribe and the Authority and the Casino.

Ordinarily, "[w]e review de novo a district court's denial of a motion to dismiss based on tribal sovereign immunity." *Miner Elec., Inc. v. Muscogee (Creek) Nation,* 505 F.3d 1007, 1009 (10th Cir.2007). But "[w]here, as here, subject-matter jurisdiction turns on a question of fact, we review the district court's factual findings for clear error and review its legal conclusions de novo." *Native Am. Distrib.,* 546 F.3d at 1293 (emphasis omitted); *accord United States ex rel. Ondis v. City of Woonsocket,* 587 F.3d 49, 54 (1st Cir.2009) ("When the district court does not rule on the pleadings alone but, rather, takes evidence in connection with a motion to dismiss for want of subject matter jurisdiction, the court's factual findings are reviewed for clear error."). In this case, the district court "ha[d] wide discretion to allow affidavits, other documents, and a limited evidentiary hearing," *Dry,* 235 F.3d at 1253 (quoting *Holt v. United States,* 46 F.3d 1000, 1003 (10th Cir.1995)) (internal quotation marks omitted), and its "reference to evidence outside the pleadings d[id] not convert the motion to a Rule 56 motion [for summary judgment]." *Holt,* 46 F.3d at 1003.

B. Analysis

We would be remiss if we did not begin our discussion of the issues by acknowledging the relevant Indian-law context that shapes our analysis. Three

major interrelated concepts play a role in this case: (1) tribal sovereignty, (2) tribal sovereign immunity, and (3) tribal economic development. As the Supreme Court has recognized, "Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government. Although no longer possessed of the full attributes of sovereignty, they remain a separate people, with the power of regulating their internal and social relations." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 55, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) (citations omitted) (internal quotation marks omitted); *accord NLRB v. Pueblo of San Juan,* 276 F.3d 1186, 1192 (10th Cir.2002) ("Indian tribes are neither states, nor part of the federal government, nor subdivisions of either. Rather, they are sovereign political entities possessed of sovereign authority not derived from the United States, which they predate." (footnote omitted)); *Native Am. Church of N. Am. v. Navajo Tribal Council,* 272 F.2d 131, 134 (10th Cir.1959) ("Indian tribes are not states. They have a status higher than that of states. They are subordinate and dependent nations possessed of all powers [except] to the extent that they have expressly been required to surrender them by the superior sovereign, the United States.").

Because Indian tribes are sovereign powers, they possess immunity from suit to the extent that Congress has not abrogated that immunity and the tribe has not clearly waived its immunity. *Santa Clara Pueblo,* 436 U.S. at 58, 98 S.Ct. 1670; *Native Am. Distrib.,* 546 F.3d at 1293; *Berrey v. Asarco Inc.,* 439 F.3d 636, 643 (10th Cir.2006). Not only is sovereign immunity an inherent part of the concept of sovereignty and what it means to be a sovereign, but "immunity [also] is thought [to be] necessary to promote the federal policies of tribal self[-]determination, economic development, and cultural autonomy." *Am. Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe,* 780 F.2d 1374, 1378 (8th Cir.1985); *accord* Patrice H. Kunesh, *Tribal Self-Determination in the Age of Scarcity,* 54 S.D. L.Rev. 398, 398 (2009) ("Tribal sovereignty and the jurisdictional counterpart of tribal ***1183** sovereign immunity from suit are the bedrock principles of tribal self-determination."); *see also* Felix S. Cohen, Cohen's Handbook of Federal Indian Law §§ 7.05, 21.02[2] (Nell Jessup Newton et al., eds., 2005 ed.).

Tribal sovereign immunity may extend to subdivisions of a tribe, including those engaged in economic activities, provided that the relationship between the tribe and the entity is sufficiently close to properly permit the entity to share in the tribe's immunity.[7] *See Native Am. Distrib.,* 546 F.3d at 1292; *see also, e.g., Allen v. Gold Country Casino,* 464 F.3d 1044,

[7] We recognize that the Supreme Court has expressed reservations about the extension of tribal immunity to economic activities, but we note that the Court has deferred to Congress in this area. *See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.,* 523 U.S. 751, 757–60, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998); *see also Native Am. Distrib.,* 546 F.3d at 1293 (in discussing *Kiowa Tribe,* stating that "[w]hile the Supreme Court has expressed misgivings about recognizing tribal immunity in the commercial context, the Court has also held that the doctrine 'is settled law' and that it is not the judiciary's place to restrict its application"). And "Congress has consistently reiterated its approval of the immunity doctrine." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* 498 U.S. 505, 510, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991).

1046–47 (9th Cir.2006); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.,* 207 F.3d 21, 29 (1st Cir.2000); *Hagen v. Sisseton–Wahpeton Cmty. Coll.,* 205 F.3d 1040, 1043 (8th Cir.2000). The broad interpretation of tribal sovereign immunity can trace its origins to "Congress' desire to promote the 'goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development,' " *Citizen Band Potawatomi Indian Tribe,* 498 U.S. at 510, 111 S.Ct. 905 (quoting *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 216, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987)), as well as to "Executive Branch policies, and judicial opinions," *Prairie Band Potawatomi Nation v. Wagnon,* 476 F.3d 818, 824 n. 9 (10th Cir.2007). As the Ninth Circuit has noted, immunity for subordinate economic entities "directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general." *Allen,* 464 F.3d at 1047 (citing *Alden v. Maine,* 527 U.S. 706, 750, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999)).

One of the ways that Congress has promoted tribal sovereignty through economic development is particularly relevant to this case—the authorization of Indian gaming. *See* 25 U.S.C. § 2702(1) (stating that the purpose behind the Indian Gaming Regulatory Act is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments"); *Cabazon Band of Mission Indians,* 480 U.S. at 218–19, 107 S.Ct. 1083 ("The Cabazon and Morongo Reservations contain no natural resources which can be exploited. The tribal

games at present provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services. They are also the major sources of employment on the reservations. Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members."); *see also generally* Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721 ("IGRA"); Cohen, *supra,* §§ 12.01–02, 21.01.

A commentator has observed that "[t]ribal governments directly control or participate in commercial activities more frequently than other [types of] governments.... [T]he tribal organization may be part of the tribal government and protected*1184 by tribal immunity, even though it may have a separate corporate structure." William V. Vetter, *Doing Business with Indians and the Three "S" es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction,* 36 Ariz. L.Rev. 169, 174 (1994). That leads to the question presented here: "Does the resulting entity have a distinct, nongovernmental character and therefore is not immune, or is it merely an administrative convenience, *i.e.,* a 'subordinate [tribal] economic organization,' and therefore immune?" *Id.* at 176 (alteration in original). Put differently, we must determine whether the Authority and the Casino are "the kind[s] of tribal entit[ies], analogous to a governmental agency, which should benefit from the defense of sovereign immunity, or whether [they] [are] more like ... commercial business enterprise[s], instituted solely for the purpose of generating profits for [their] private owners." *Gavle v. Little Six, Inc.,* 555 N.W.2d 284, 293 (Minn.1996).

BMG does not dispute the general principle that subordinate economic entities may share in a tribe's sovereign immunity; rather, BMG contends that, under *Johnson,* the entities in this case may not do so.[8]

[8] However, BMG plainly is not entirely comfortable with the notion that subordinate economic entities may share in a tribe's sovereign immunity. Its reluctance to endorse that principle is demonstrated by its remark that "the Supreme Court has not ruled upon the issue of whether a separate business entity that is directly or indirectly owned by a tribe is subject to tribal immunity." Aplee. Answer Br. & Opening Br. at 19. But BMG's briefing nevertheless focuses on whether the Authority and the Casino can satisfy the *Johnson* test. BMG does not ask us to hold that economic entities can never share in a tribe's immunity from suit. It is just as well; that ship plainly sailed in *Native American Distributing.* We are bound by that precedent.

In advocating against the application of *Native American Distributing* at oral argument, BMG attempted to distinguish between the types of entities created by tribes—on the one hand, those created under tribal law, and, on the other hand, those created under Section 17 of the Indian Reorganization Act, 25 U.S.C. § 477, which authorizes the Secretary of Interior "upon petition by any tribe" to "issue a charter of incorporation to such tribe." *Id.* According to BMG, the Tribe did not avail itself of § 477 here, but rather created the Authority and the Casino under tribal law. On the other hand, it argues that in *Native American Distributing,* where we concluded that the tribe-related entity was immune from suit, the analysis turned on whether the tribe had created a § 477 entity. We are inclined, however, to believe that BMG's argument reflects a misreading of that case, which contains no mention of § 477. We also note that

> Section 17 is not the exclusive means for tribes to incorporate for business or other purposes—*i.e.,* tribes can create corporate entities under their own laws or those of other sovereigns. The principal legal difference is that, while section 17 corporations retain their tribal status—and, accordingly, sovereign immunity in the absence of a "sue and be sued" waiver—the other species of corporations are not imbued automatically with such status. Courts nonetheless have resorted generally to a multi-factor inquiry, comparable to that employed in section 17 controversies, to decide whether the corporation constitutes an "arm of the tribe" and shares in the tribe's immunity from suit.

Clay Smith, *Tribal Sovereign Immunity: A Primer,* 50 Advoc. 19, 20–21 (May 2007) (footnotes omitted). However, we need not opine definitely on this purported distinguishing factor because BMG has waived this argument by not including it in its opening brief. We do not consider issues raised for the first time at oral argument. *See Corder v. Lewis Palmer Sch. Dist. No. 38,* 566 F.3d 1219, 1235 n. 8 (10th Cir.), *cert. denied,* —— U.S. ——, 130 S.Ct. 742, 175 L.Ed.2d 515 (2009).

[9] We note that the courts that have addressed this issue have utilized different turns of phrase to describe a tribe's economic entities. If the economic entities are held to be sufficiently close to a tribe so as to share in its sovereign immunity, courts have deemed those entities to be, *inter alia,* "an arm of the tribe," *Allen,* 464 F.3d at 1046; "a division of the Tribe," *Native Am. Distrib.,* 546 F.3d at 1293; "a tribal agency," *Dillon v. Yankton Sioux Tribe Hous. Auth.,* 144 F.3d 581, 583 (8th Cir.1998); and "a sub-entity of the Tribe," *Ramey Constr. Co., Inc. v. Apache Tribe of Mescalero Reservation,* 673 F.2d 315, 320 (10th Cir.1982). Moreover, the doctrine has its roots in the Arizona state courts, which refer to it as "the subordinate economic organization doctrine." *See, e.g., Dixon v. Picopa Constr. Co.,* 160

It argues that the Authority and the Casino are independent from the Tribe to such a degree that they cannot share in the Tribe's sovereign immunity. Accordingly, we must first determine the appropriate test to measure the relationship between an Indian tribe and its economic entities, and then decide whether the Authority*1185 and the Casino are subordinate economic entities that share in the Tribe's immunity.[9]

1. The appropriate test to determine whether an economic entity is entitled to tribal sovereign immunity.

As we have stated, to measure the closeness of the relationship between the Tribe and the Authority and the Casino, the district court applied a test adopted from an unpublished decision from the United States District Court for the District of Kansas, *Johnson v. Harrah's Kansas Casino Corp.* To understand that standard, we find it necessary to explain the holding in *Johnson* in some detail. In that case, Harrah's Kansas Casino Corporation ("Harrah's") had urged the district court to hold that the plaintiff's claims against it were barred by the doctrine of tribal sovereign immunity. Harrah's operated Harrah's Prairie Band Casino, pursuant to a Management Agreement between Harrah's and the tribe, on property held in trust by the United States for the Prairie Band Potawatomi Nation. *Johnson,* 2006 WL 463138, at *2. Under that agreement, Harrah's conducted the casino's daily operations and the tribe received the total net revenue from the casino; in return, the tribe paid Harrah's a management fee. *Id.* The *Johnson* court concluded that Harrah's was not a tribal housing authority or a tribal agency and that it therefore needed to determine whether Harrah's "[wa]s a 'subordinate economic organization' of the Tribe." *Id.* at *4. The court then explained that

Ariz. 251, 772 P.2d 1104, 1108–12 (1989); *see also* Vetter, *supra,* 36 Ariz. L.Rev. at 177 (referring to "a subordinate tribal organization."). For the sake of consistency, we will refer to an economic entity entitled to tribal sovereign immunity as a "subordinate economic entity."

> [m]ost courts addressing the issue have considered some or all of the following factors: (1) the announced purpose for which the entity was formed; (2) whether the entity was formed to manage or exploit specific tribal resources; (3) whether federal policy designed to protect Indian assets and tribal cultural autonomy is furthered by the extension of sovereign immunity to the entity; (4) whether the entity is organized under the tribe's laws or constitution rather than federal law; (5) whether the entity's purposes are similar to or serve those of the tribal government; (6) whether the entity's governing body is comprised mainly of tribal officials; (7) whether the tribe has legal title or ownership of property used by the entity; (8) whether tribal officials exercise control over the administration or accounting activities of the organization; (9) whether the tribe's governing body has power to dismiss members of the organization's governing body, and (10) whether the entity generates its own revenue, whether a suit against the entity would impact the tribe's fiscal resources, and whether it may bind or obligate tribal funds.

Id. The *Johnson* court decided to apply those factors to determine whether the ***1186** economic entity at issue was entitled to tribal immunity. Significantly, however, it decided to treat the tenth factor, the financial relationship between the entity and the tribe and whether a judgment against the entity would affect tribal assets, as a threshold determination, just as the Supreme Court of Alaska did in *Runyon ex rel. B.R. v. Association of Village Council*

Presidents, 84 P.3d 437 (Alaska 2004). The *Johnson* court agreed with *Runyon* 's determination that

> [w]hen considering whether an entity is an arm of the tribe for purposes of tribal sovereign immunity, ... "the entity's financial relationship with the tribe is ... of paramount importance—if a judgment against it will not reach the tribe's assets or if it lacks the 'power to bind or obligate the funds of the [tribe],' it is unlikely that the tribe is the real party in interest." On the other hand, ... the entity may be an arm of the tribe if it would be legally responsible for the entity's obligations.

Johnson, 2006 WL 463138, at *5 (quoting *Runyon,* 84 P.3d at 440–41).

The district court in *Johnson* therefore first examined "the financial relationship between the Tribe and Harrah's" to determine if Harrah's was entitled to share in the tribe's sovereign immunity. *Id.* "If the Tribe may be financially liable for Harrah's legal obligations, the Court w[ould then] proceed to discuss [the] other factors pertaining to the purpose and control of Harrah's." *Id.* The court concluded that it was not clear whether a judgment against Harrah's would reach the tribe's assets and so proceeded to analyze the remaining factors, ultimately concluding that the balance of the factors "militate[d] against extending tribal sovereign immunity to ... Harrah's." *Id.* at *6, *8.

In applying *Johnson,* the district court in this case concluded that the Authority and the Casino could not satisfy the threshold inquiry; it determined

as a dispositive matter that a judgment against the Authority or the Casino would not endanger the Tribe's right to receive profits. On that basis, the court held that those entities were not entitled to tribal sovereign immunity and declined to reach the remaining *Johnson* factors. We conclude that the district court applied the wrong legal standard to determine whether the Authority and the Casino are entitled to tribal sovereign immunity.

Our recent decision in *Native American Distributing* reveals the district court's error. In that case, we were asked to decide whether the Seneca–Cayuga Tobacco Company, or "SCTC," an enterprise of the Seneca–Cayuga Indian Tribe, was entitled to sovereign immunity. That question in turn depended upon whether SCTC was a division of the tribal corporation, which had waived its immunity from suit, or of the tribe, which had waived its immunity only as to actions of the tribal corporation. *Native Am. Distrib.,* 546 F.3d at 1293. To answer that question, we examined the tribe's business committee resolution that created SCTC.

We determined that "SCTC was a division of the Tribe" based on the following facts: the resolution's invocation of the business committee's powers under the tribal constitution rather than its powers under the corporate charter, thereby "lend[ing] support to the conclusion that SCTC was created by the Tribe acting in its governmental, rather than corporate, capacity"; the resolution's express declaration that SCTC would act as an economic development project to provide economic opportunities and revenue for the tribe, and its statement that SCTC was an essen-

tial governmental function of the tribe; and the resolution's inclusion of an express waiver of immunity as to suits brought by a specific management company, indicating *1187 that the business committee believed SCTC was a division of the tribe that otherwise was entitled to tribal immunity. *Id.* at 1293–94. We therefore looked to the purpose of the entity, whether it was created under tribal law, and whether the tribe intended for the entity to have tribal immunity.

The most important lesson for our purposes that we glean from *Native American Distributing* is found in what we did *not* consider—in that case, we did not examine the financial relationship between SCTC and the tribe and whether a judgment against SCTC would reach the tribe's monetary assets, much less designate that factor as a threshold determination. Although we recognize that the financial relationship between a tribe and its economic entities is a relevant measure of the closeness of their relationship, *Native American Distributing* plainly demonstrates that it is *not* a dispositive inquiry. The district court's decision to treat it as such was error.

We therefore must determine the correct legal standard. At this time there is no need to define the *precise* boundaries of the appropriate test to determine if a tribe's economic entity qualifies as a subordinate economic entity entitled to share in a tribe's immunity. In this case, we conclude that the following factors are helpful in informing our inquiry: (1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the

tribe has over the entities; (4) the tribe's intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entities.[10] *See, e.g., Allen,* 464 F.3d at 1046–47; *Altheimer & Gray v. Sioux Mfg. Corp.,* 983 F.2d 803, 812 (7th Cir.1993); *Gavle,* 555 N.W.2d at 294–95; *Ransom v. St. Regis Mohawk Educ. & Cmty. Fund, Inc.,* 86 N.Y.2d 553, 635 N.Y.S.2d 116, 658 N.E.2d 989, 992–93 (1995); *Dixon,* 772 P.2d at 1109–11; *Trudgeon v. Fantasy Springs Casino,* 71 Cal.App.4th 632, 84 Cal.Rptr.2d 65, 67–72 (1999); Vetter, *supra,* at 176–79; *cf. Dillon,* 144 F.3d at 583 (evaluating whether tribal housing authority was a corporation created by the tribe and subject to suit). Furthermore, our analysis also is guided by a sixth factor: the policies underlying tribal sovereign immunity and its connection to tribal economic development,

[10] As the district court in the Western District of Oklahoma commented, "[a]lthough the subordinate economic entity analysis has been widely adopted, its implementation is rarely uniform." *Somerlott v. Cherokee Nation Distribs. Inc.,* No. CIV–08–429–D, 2010 WL 1541574, at *3 (W.D.Okla. Apr.16, 2010); *see also Gavle,* 555 N.W.2d at 293 (stating that "the demarcation between those business entities so closely related to tribal governmental interests as to benefit from the tribe's sovereign immunity and those so far removed as to be treated as mere commercial enterprises is not as clear" and that " 'whether tribal sovereign immunity now extends to commercial activities is an important, complex and unresolved question,' which the U.S. Supreme Court has never directly considered" (quoting *In re Greene,* 980 F.2d 590, 600–01 (9th Cir.1992))). Accordingly, we have looked to the various tests used by federal courts, as well as state courts, and have identified factors we believe to be most helpful in this particular instance. We have *not* concluded that those factors constitute an exhaustive listing or that they will provide a sufficient foundation in every instance for addressing the tribal-immunity question related to subordinate economic entities.

and whether those policies are served by granting immunity to the economic entities. *See Dixon,* 772 P.2d at 1111 ("Tribal immunity should only apply when doing so furthers the federal policies behind the immunity doctrine." (citing Note, *Tribal Sovereign Immunity: Searching for Sensible Limits,* 88 Colum. L.Rev. 173, 183, 186 (1988))); *Gavle,* 555 N.W.2d at 294 *1188 (courts should determine "whether federal policies intended to promote Indian tribal autonomy are furthered by the extension of immunity to the business entity"). Those policies include protection of the tribe's monies, *see Cabazon Band of Mission Indians,* 480 U.S. at 218–19, 107 S.Ct. 1083; *Allen,* 464 F.3d at 1046–47, as well as "preservation of tribal cultural autonomy, preservation of tribal self-determination, and promotion of commercial dealings between Indians and non-Indians," *Dixon,* 772 P.2d at 1111. We will therefore consider these factors in determining whether the Authority and the Casino are subordinate economic entities of the Tribe and entitled to share in the Tribe's sovereign immunity.

2. Whether the Authority and the Casino are entitled to share in the Tribe's sovereign immunity.

a. BMG's challenge to the district court's discovery and evidentiary rulings.

Before we evaluate those factors, we first must address BMG's argument that the district court abused its discretion in denying its request for discovery and in preventing BMG from calling what it deemed to be necessary witnesses. If we were to conclude that the district court did abuse its discretion

in limiting jurisdictional discovery, we likely would remand the matter for discovery and further factual development.

BMG moved in the district court for leave to conduct limited discovery on the issue of tribal sovereign immunity. The court denied the motion, expressing its concern that discovery would undermine the purposes behind the immunity doctrine. But the district court did permit the parties to subpoena documents and witnesses. Consequently, the evidence upon which the district court based its denial of Defendants' motion to dismiss consisted of documents introduced by the Authority and the Casino at the evidentiary hearing (with an admissibility stipulation from BMG), testimony by the tribal chairperson, Dustin Graham, and the stipulated agreed-upon facts filed by the parties. BMG argues that "the denial of discovery prejudiced BMG because ... BMG could only utilize documents that the [Authority and the Casino] 'cherry picked' in the belief they would support their case." Aplee. Answer Br. & Opening Br. at 54. Additionally, BMG argues it was prejudiced by not being allowed to call as witnesses two individuals it had subpoenaed—Jeff Livingston, the Casino's general manager, and Dixie Jackson, the former chairperson of the Authority. Those witnesses did not appear at the hearing. BMG asserts that Mr. Graham did not have the same amount of knowledge about the Authority and the Casino as the witnesses it would have liked to examine.

Because a 12(b)(1) motion is "a 'speaking motion' and can include references to evidence extraneous to the complaint without converting it to a Rule 56 mo-

tion," the district court "ha[d] wide discretion to allow affidavits, documents and even a limited evidentiary hearing to resolve disputed jurisdictional facts under 12(b)(1)." *Wheeler v. Hurdman,* 825 F.2d 257, 259 n. 5 (10th Cir.1987); *accord Zappia Middle E. Constr. Co. Ltd. v. Emirate of Abu Dhabi,* 215 F.3d 247, 253 (2d Cir.2000). "If ... the court holds an evidentiary hearing to adjudicate the issue of whether the court has jurisdiction ..., the court determines the credibility of witness testimony, weighs the evidence, and finds the relevant jurisdictional facts." *PVC Windoors, Inc. v. Babbitbay Beach Constr., N. V.,* 598 F.3d 802, 810 (11th Cir.2010).

As with the court's handling of discovery in other stages of litigation, in the context of a 12(b)(1) motion, "[w]e give the ***1189** district court much room to shape discovery," *Citizens for Responsibility & Ethics in Wash. v. Office of Admin.,* 566 F.3d 219, 225 (D.C.Cir.2009), and review the district court's handling of jurisdictional discovery under an abuse-of-discretion standard, *Cheyenne Arapaho Tribes of Okla. v. United States,* 558 F.3d 592, 596 (D.C.Cir.2009). *See also Trentadue v. F.B.I.,* 572 F.3d 794, 806 (10th Cir.2009). Similarly, we review the court's evidentiary rulings, including the court's decision to exclude evidence or testimony, for abuse of discretion. *See La Resolana Architects, PA v. Reno, Inc.,* 555 F.3d 1171, 1180–81 (10th Cir.2009); *Polys v. Trans–Colo. Airlines, Inc.,* 941 F.2d 1404, 1407–08 (10th Cir.1991). "A district court abuses its discretion where it commits a legal error or relies on clearly erroneous factual findings, or where there is no rational basis in the evidence for its ruling." *Trentadue,* 572 F.3d at 806 (quoting *Breaux v. Am. Family Mut. Ins. Co.,* 554 F.3d 854, 866 (10th Cir.2009)) (internal quotation marks omitted).

We are not persuaded that the district court abused its discretion in this case. We have held that "a refusal to grant [jurisdictional] discovery constitutes an abuse of discretion if the denial results in prejudice to a litigant" and that "[p]rejudice is present where 'pertinent facts bearing on the question of jurisdiction are controverted ... or where a more satisfactory showing of the facts is necessary.' " *Sizova v. Nat'l Inst. of Standards & Tech.,* 282 F.3d 1320, 1326 (10th Cir.2002) (quoting *Wells Fargo & Co. v. Wells Fargo Express Co.,* 556 F.2d 406, 430 n. 24 (9th Cir.1977)). BMG has failed to convince us of its legal entitlement to jurisdictional discovery and, more specifically, that it was prejudiced by the district court's denial of its motion for discovery.[11] First,

[11] Our research reveals that we previously have placed the burden of demonstrating a legal entitlement to jurisdictional discovery—and the related prejudice flowing from the discovery's denial—on the party seeking the discovery; but we have done so only in unpublished, non-binding cases. *See, e.g., Xie v. Univ. of Utah,* 243 Fed.Appx. 367, 375–76 (10th Cir.2007) (holding in the Rule 12(b)(1) context that the movant had failed to establish that the court's denial of her request for jurisdictional discovery had prejudiced her); *cf. United States v. Cervantes,* 267 Fed.Appx. 741, 744 n. 2 (10th Cir.2008) (in denying a request for a COA for a § 2255 motion, stating that the petitioner "never renewed his motion [for discovery and an evidentiary hearing], so the responsibility for this outcome lies with him"). We are persuaded by those cases. We also note that placing the burden on the party that has sought jurisdictional discovery is in accord with the general approach of at least three other circuits—the Fifth, Seventh, and Ninth Circuits. *See Freeman v. United States,* 556 F.3d 326, 341–42 (5th Cir.), *cert. denied,* —— U.S. ——, 130 S.Ct. 154, 175 L.Ed.2d 39 (2009); *Boschetto v. Hans-*

*1190 BMG did not renew its motion for discovery at the evidentiary hearing. That alone makes us inclined to find that BMG bears the responsibility for any purported evidentiary deficiencies at the hearing and effectively forfeited its challenge. But there is more.

At the evidentiary hearing, BMG stipulated to the admissibility of approximately seventy-one exhibits. Counsel for BMG then essentially conceded that BMG had not been prejudiced by the lack of discovery. Not only did counsel express a desire to go forward with the hearing, but in response to the district

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ing, 539 F.3d 1011, 1020 (9th Cir.2008); *Searls v. Glasser,* 64 F.3d 1061, 1068–69 (7th Cir.1995). Requiring the party challenging the denial of jurisdictional discovery to prove prejudice is particularly fitting when a party has challenged the district court's subject matter jurisdiction on immunity grounds. In that context, we have concerns about burdening the potentially sovereign party with discovery, as the district court in this case recognized. *Cf. Freeman,* 556 F.3d at 341 (in discussing the burden the Fifth Circuit places on a party seeking discovery on summary judgment to show that discovery is necessary, stating that "[t]his is particularly true where the party seeking discovery is attempting to disprove the applicability of an immunity-derived bar to suit because immunity is intended to shield the defendant from the burdens of defending the suit, including the burdens of discovery"); *Arriba Ltd. v. Petroleos Mexicanos,* 962 F.2d 528, 534 (5th Cir.1992) (discussing tension between discovery and protecting a sovereign's legitimate claim to suit and stating that "[a]t the very least, discovery should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination"); *cf. also Mitchell v. Forsyth,* 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) (noting that one purpose of resolving qualified immunity early in the litigation is "to avoid subjecting government officials ... to the burdens of broad-reaching discovery" (alteration omitted) (internal quotation marks omitted)).

court's inquiry about the missing witnesses, counsel stated that, based solely on the evidence presented at the hearing, he was "confident ... that the Court will see how the documents at hand, in particular one document, ... establishes this case." Aplee. Supp.App. at 123.

Furthermore, BMG does not tell us what specific documents it would have sought in discovery. Nor does BMG offer any support for its claim that the Authority and the Casino "cherry picked" documents they believed were favorable to their claim of tribal immunity. *See Freeman,* 556 F.3d at 342 ("The party seeking discovery typically ... alleg[es] the 'specific facts crucial to immunity which demonstrate[ ] a need for discovery.' " (second alteration in original) (quoting *Kelly v. Syria Shell Petroleum Co. B.V.,* 213 F.3d 841, 852 (5th Cir.2000))); *Boschetto,* 539 F.3d at 1020 (holding that the district court's denial of a request for jurisdictional discovery was not an abuse of discretion where the request "was based on little more than a hunch that it might yield jurisdictionally relevant facts"); *cf. Garcia v. U.S. Air Force,* 533 F.3d 1170, 1179 (10th Cir.2008) ("A party may not invoke Rule 56(f) 'by simply stating that discovery is incomplete but must state with specificity how the additional material will rebut the summary judgment motion.' " (quoting *Libertarian Party of N.M. v. Herrera,* 506 F.3d 1303, 1308–09 (10th Cir.2007))). Indeed, BMG's conclusory assertion that jurisdictional discovery was necessary seems almost like an attempt to "use discovery as a fishing expedition" rather than to obtain needed documents to defeat the tribal immunity claim. *Anthony v. United States,* 667 F.2d 870, 880 (10th Cir.1981).

We also fail to see how the district court abused its discretion in effectively preventing BMG from examining certain witnesses.[12] At the evidentiary hearing, when asked to make a proffer as to what those witnesses' testimony would have been, counsel was unable to explain how Mr. Livingston's or Ms. Jackson's testimony would have differed from Mr. Graham's. *Cf. Polys,* 941 F.2d at 1406–11 (finding that the district court did not err in excluding deposition testimony because plaintiffs did not make an offer of proof). And BMG does not explain on appeal what *1191 the value of the missing witnesses' testimony would have been, particularly in light of the fact that BMG had the opportunity to examine a higher-ranked tribal official, the tribal Chairperson. BMG offers no support for its conclusory assertion that Mr. Graham was not as knowledgeable as the missing witnesses about the Authority and the Casino. Because we conclude that the district court did not abuse its discretion in its denial of jurisdictional discovery, we will therefore proceed to determine

[12] It is not entirely clear from the record whether the district court took an affirmative action that amounted to a ruling that BMG was not permitted to call Mr. Livingston and Ms. Jackson. BMG's counsel objected to the witnesses' absence, and the district court permitted him to make a proffer as to their probable testimony. Counsel stated that he "c[ould] not say how Mr. Livingston would testify differently [than] Mr. Graham." Aplee. Supp.App. at 149. The court never made an explicit ruling, but we conclude that the court must have decided tacitly that it would not allow BMG to call those witnesses at a later date because it then heard closing arguments and issued a ruling without comment. We will therefore analyze BMG's challenge under the assumption that the district court denied BMG the opportunity to call those witnesses.

whether the facts support the Authority and the Casino's claim that they are subordinate economic entities entitled to tribal sovereign immunity.

b. Whether the Authority and the Casino are subordinate economic entities that share in the Tribe's sovereign immunity.

As we have stated, we will review the record in light of the following factors: (1) the method of the Authority and the Casino's creation; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the Tribe has over the entities; (4) whether the Tribe intended for them to have tribal sovereign immunity; (5) the financial relationship between the Tribe and the Authority and the Casino; and (6) whether the purposes of tribal sovereign immunity are served by granting them immunity.[13]

[13] Although the district court did not evaluate all of these factors because it erroneously concluded that the financial relationship between the Tribe and the Authority and the Casino was dispositive, we do not choose to remand this case for the district court to weigh them in the first instance. Because these factors were part of the *Johnson* test, the district court received evidence sufficient for us to evaluate these factors on appeal. Moreover, because the balance of the factors weighs so strongly in favor of immunity—as we discuss *infra*—it would be an imprudent allocation of judicial resources to remand this matter.

We also note that in evaluating these factors, we need not decide whether the Authority and the Casino are located on Indian lands. BMG vigorously argues that they are not, contending that their purported location outside of Indian land undermines their claim that their operations further tribal economic development and self-determination. *See* Aplee. Answer & Opening Br. at 29 ("While the Resort Parties argue that grant-

The first factor, the method of creation of the Authority and the Casino, weighs in favor of the conclusion that these entities are entitled to tribal sovereign immunity. The parties stipulated that the Tribe created the Authority under tribal law. It is also evident from our review of the tribal resolution creating the Authority that the Tribe created those entities under its constitution. As in *Native American Distributing,* "[t]his lends support to the conclusion that [the Authority] was created by the Tribe acting in its governmental ... capacity." 546 F.3d at 1294. We also ***1192** find the Tribe's own descriptions of the Authority to be significant. The resolution described the Authority as "a body corporate and politic and an instrumentality of the Tribal Government and an authorized agency of the Tribe." Aplts. App.

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ing immunity will promote 'tribal economic development, self sufficiency, and strong tribal governments,' they do not address how compelling a separate business entity that operates outside of 'Indian Lands' to comply with U.S. copyright and trademark laws will weaken its government, cause it to be less self-sufficient, or will impact its economic development." (quoting Aplts. Opening Br. at 12)). However, this factor did not appear to be a significant one to the *Native American Distributing* court; it did not discuss whether SCTC was located on Indian lands. Consequently, we do not feel obliged to give it independent consideration in our tribal immunity analysis here. Furthermore, even if the Authority and the Casino were not located on Indian land, we suspect that this fact would not avail BMG in the tribal immunity analysis. *See Kiowa Tribe of Okla.,* 523 U.S. at 758, 118 S.Ct. 1700 (rejecting the invitation to "confine it [i.e., the doctrine of tribal sovereign immunity] *to reservations* or to noncommercial activities" (emphasis added)); Cohen, *supra,* § 21.02[2] at 1285 ("Tribal sovereign immunity extends to *off-reservation activities* of the tribe and applies to both governmental and commercial activities." (emphasis added)).

at 126. That same language was used in the ordinance establishing and governing the Authority, which originally provided that the "Authority is and shall be considered a body corporate and politic and instrumentality of the Picayune Rancheria of Chukchansi Indians ... and shall be deemed an authorized agency of the Tribe." *Id.* at 129. That provision was later amended to describe the Authority as "a wholly owned unincorporated enterprise of the Tribe [which] shall be deemed an authorized agency of the Picayune Rancheria of Chukchansi Indians." *Id.* at 135. We agree with the Authority and the Casino that the change in terminology seems intended to remove the reference to them as "corporate" entities and, consequently, to emphasize that they are subordinate entities of the Tribe and not separate corporations. And the categorization of the Authority as "a wholly owned ... enterprise of the Tribe" naturally suggests that the Authority enjoys a close relationship to the Tribe.

The second factor also weighs strongly in favor of immunity because the Authority and the Casino were created for the financial benefit of the Tribe and to enable it to engage in various governmental functions. The resolution states that "the Tribal Council has determined that it is in the best interests of the members of the Tribe for the Tribe to conduct Class II and Class III gaming."[14] Aplts. App. at 126. It also

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[14] We acknowledge that the IGRA provides for the creation and operation of Indian casinos to promote "tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). Moreover, one of the principal purposes of the IGRA is "to ensure that the Indian tribe is the primary beneficiary of the gaming operation." *Id.* § 2702(2). But we decline to

states that "the Tribal Council has determined that it is in the best interest of the Tribe and its members to create a Tribal Economic Development Authority as a body corporate and politic and an instrumentality of the Tribal Government and an authorized agency of the Tribe to develop and own the Casino ... and to manage all assets and revenues" of the Casino. *Id.* Similarly, the tribal ordinance states that the "Authority ... is created by the Tribal Council to act on behalf of the Tribe ... for the following purposes," including "further[ing] the economic prosperity of the Tribe." *Id.* at 128.

The allocation of revenue from the Casino clearly benefits the Tribe: 50% goes to tribal governmental functions, including programs such as education, health care, cultural preservation, child care, judicial

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adopt a blanket rule proposed by the Authority and the Casino that "the IGRA dictates that the Authority and the Casino must be considered tribal entities protected from suit under the doctrine of tribal immunity." Aplts. Opening Br. at 14. The purposes of Indian gaming certainly are relevant to our analysis, and the fact that gaming is both generally intended to benefit the tribe and is in this case used to fund the Tribe's governmental functions weighs in favor of immunity. *See Gavle,* 555 N.W.2d at 295 (recognizing "the unique role that Indian gaming serves in the economic life of here-to-fore impoverished Indian communities across this country"). But it is equally true that some casinos are run by management companies, as in *Johnson,* and we are unable to say that in every case, Indian gaming under the IGRA would automatically mean that all economic entities associated with gaming would be sufficiently closely related to the Tribe to share in its sovereign immunity. Although *Native American Distributing* did not involve Indian gaming, that decision nevertheless demonstrates that a multi-factor analysis, rather than a per se rule, is best suited to our examination of the sometimes-complicated relationship between an Indian tribe and its economic entities.

*1193 systems, and law enforcement; 15% is allocated for tribal economic development and is intended to enable the Tribe to diversify in order "to reduce the Tribe's dependancy on revenues from a Gaming Facility"; 10% goes to a tribal trust fund, which "guarantee[s] for the future a basic level of economic security for Tribal families"; and 25% is distributed among each eligible member of the tribe as per capita payments. *Id.* at 152–53 (Gaming Revenue Allocation Ordinance, adopted Aug. 16, 2007).

In a letter to the Bureau of Indian Affairs dated August 20, 2007, Mr. Graham reiterated that "we believe self-sufficiency is once again within our reach"; he stated that the Tribe would use the Casino's revenue to "encourag[e] our young people to improve their own capacities through education," and indicated that the Tribe "plan[ned] to provide extra care and benefits to our youth and our elders through Tribal programs." Aplts. App. at 146–47. Similarly, a Memorandum of Understanding between the Tribe and the County of Madera, California, states that "the purpose of the [Casino] is to promote the Tribal economic development, self-sufficiency, self-determination, strong Tribal government, and the ability to provide services and benefits to Tribal members." Aplee. Supp.App. at 55. The gaming compact between the Tribe and the State of California contains similar statements about the purpose of the Tribe's engagement in gaming.

The third factor in our analysis, the structure, ownership, and management of the Authority and the Casino, weighs both for and against a finding of immunity. The seven members of the Board of Direc-

tors of the Authority are members of the Tribe who also are sitting members of the Tribal Council, which makes the Tribe's Council identical to the Authority's Board. The Chairperson of the Tribe also acts as the Chairperson of the Authority. But the Chief Financial Officer of the Authority, the General Manager of the Casino, and the Chief Financial Officer of the Casino are not tribal members. Moreover, the Casino has fifteen directors, twelve of whom are not Tribal members.

As for the fourth factor, we conclude that the Tribe clearly intended for the Authority to have tribal sovereign immunity.[15] The tribal ordinance governing the Authority states that the Authority is empowered "[i]n connection with any contractual obligation of the Authority, to waive the Authority's sovereign immunity from suit, to consent to the jurisdiction of any court over the Tribe, or to consent to the levy of any judgment, [or] lien attachment upon any property or income of the Authority." Aplts. App. at 130. The ordinance continues, in a provision la-

[15] It is less clear to us that the Tribe intended for the Casino also to have immunity. But because the Casino is wholly owned by the Authority, it is logical to assume that if the Tribe intended for the Authority to have immunity from suit, it also intended for the Casino to have immunity. Otherwise, a suit against the Casino would be fruitless—the Authority owns all of the Casino's assets and can choose not to waive its own immunity. In their briefs, the Authority and the Casino almost exclusively discuss the Authority and appear to assume that the Casino may be treated similarly to or as a derivative creature of the Authority. Even BMG acknowledges that "[i]t is uncertain if the [Casino] is a separate entity from the Authority." Aplee. Answer & Opening Br. at 13. When asked whether the two were separate, Mr. Graham testified "[p]robably not." Aplee. Supp.App. at 144.

beled "Sovereign Immunity,"

> [a]s a body corporate and politic and instrumentality and authorized agency of the Tribe, the Authority shall be clothed by federal and tribal law with all the privileges and immunities of the *1194 Tribe, including sovereign immunity from suit in any state, federal, or tribal court. Nothing contained in this Section shall be deemed or construed to be a waiver of sovereign immunity by the Authority from suit, which may be waived only in accordance with this Section.

Id. at 131. That provision was later amended to describe the Tribe as "a wholly owned unincorporated enterprise and agency of the Tribe," but the rest of the language remains the same. *Id.* at 135. The ordinance explicitly waives the Authority's sovereign immunity "in accordance with the terms of the Project and Financing Documents," but as to other instances, it provides that

> [t]he Authority may waive its sovereign immunity when necessary, in the best business judgment of the Board of Directors, to secure a substantial advantage or benefit for the Authority or the Tribe. Any waiver of sovereign immunity shall be specific and limited as to (i) duration, (ii) the grantee, (iii) the scope of the waiver, (iv) nature and description of the property or funds, if any, of the Authority, available to satisfy any order or judgment, (v) a particular court or courts having jurisdiction over the Authority, and (vi) the law that shall

be applicable thereto. Any express waiver of sovereign immunity by resolution or contract of the Authority shall not be deemed a waiver of the sovereign immunity of the Tribe.

Id. at 131. Accordingly, much like in *Native American Distributing,* the Tribe "clearly expressed its belief that [the Authority] was a division of the Tribe that was entitled to its immunity from suit." 546 F.3d at 1294.

We also find that the fifth factor, the financial relationship between the Tribe and the entities, weighs in favor of tribal sovereign immunity. Significantly, we note that BMG appears to acknowledge that the district court's determination that the Authority was obligated to pay the Tribe a minimum payment of $1 million per month was error. *See* Aplee. Answer Br. & Opening Br. at 12–13, 26 ("It is also important to note that there is no mandatory $1,000,000 payment."). That minimum payment was a key fact that the district court relied upon in its analysis.

In denying the Authority and the Casino's motion to dismiss, the district court stated that "the Authority is obligated to pay over to the Tribe at least $1 million per month, regardless of its actual revenues." Aplts. App. at 46. Therefore, the court reasoned, "should the actual profits fall short, the Authority will borrow or run a deficit to ensure that the Tribe receives that which it is entitled to," *id.* at 47, and, as a consequence, "the judgment would neither deprive the Tribe of its asset—the right to receive profits—nor its guaranteed minimum payment," *id.* at 48.

However, Mr. Graham testified at the evidentiary hearing that if the Authority did not have the funds to cover the payment due to a decrease in Casino revenue, that payment "wouldn't happen." Aplee. Supp.App. at 147–48. Furthermore, an auditor's report explains the "minimum guaranteed monthly payment" as follows: "[T]he monthly payments to the Tribe from the Casino *may* be *up to* $1,000,000 per month cumulatively...." *Id.* at 85 (emphasis added). Moreover, "the Authority introduced exhibits at the Evidentiary Hearing that reveal that it has previously failed to pay the Tribe the alleged mandatory $1,000,000 monthly payment for a number of months without any adverse consequences." Aplee. Answer Br. & Opening Br. at 26 (citing Aplee. Supp.App. at 53). Thus, we conclude from our review of the record that the district court's finding concerning the minimum payment was clearly erroneous.

*1195 Keeping that error in mind, the evidence reveals that the Tribe depends heavily on the Casino for revenue to fund its governmental functions, its support of tribal members, and its search for other economic development opportunities. One hundred percent of the Casino's revenue goes to the Authority and then to the Tribe. Therefore, as Mr. Graham testified, any reduction in the Casino's revenue that could result from an adverse judgment against it would therefore reduce the Tribe's income.

And, finally, we conclude that the sixth factor, the overall purposes of tribal sovereign immunity, is served by a conclusion that the Authority and the Casino have such immunity. They are so closely related to the Tribe that their "activities are properly

deemed to be those of the tribe." *Allen,* 464 F.3d at 1046. The Authority and the Casino plainly promote and fund the Tribe's self-determination through revenue generation and the funding of diversified economic development. *See, e.g., Cabazon Band of Mission Indians,* 480 U.S. at 218–19, 107 S.Ct. 1083; *Allen,* 464 F.3d at 1046–47; *Gavle,* 555 N.W.2d at 294–95; *Trudgeon,* 84 Cal.Rptr.2d at 70. Not only has "Congress ... expressed a strong policy in favor of encouraging tribal economic development," Note, *Tribal Sovereign Immunity: Searching for Sensible Limits, supra,* at 186, but extending immunity to the Authority and the Casino "directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general," *Allen,* 464 F.3d at 1047. In comparison, "[c]ases which have not extended immunity to tribal enterprises typically have involved enterprises formed 'solely for business purposes and without any declared objective of promoting the [tribe's] general tribal or economic development.' " *Trudgeon,* 84 Cal.Rptr.2d at 70 (alteration in the original) (quoting *Dixon,* 772 P.2d at 1110).

After considering these factors, it is patent to us that the Authority and the Casino are so closely related to the Tribe that they should share in the Tribe's sovereign immunity. Under these circumstances, we must conclude that the district court clearly erred in finding that the Authority and the Casino were not subordinate economic entities entitled to tribal sovereign immunity.[16] We consequent-

[16] We are not persuaded otherwise by the portions of the ordinance that the district court found so compelling. For example, the district court discussed the provision in the ordinance that states that the Authority shall be exempt from taxes "to the

ly reverse the district*1196 court's denial of the motion to dismiss; the Authority and the Casino (and

same extent as the Tribe, and for such purposes shall not be deemed to be an entity or enterprise taxable separate from the Tribe." Aplts. App. at 138. That provision goes on to say that "[f]or all other purposes of the [Casino], its ownership and operation, the Authority shall be considered a separate entity." *Id.* at 139. The district court also relied upon liability-limiting language in the ordinance, which reads: "For the purposes of all liabilities and obligations incurred in the name of the Authority or arising from the Authority's ownership or operation of the [Casino], the Authority shall constitute a separate entity, and no other Tribal Party shall be obligated thereon except as such party may otherwise expressly agree." *Id.* Those provisions merely demonstrate that the Authority and the Casino are not the Tribe itself, but are separate entities. Other provisions demonstrate that fact, as well—for example, the ordinance provides that the Authority's waiver of sovereign immunity waives it only as to the Authority and does not necessarily waive the Tribe's immunity. *See id.* at 131 ("Any express waiver of sovereign immunity by resolution or contract of the Authority shall not be deemed a waiver of the sovereign immunity of the Tribe."). But that does not change our sovereign immunity analysis. The Authority and the Casino may, as subordinate economic entities, share in the Tribe's immunity without being the same as, or indistinguishable from, the Tribe. If that were not true, there would be no need for the subordinate economic enterprise doctrine. Even if we assume *arguendo* that those provisions should weigh against a finding of immunity in our analysis, they cannot outweigh the balance of factors that weigh in favor of immunity.

We also are not convinced by BMG's contention that the Authority and Casino's insurance policies protect the Tribe from being financially responsible for, or harmed by, an adverse judgment against them, and weigh against a finding of immunity. Even if the insurance policies would provide coverage in this instance, which is far from certain, we would nevertheless conclude that this fact does not outweigh the balance of the other factors in favor of immunity.

thus Mr. Stanley) are protected from suit by tribal sovereign immunity.

Therefore unless they have waived their immunity,[17] the complaint against the Authority, the Casino, and Mr. Stanley should be dismissed for lack of subject matter jurisdiction. Because the district court concluded that the Authority and the Casino were not entitled to tribal sovereign immunity, it did not address BMG's alternative argument—*viz.,* that those entities had waived whatever immunity they possessed by entering into BMG's licensing agreements containing forum-selection clauses. We conclude that the most prudent course is to remand the case for the district court to address waiver in the first instance. *See Apartment Inv. & Mgmt. Co. (AIMCO) v. Nutmeg Ins. Co.,* 593 F.3d 1188, 1198 (10th Cir.2010) (recognizing that the "better practice" is to remand issues raised but not ruled on by the district court in the first instance).

II. *BMG's "Protective" Cross–Appeal*

BMG also raised the issue of waiver in what it calls a "protective" cross-appeal. Specifically, BMG cross-appealed "to preserve, as an additional or alternative basis for affirming that portion of the District Court's order of August 6, 2008[,] finding that Appellants could not invoke tribal sovereign immunity, the issue that Appellants also waived any claim of tribal sovereign immunity by executing the two license agreements with Breakthrough Management."

[17] BMG does not contend that Congress has abrogated the immunity of these entities.

Aplee./Cross–Aplt. Mem. Br. Jurisdiction, Attach. BMG0093 (Notice of Protective Cross–Appeal, filed Sept. 3, 2008). BMG argues that this court should exercise pendent appellate jurisdiction over its cross-appeal because the issue of waiver is "inextricably intertwined" with the Appellants's interlocutory appeals. Aplee./Cross–Aplt. Mem. Br. Jurisdiction at 18–19. BMG contends that there is a single issue at stake: "whether Appellants are entitled to assert tribal sovereign immunity as a defense." *Id.* at 18.

BMG states in the alternative that "[e]ven if the claims ... *were not* 'inextricably intertwined,' pendent jurisdiction still would be appropriate here, because review of the cross-appeal is necessary to ensure meaningful review of Appellants' claims of tribal sovereign immunity." *Id.* at 19. BMG maintains that if its argument regarding waiver is later found to be correct on subsequent appeal, that would render this court's review of the instant appeal meaningless. *Id.* BMG also contends that the only way it could raise the issue of waiver is through a cross-appeal because it "asks the Court to affirm on grounds that might enlarge the rights afforded the prevailing party" (i.e., the Tribe may be affected by this court's ruling that the parties to this appeal had waived any sovereign immunity they possessed). *Id.* at 13, 16.

We are unpersuaded. We conclude that it would be improper for us to exercise pendent jurisdiction over BMG's cross-appeal.***1197** "We have recognized that the exercise of pendent appellate jurisdiction 'is generally disfavored.' " *Timpanogos Tribe v. Conway,* 286 F.3d 1195, 1200 (10th Cir.2002) (quoting *Armijo ex rel. Chavez v. Wagon Mound Pub. Schs.,* 159 F.3d

1253, 1264 (10th Cir.1998)). "This court has stated it will take pendant [sic] jurisdiction over an interlocutory appeal only where the otherwise nonappealable decision is inextricably intertwined with the appealable decision, or where review of the nonappealable decision is necessary to ensure meaningful review of the appealable one." *Tarrant Reg'l Water Dist. v. Sevenoaks,* 545 F.3d 906, 915 (10th Cir.2008) (quoting *Timpanogos Tribe,* 286 F.3d at 1200) (internal quotation marks omitted); *see United Transp. Union Local 1745 v. City of Albuquerque,* 178 F.3d 1109, 1114 (10th Cir.1999) (noting that the exercise of pendent jurisdiction is discretionary and should be used sparingly); *Armijo,* 159 F.3d at 1264 (same).

Issues are inextricably intertwined if "the pendent claim is coterminous with, or subsumed in, the claim before the court on interlocutory appeal—that is, when the appellate resolution of the collateral appeal *necessarily* resolves the pendent claim as well." *Moore v. City of Wynnewood,* 57 F.3d 924, 930 (10th Cir.1995); *see Malik v. Arapahoe Cnty. Dept. of Social Servs.,* 191 F.3d 1306, 1317 (10th Cir.1999) ("Accordingly, our application of the 'inextricably intertwined' standard for exercising pendent jurisdiction over interlocutory appeals must be narrowly focused on those claims the review of which would *not* require the consideration of legal or factual matters distinct from those raised by the claims over which we unquestionably have jurisdiction." (emphasis added)).

As clearly evident from our decision to remand the issue of waiver to the district court, *supra,* we do not view the waiver issue as being inextricably intertwined with the question of whether the Authority and the Casino share in the Tribe's sovereign immunity. Our decision concerning the latter issue does not "necessarily resolve[ ] the pendent [waiver] claim as well." *Moore,* 57 F.3d at 930. The immunity and waiver issues are distinct. *See Sac & Fox Nation v. Hanson,* 47 F.3d 1061, 1064 (10th Cir.1995) ("[I]f the Nation was entitled to sovereign immunity, it did not waive its immunity from suit. We must therefore address the predicate question of whether the Nation had sovereign immunity in the first instance."); *see also Gonzalez v. 7th St. Casino,* No. 09–2674–CM, 2010 WL 1875734, at *2 (D.Kan. May 5, 2010) ("Whether an entity is entitled to tribal sovereign immunity to begin with is a separate issue from whether immunity has been waived."); *Bales v. Chickasaw Nation Indus.,* 606 F.Supp.2d 1299, 1305–06 (D.N.M.2009) (as to that case, noting that "waiver is not an issue but rather the issue is whether there is tribal sovereign immunity to begin with"). Our resolution of the former issue (i.e., the availability of tribal sovereign immunity) involves consideration of the relationship between the Tribe and the Authority and the Casino, whereas our resolution of the latter (i.e., waiver of any tribal sovereign immunity) calls for consideration of the effect of the forum-selection clauses of the license agreements. *See* Aplts./Cross–Aplees. Mem. Br. Jurisdiction at 10 ("[T]he appeal only requires the Court to examine the relationship between Appellants and the Tribe. The effect, if any, of BMG's license agreement is a separate claim under a separate legal theory."). Furthermore, our decision concerning sovereign immunity will stand as meaningful precedent involving complicated Indian-law issues, irrespective of the ultimate

conclusion concerning waiver before the district court or in any subsequent appeal.

*1198 BMG is free to litigate the waiver issue before the district court and to appeal from an adverse ruling on this issue. BMG's suggestion that it must raise this issue on cross-appeal because of the possible impact of a waiver ruling on the Tribe's claim of immunity is misguided.[18] A cross-appeal ordinarily

[18] In making this argument, BMG relies upon our decision in *Housing Authority of Kaw Tribe of Indians of Oklahoma v. City of Ponca City,* 952 F.2d 1183 (10th Cir.1991). Specifically, BMG contends that "the Tenth Circuit has warned that filing a cross-appeal is necessary when resolution of an issue potentially diminishes the rights of absent third parties." Aplee./Cross–Aplt. Mem. Br. Jurisdiction at 20. *Housing Authority of Kaw Tribe,* however, is distinguishable. There, we rejected the city defendant's contention that we should affirm on the alternative ground of res judicata because the city failed to file a cross-appeal. In particular, we stated: "Were we to affirm the original judgment on the basis of res judicata, other potential plaintiffs having some relationship with the Authority might unfairly be precluded from bringing claims against Ponca City." *Hous. Auth. of Kaw Tribe,* 952 F.2d at 1195. It is significant, however, that the alternate ground for affirmance advanced in *Housing Authority of Kaw Tribe* was res judicata. As the Supreme Court decision that we relied upon there indicates, "[u]nder res judicata, a final judgment on the merits bars further claims by parties *or their privies* based on the same cause of action." *Montana v. United States,* 440 U.S. 147, 153, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979) (emphasis added). If we were to affirm the district court's sovereign immunity order under a waiver rationale, the Tribe—not subject to the terms of that order nor a party to this appeal—would not necessarily and unfairly have its rights lessened by operation of law, as apparently could have been the situation with the potential future litigants in *Housing Authority of Kaw Tribe.* Relatedly, BMG's rights would not be enlarged necessarily by operation of law by an affirmance on a waiver rationale. Accordingly, *Housing Authority of Kaw Tribe* is dis-

would be appropriate where a litigant seeks to enlarge his rights conferred by the original judgment or to lessen the rights of his adversary under that judgment. *United States v. Am. Ry. Exp. Co.,* 265 U.S. 425, 435, 44 S.Ct. 560, 68 L.Ed. 1087 (1924) ("[T]he appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below."); *see June v. Union Carbide Corp.,* 577 F.3d 1234, 1248 n. 8 (10th Cir.2009) ("Under the cross-appeal rule, 'an appellate court may not alter a judgment to benefit a nonappealing party.' " (quoting *Greenlaw v. United States,* 554 U.S. 237, 244, 128 S.Ct. 2559, 171 L.Ed.2d 399 (2008)).

In the context of an interlocutory appeal, the functional equivalent of the original judgment is the interlocutory order appealed from—*viz.,* in this instance, the district court's order denying sovereign immunity to the Authority and the Casino. *See Behrens v. Pelletier,* 516 U.S. 299, 307, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996) ("[A]n order rejecting the defense of qualified immunity at either the dismissal stage or the summary judgment stage is a 'final' judgment subject to immediate appeal."); *Roska ex*

tinguishable. Be that as it may, perhaps more importantly, we have concluded that the waiver issue is not inextricably intertwined with the tribal immunity issue raised in the principal (interlocutory) appeal. Therefore, even if BMG could cogently argue that the waiver issue needed to be raised in a cross-appeal because it might enlarge its rights, we have determined that it would not be appropriate for us to exercise pendent jurisdiction over any cross-appeal involving the waiver issue because that issue is not inextricably intertwined.

rel. Roska v. Sneddon, 437 F.3d 964, 970 (10th Cir.2006) ("Although we have jurisdiction over Defendants' appeal from the district court's denial of their motion for summary judgment on qualified immunity, we decline to assert pendent appellate jurisdiction over Defendants' claim that the district court failed to apply *1199 a local rule."); *see also* 15A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3904, at 221 (Supp. 2010) ("Interlocutory appeals may present special challenges in cross-appeal practice.... [T]he appeal may properly be confined to matters that relate closely to *the order that supports the appeal.*" (emphasis added)).

As the Authority and the Casino correctly note, "BMG's 'right' conferred by that [interlocutory immunity] order is the right to maintain its lawsuit *against these two defendants.*" Aplts./Cross–Aplees. Mem. Br. Jurisdiction at 12 (emphasis added). If BMG were successful on its waiver argument, that right would not be enlarged. Accordingly, we decline to assert pendent jurisdiction over BMG's waiver-based cross-appeal, and, accordingly, dismiss it.

CONCLUSION

For these reasons, we **REVERSE** the district court's orders denying the Authority and the Casino's motion to dismiss and the motion to dismiss of Mr. Stanley, and **REMAND** for further proceedings consistent with this opinion. We **DISMISS** the cross-appeal of BMG for lack of jurisdiction.

C.A.10 (Colo.),2010.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Honorable Marcia S. Krieger

Civil Action No. 06-cv-01596-MSK-KLM

BREAKTHROUGH
MANAGEMENT GROUP, INC.,

Plaintiff,

v.

CHUKCHANSI GOLD CASINO AND RESORT, JEFF LIVINGSTON, PICAYUNE RANCHERIA OF THE CHUKCHANSI INDIANS, THE CHUKCHANSI ECONOMIC DEVELOPMENT AUTHORITY, RYAN STANLEY, and VERNON D'MELLO,

Defendants.

OPINION AND ORDER DENYING, IN PART, MOTION TO DISMISS, AND DENYING MOTION FOR RECONSIDERATION

THIS MATTER comes before the Court pursuant to Defendants Chukchansi Gold Casino and Resort ("the Casino") and Chukchansi Economic Development Authority's ("the Authority") Motion to Dismiss (# 19), the Plaintiffs' response (# 44), and the Casino and the Authority's reply (# 52). By Order dated September 12, 2007 (# 83), the Court reserved

ruling on this motion as it related to the Casino and the Authority, and on October 23, 2007, conducted an evidentiary hearing (# 103, 104) to address certain factual disputes relevant to the determination of the motion. Thereafter, the parties filed a stipulation (# 105) agreeing to additional relevant facts.

Also pending before the Court are the Plaintiffs' Motion for Reconsideration (# 99) of portions of the September 12, 2007 Order, to which no responsive papers have been filed; and the Plaintiff's Motion to Strike (# 107) a letter (# 106) filed by the Authority purporting to set forth facts that the Authority believes are undisputed but to which the Plaintiff refuses to agree, the Authority's response (# 108) to the Motion to Strike, and the Plaintiff's reply (# 110).

FACTS

The operative facts are set forth in some detail in the Court's September 12, 2007 Order, and to the extent relevant, are deemed incorporated herein. In summary, the Plaintiffs contend that the Casino, an gambling entity operated by the Chukchansi Indians ("the Tribe"); the Authority, the corporate entity through which the Tribe operates the casino; and Defendant Stanley, an individual officer of the Casino, unlawfully reproduced the Plaintiff's online educational programming and distributed it to the casino's staff without the Plaintiff's authorization and without compensation to the Plaintiff. The Plaintiff asserts a variety of claims sounding in federal copyright and trademark law, various common-law torts, breach of contract, and violation

of the Colorado Consumer Protection Act, among others.

The Casino, the Authority, and the Tribe, which had been named as a defendant, filed a Motion to Dismiss (# 19), asserting that all three entities were entitled to invoke the Tribe's sovereign immunity. The Plaintiff opposed the motion and requested leave to conduct discovery into the status of the Tribe's immunity. In its September 12, 2007 Order, the Court granted the motion with respect to the Tribe, rejecting the Plaintiff's argument that the Tribe had waived its sovereign immunity by agreed to a venue clause in the Plaintiff's End User License Agreement. Finding that there were disputed questions of fact that bore on whether the Casino and the Authority were entitled to share in the Tribe's immunity, the Court reserved ruling on their portion of the motion to dismiss, and conducted an evidentiary hearing with regard to those factual issues. Having considered the evidence adduced at that hearing, the parties' stipulation as to additional facts,[1] and the parties' written and oral arguments,

[1] On the same day that the parties filed a stipulation of additional facts, the Authority filed a Letter (# 106) with the Court, explaining that it believed that 53 additional facts were not disputed, but that the Plaintiff would not stipulate to those facts. The Authority attached a list of those 53 facts to the letter. The Plaintiff responded by moving to strike (# 107) the letter, arguing that the letter constituted a supplemental brief for which leave to file had not been sought or granted, and that it violated certain Local Rules of this Court, including D.C. Colo. L. Civ. R. 7.1(A) and 10.1.

The Court agrees, at least in principle, with the Plaintiff Regardless of the reasons therefor, if the parties

the Court is prepared to rule on the Motion to Dismiss as it relates to the Casino and the Authority.

Separately, the Plaintiff moves for reconsideration pursuant to Fed. R. Civ. P. 60(b) of that part of the Court's September 12, 2007 Order that granted the Tribe's Motion to Dismiss on sovereign immunity grounds. The Plaintiff states that the Gaming Compact between the Tribe and the State of California expressly requires the Tribe to waive its sovereign immunity for civil claims arising out of casino operations. The Plaintiff acknowledges that it has yet to obtain a copy of the actual Tribal ordinance that effectuates the promised waiver of sovereign immunity, and requests that the Court vacate that portion of the September 12, 2007 Order that found the Tribe entitled to sovereign immunity, and reserve ruling on that issue until the Plaintiff has had an opportunity to engage in additional discovery.

ANALYSIS

cannot stipulate to the existence of a fact, it is not a fact. Rather, it is a point of dispute that will require resolution by the Court. Thus, a listing of "facts" that are disputed is nothing more than a statement of one side's position the functional equivalent of a brief. The Motion to Dismiss was already fully briefed, and neither party requested leave to file supplemental written briefing after the evidentiary hearing. Thus, the Court treats the Authority's letter as an unauthorized supplemental brief, and has disregarded it in its entirety. "Striking" of the brief, even if authorized under Fed. R Civ. P. 12(f) (which, by its terms, applies only to "pleadings"), is unnecessary, as the Court has not considered the document. Accordingly, the Motion to Strike is denied as moot.

A. Sovereign Immunity as to the Casino and the Authority

The Court reserved ruling on the Casino and the Authority's contention that they — despite being non-Indian entities — were nevertheless entitled to enjoy the Tribe's sovereign immunity. The Court found that question of whether a non-Indian entity could invoke an Indian tribe's sovereign immunity turned on the 10-factor analysis articulated in *Johnson v. Harrah's Kansas Casino Corp.,* 2006 WL 463138 (D. Kan. 2006) (unpublished). Those factors are: (i) the announced purpose for which the entity was formed; (ii) whether the entity was formed to manage or exploit specific tribal resources; (iii) whether federal policy protecting Indian assets is furthered by extending sovereign immunity to the entity; (iv) whether the entity is organized under the Tribe's laws or under federal law; (v) whether the entities purposes are similar to or serve tribal government; (vi) whether the entity's governance is drawn mainly from tribal officials; (viii) whether tribal officials exercise control over the organization; (ix) whether the Tribe has the power to dismiss members of the organization's governance; and (x) whether suit against the entity would impact the Tribe's fiscal resources. The court in *Johnson* treated the final factor — whether the Tribe will be financially liable for legal obligations incurred by the Casino and the Authority — as a threshold matter, reaching the remaining factors only if it were shown that a judgment against the entities would result in financial liability for the Tribe.

The Authority owns and operates the Casino.

The Authority is governed by a board whose membership is identical to the council that governs the Tribe. The Tribal ordinance creating the Authority states that the Authority is exempt from all taxes in the same manner as the Tribe, but "for all other purposes the Authority shall be considered a separate entity" from the Tribe. Mr. Graham, the Chairperson of both the Tribal Council and the Authority, explained that lenders were concerned that a default on loans would not be recoverable against the Tribe. Thus, the Tribe created the Authority as a separate entity that would receive the loans and hold and manage the Casino property. The ordinance creating the Authority contains language protecting the Tribe from claims against the Authority, stating that "For the purpose of all liabilities and obligations incurred in the name of the Authority, the Authority shall constitute a separate entity, and no Tribal party shall be obligated therein." In other words, a judgment imposed against the Authority does not become a liability of the Tribe. Moreover, the ordinance states that "no Authority assets shall be considered owned by the Tribe, and no assets . . . of the Tribe . . . shall be considered those of the Authority."[2]

Thus, revenues derived from the operation of the Casino are deemed to be owned by the Authority, not the Tribe, and the Authority, not the Tribe, owns

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[2] In 2002, the Tribe modified the ordinance creating the Authority to delete language declaring the Authority "an instrumentality of the Tribe" and replace it with language stating that the Authority is "a wholly owned unincorporated enterprise of the Tribe."

all of the assets of the Casino. By the terms of the Authority's articles of incorporation, "For the purpose of all liabilities and obligations incurred in the name of the Authority, the Authority shall constitute a separate entity, and no Tribal party shall be obligated therein." Thus, a judgment imposed against the Authority does not become a liability of the Tribe.

The revenues of the Casino flow to the Authority, which, in turn, supplies them to the Tribe. Thus, a successful claim against the Casino or the Authority would reduce the revenue that would be paid by the Authority to the Tribe. However, the evidence indicates that the Authority is obligated to pay over to the Tribe at least $1 million per month, regardless of its actual revenues. Thus, in months where Casino revenues dip or judgments are imposed against the Casino, the Authority has run a deficit in order to make the required $1 million payment to the Tribe.

Having considered the evidence and the *Johnson* analysis, the Court finds that neither the Casino nor the Authority are entitled to invoke the Tribe's sovereign immunity. Indeed, the record indicates that a judgment against either of the entities will not result in direct financial liability for the Tribe or otherwise imperil the Tribe's assets. Mr. Graham essentially acknowledged that the Authority was created for the purpose of having an entity with assets reachable by creditors, because the creditors would be otherwise unwilling to lend money to the Tribe out of concern that the Tribe's claim of sovereign immunity would be used to defeat any

claim arising out of the loans. Indeed, it is somewhat ironic that the Authority, having been formed to create a non-immune entity for creditors, now claims the right to invoke the Tribe's immunity.

In any event, it is evident to the Court that any judgment imposed against the Casino or the Authority will not reach to the Tribe's assets. The Defendants counsel acknowledged in closing argument that the only Tribal asset that would be endangered by a judgment against the Casino or the Authority would be the Tribe's right to receive the profits from the Casino. However, the asset itself — the right to receive profits — would not be threatened by a judgment against the Authority; only the amount of profits that would be available to turn over to the Tribe would be affected. The record reflects that the Tribe is entitled to receive at least $1 million per month from the Authority, regardless of the Casino's profits, but that should the actual profits fall short, the Authority will borrow or run a deficit to ensure that the Tribe receives that which it is entitled to. Thus, while a judgment against the Authority in this case may result in the Tribe receiving less in profits than it had anticipated, the judgment would neither deprive the Tribe of its asset the right to receive profits — nor its guaranteed minimum payment. Accordingly, the Court cannot find that a judgment against the Authority or the Casino would constitute a liability against the Tribe, and thus, the Court need not reach the remaining *Johnson* factors.

Accordingly, the Court finds that the Casino and the Authority are not entitled to invoke the

Tribe's sovereign immunity, and their Motion to Dismiss on sovereign immunity grounds is denied.

B. Motion for Reconsideration

The Plaintiff seeks reconsideration of the Court's finding that the Tribe itself was entitled to dismissal of all claims against it on the grounds of sovereign immunity. The Plaintiff now points to the terms of the Gaming Compact, which appear to call for the Tribe to waive its sovereign immunity with regard to claims arising from. Casino operations.

Although the Federal Rules of Civil Procedure do not expressly contemplate a "motion for reconsideration," Rules 59(e), 60(b), and the Court's inherent authority all permit the Court, in appropriate circumstances, to revisit and revise its rulings if necessary, prior to the entry of final judgment *Price y. Philpot,* 420 F.3d 1158, 1167 n. 9 (10th Cir. 2005). The timeliness of the motion determines whether it is analyzed under Rule 59(e) — if filed within 10 days of the entry of the judgment or order — or Rule 60(b) — if filed later than 10 days. *Id, citing Hawkins v. Evans,* 64 F.3d 543, 546 (10th Cir. 1995). Here, the Defendant? motion was filed more than 10 days after the entry of the Order it seek reconsideration of, and thus, the Court analyzes the motion under Fed_ R. Civ. P. 60(b).

Rule 60(b) permits the Court to reconsider an order due to, among other things, a substantive "mistake or law or fact" by the Court, Fed. R. Civ. P. 60(b)(1), *Yapp v. Excel Corp.,* 186 F.3d 1222, 1231 (10th Cir. 1999), "newly discovered evidence that,

with reasonable diligence, could not have been discovered [earlier]," Fed. it Civ. P. 60(b)(2), or as a result of "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). Nevertheless, reconsideration under Rule 60(b) is extraordinary, and may only be granted in exceptional circumstances. *Rogers v. Andrus Transp. Services,* 502 F.3d 1147, 1153 (10th Cir. 2007). Reconsideration is not a tool to rehash previously-presented arguments already considered and rejected by the Court, nor properly used to present new arguments based upon law or facts that existed at the time of the original argument. *FDIC v. United Pacific Ins. Co.,* 152 F.3d 1266, 1272 (10th Cir.1998); *Van Skiver v. United States,* 952 F.2d 1241, 1243-44 (10th Cir.1991).

Here, the Plaintiff has not identified which portion of Rule 60(b) it invokes in seeking reconsideration, but the most likely candidate is Rule 60(b)(2), which permits a party to seek reconsideration as a result of newly-discovered evidence. The Plaintiff's motion does not indicate when the Plaintiff discovered the Gaming Compact, but one can reasonably assume that, because it was not referenced in the Plaintiff's response to the Motion to Dismiss, it was not discovered by the Plaintiff until later. Nevertheless, the fact that evidence was recently discovered by a party does not automatically render it "newly discovered evidence." Under the terms of Rule 60(b) itself, "newly discovered evidence" is that which "with reasonable diligence, could not have been discovered" within 10 days of the date of the Court's Order — that is, within 10 days of September 12, 2007. Moreover, courts recognize that a motion for reconsideration is

not a means to present arguments based on facts that were in existence at the time of initial briefing. *Van Skiver,* 952 F.2d at 1243-44.

Here, the Gaming Compact cited by the Plaintiff is dated September 10, 1999. Certainly, the Compact itself was in existence when the Motion to Dismiss was being briefed in 2007. The Plaintiff has previously described difficulties in obtaining copies of tribal laws and records from the Tribe itself, but nothing indicates that the Gaming Compact could not have been expeditiously obtained from the other party to its terms, the State of California. Thus, in the absence of some indication that the Gaming Compact could not have been discovered by the Plaintiff in time to include it in the Plaintiff's response to the Motion to Dismiss, the Court does not consider it to be "newly discovered evidence" warranting reconsideration under Rule 60(b).

Nor is the Court inclined to grant reconsideration of its sovereign immunity finding at this time based on the terms of the Compact. Admittedly, the Compact does appear to require the Tribe to execute a waiver of sovereign immunity for claims arising from "injuries to person or property . . . in connection with the Tribe's Gaming Operations." Arguably, the claims in this case might fall within those terms, calling into doubt whether the Tribe is, in fact, entitled to sovereign immunity. But the Gaming Compact itself cannot be construed to be a waiver of the Tribe's sovereign immunity, only a promise by the Tribe to execute such a waiver as part of the adoption of a "tort liability ordinance " Without that ordinance itself, the Court cannot determine

whether the Tribe did indeed waive sovereign immunity in the manner required by the Compact. If it did, the Plaintiff may be within its rights to seek reconsideration of the dismissal of the Tribe on sovereign immunity grounds.[3] If it did not, the Tribe may be in breach of the Compact as against the State of California, but it is by no means clear that this breach would permit the Court to impose the terms of the Compact's intended waiver against the Tribe. In either event, reconsideration is inappropriate here until the actual tort ordinance (or an explanation for its absence) is secured.

Accordingly, the Plaintiff's Motion for Reconsideration is denied.

CONCLUSION

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[3] Admittedly, reconsideration under these circumstances would again be most appropriate under Rule 60(b)(2), in that discovery of the tort ordinance and immunity waiver may constitute newly-discovered evidence that was not available earlier to the Plaintiff because the Tribe refused to supply it. It is also conceivable that the Tribe's assertion in the Motion to Dismiss that it had not waived sovereign immunity in the Motion to Dismiss could be characterized as fraud or misrepresentation warranting reconsideration under Rule 60(b)(3) (and perhaps sanctions under Fed. R. Civ. P. 11). In either instance, however, reconsideration is only permitted within one year of the September 12, 2007 Order, Fed. R. Civ. P. 60(c)(1), a time period soon to expire.

Even assuming that reconsideration under Rule 60(b)(2) and (3) were not available when the tort ordinance is finally obtained, the Court is confident that, in appropriate circumstances, reconsideration could be available under Rule 60(b)(6), or through invocation of the Court's inherent authority.

For the foregoing reasons, to the extent it seeks dismissal of the Casino and the Authority on sovereign immunity grounds, the Defendants' Motion to Dismiss (# 19) is **DENIED IN PART**. The Court's September 12, 2007 ruling with, regard to the remaining portions of that motion remain effective. The Plaintiff's Motion for Reconsideration (# 99) is **DENIED**. The Plaintiff's Motion to Strike (# 107) is **DENIED AS MOOT**.

Dated this 5th day of August, 2008

BY THE COURT:

Marcia S. Krieger
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Honorable Marcia S. Krieger

Civil Action No. 06-cv-01596-MSK-KLM

BREAKTHROUGH
MANAGEMENT GROUP, INC.,

Plaintiff,

v.

CHUKCHANSI GOLD CASINO AND RESORT, JEFF LIVINGSTON, PICAYUNE RANCHERIA OF THE CHUKCHANSI INDIANS, THE CHUKCHANSI ECONOMIC DEVELOPMENT AUTHORITY, RYAN STANLEY, and VERNON D'MELLO,

Defendants.

OPINION AND ORDER GRANTING, IN PART, MOTIONS TO DISMISS

THIS MATTER comes before the Court pursuant to Defendants Chukchansi Gold Casino and Resort, Picayune Rancheria of the Chukchansi Indians ("the Tribe"), and Chukchansi Economic Development Authority's (collectively, "the Chukchansi Defendants") Motion to Dismiss (# 19), the Plaintiffs response (# 44), and the Chukchansi Defendants' reply (# 52); Defendant Livingston's

Motion to Dismiss for Lack of Jurisdiction (#1 23), the Plaintiff's response (# 43), and Defendant Livingston's reply (# 51); Defendant Stanley's Motion to Dismiss for Lack of Jurisdiction (# 28), the Plaintiff's response (# 42), and Defendant Stanley's reply (# 53); the Plaintiff's Motion to Convert (# 41) the Defendants' motions to dismiss to summary judgment motions pursuant to Fed. R. Civ. P. 12 and 56, the Chukchansi Defendants' response (# 57), Defendant Livingston's response (# 58), Defendant Stanley's response (# 59), and the Plaintiff's reply (# 64); Defendant D'Mello's Motion to Dismiss (# 61), the Plaintiff's response (# 67), and Defendant D'Mello's reply (# 74); the Plaintiff's Motion to Convert (# 72) Defendant D'Mello's motion to dismiss to a summary judgment motion, Defendant D'Mello's response (# 75), and the Plaintiff's reply (# 76), and Defendant Stanley's Motion to Join (# 80).

FACTS

According to the Complaint (# 1), the Plaintiff is a Colorado corporation that provides training and consulting services via online education courses. Defendant Chukchansi Gold Resort and Casino ("the Casino"), is located in Madera County, California, and is owned and operated by the Tribe. The Casino purchased a single license for one of the Plaintiff's courses, ostensibly for the Casino's Director, Defendant Stanley. However, the Casino devised and implemented a scheme to record and transcribe the class, thereby making it available to all of the Casino's 1,300 employees without further payment to the Plaintiff In doing so, the Casino duplicated the Plaintiff's copyrighted content, and included the

Casino's trademark in place of the Plaintiffs.

The Plaintiff asserts fourteen claims in this action: (i) copyright infringement under 17 U.S.C. § 501 against all Defendants; (ii) contributory copyright infringement against the Chukchansi Defendants; (iii) vicarious copyright infringement against the Chukchansi Defendants; (iv) trademark infringement under 15 U.S.C. § 1125(a) against all Defendants; (v) contributory trademark infringement against the Chukchansi Defendants; (vi) vicarious trademark infringement against the Chukchansi Defendants; (vii) a civil RICO claim against all Defendants under 18 U.S.C. § 1961; (viii) a claim for common-law conversion against all Defendants under Colorado law; (ix) a claim for common-law misappropriation against all Defendants under Colorado law; (x) breach of contract against the Casino based on its breach of the End User License Agreement ("EULA") accompanying the license to use the Plaintiff's product; (xi) breach of the implied covenant of good faith and fair dealing against the Casino based upon that breach; (xii) common-law fraud under Colorado law against all Defendants; (xiii) common-law unfair competition under Colorado law against all Defendants; and (xiv) a violation of the Colorado Consumer Protection Act, C.R.S. § 6-1-105, against all Defendants.

The Chukchansi Defendants move (# 19) to dismiss the Complaint against them, arguing: (i) that the Court lacks subject-matter jurisdiction over this action because the Chukchansi Defendants are entitled to sovereign immunity; (ii) that the Complaint fails to state valid copyright claims

because it does not allege that the Plaintiff had secured copyright registrations for the contents of the class; (iii) that the Chukchansi Defendants, as governmental entities, are "categorically immune" from RICO; and (iv) that the common-law conversion and misappropriation claims against them are preempted by federal copyright law.

Defendant Livingston moves to dismiss (# 23) the claims against him, arguing: (i) that, as a California resident with no connections to Colorado, the Court lacks personal jurisdiction over him; (ii) by acting in the scope of his employment as an employee of the Chukchansi Tribe, he is entitled to sovereign immunity; and (iii) that the proper venue for this action is the Eastern District of California. Defendant Stanley moves to dismiss (# 28) the Complaint as against him, alleging effectively identical arguments to those presented by Defendant Livingston, and additionally moving to dismiss the RICO claim, both on the grounds that the Plaintiff fails to plead the existence of a RICO enterprise, and because the Complaint is insufficiently specific as to the nature of the predicate acts. Defendant D'Mello filed a motion to dismiss (# 61) that is substantively identical to Defendant Stanley's motion.[1]

[1] Defendant Stanley then filed a "request for joinder" (# 77) with Defendant D'Mello's motion. This motion is somewhat curious, in that Defendant D'Mello's motion is nearly a verbatim copy of Defendant Stanley's motion, and raises no new issues. In any event, the entire notion of 'joining" in another party's motions is not recognized by this Court. For a variety of administrative and substantive reasons, "joining" in another party's motion creates undue burdens on the Court in tracking the relief requested by a party and the reasons therefor. Although needless duplication of content already in

In response to these motions, the Plaintiff moved to convert (# 41, 72) each of the motions to dismiss into motions for summary judgment, on the grounds that the defense of sovereign immunity is intertwined with the merits of the case, and that the Plaintiff needs to engage in discovery to respond to it.

ANALYSIS

A. Sovereign immunity

The primary focus of all of the Defendants' motions are an assertion of sovereign immunity, an argument that implicates the Court's subject-matter jurisdiction. *E.F. W. v. St. Stephen's Indian High School,* 264 F.3d 1297, 1302-03 (10th Cir. 2001); *Fletcher v. United States,* 116 F.3d 1315, 1324 (10th Cir. 1997). When a challenge is made to the Court's subject-matter jurisdiction, the party asserting the existence of such jurisdiction — here, the Plaintiff— bears the burden of establishing that such jurisdiction exists. *Montoya v. Chao,* 269 F.3d 952, 955 (10th Cir. 2002). Although sovereign immunity is recognized as an affirmative defense, it is clear that the party seeking to sue a sovereign entity bears the

the record should certainly be avoided, the preferred means by which to do so is for each party seeking specific relief to make a separate motion for such relief, and incorporate by specific reference those arguments in another party's papers that the movant wishes to assert. In other words, it is permissible to join in another party's previously-asserted argument but not in another party's motion.

burden of showing that such immunity has been waived. *See e.g. James v. U.S.,* 970 F.3d 750, 752 (10[6] Cir. 1992).

Motions to dismiss for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1) generally take one of two forms: (1) a facial attack on the sufficiency of the complaint's allegations as to subject matter jurisdiction; or (2) a challenge to the actual facts upon which subject matter jurisdiction is based. *Ruiz v. McDonnell,* 299 F.3d 1173, 1180 (10[6] Cir. 2002), *citing Holt v. United States,* 46 F.3d 1000, 1002-03 (10th Cir.1995). Where a Rule 12(b)(1) motion challenges the underlying facts of the case, the Court may not presume the truthfulness of the complaint's factual allegations; rather, the Court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts without converting the motion into one for summary judgment under Rule 56. *Sizova v. National Institute of Standards and Technology,* 282 F.3d 1320,1324 (10th Cir. 2002). However, such discretion does not exist, and the Court must convert the motion to one for summary judgment, where the substantive cause of action and the disputed jurisdictional facts are closely intertwined. *Id.* Whether such an intertwining exists depends on whether "resolution of the jurisdictional question requires resolution of an aspect of the substantive claim." *Id.*

The Court need not reach the Plaintiffs motion for conversion because, as explained herein, it is able to determine the issue of sovereign immunity with respect to some Defendants as a matter of law, and

must conduct an evidentiary hearing as to the status of the remaining Defendants.[2]

First, the Court begins with the Plaintiff's assertion that the Defendants waived sovereign immunity by entering into two license agreements with the Plaintiff. The "eChampion" licensing agreement, attached as Exhibit F to the Plaintiffs response to the Chukchansi Defendants' motion, does not contain any content that expressly waives any sovereign immunity The agreement consists of three separate paragraphs of text,[3] one entitled "Ethics" and requiring that the student abide by the Plaintiff's rules and regulations; one entitled "Copyright," detailing types of prohibited reproduction of the course's content; and one entitled "Disclaimer," absolving the Plaintiff of liability for errors in the material or failure of the website. The Plaintiff contends that this agreement contains the text "you agree to venue in the State of Colorado," but the Court is unable to locate such text in Exhibit F. The Plaintiff also points to Section 12 of the "eBlack Belt" licensing agreement, reproduced as Exhibit G. That agreement contains a provision reading "The parties agree that the sole and exclusive venue for any and all disputes involving,

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[2] The Court addresses the Plaintiffs claimed need for discovery below.

[3] The Plaintiff has reproduced this agreement as screenshots from a computer, apparently as it appears to a user. As a result, the agreement in a format consisting of small, somewhat unclear type, spread over several pages. Unless there is some compelling need to present exhibits as they appear in *situ,* the parties are encouraged to present the contents of such exhibits in a way that emphasizes their readability.

arising out of or related to this Agreement shall be the state and federal courts located within the state of Colorado, County of Boulder."[4]

The Plaintiff argues that agreement to a forum selection clause, of itself; is sufficient to waive sovereign immunity. In support of this proposition, it relies first on *C&L Enterprises, Inc., v. Citizen Band Potawatomi Tribe,* 532 U.S. 411, 415 (2001). There, the Supreme Court explained that, to be effective, a tribe's waiver of its sovereign immunity must be "clear." *Id. at 418.* The Court found that the tribe's contractual agreement to submit any contract disputes to arbitration, there to be decided by Oklahoma law, and to permit ány arbitral award to be enforced in "any court having jurisdiction," constituted a clear waiver of sovereign immunity. *Id.* at 415. The Plaintiff here goes on to cite two state court decisions that allegedly reach the same result as *C&L,* finding a waiver of sovereign immunity resulting from agreement to a forum selection clause coupled with an agreement to arbitrate. *Citing Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402, 407 (Colo. App. 2004*), and Smith v. Hopland Band of Pomo Indians*, 115 Cal.Rptr.2d 455, 459 (Cal App. 2002). Although the facts and outcome in Smith are indistinguishable from *C&L*, the Plaintiff has misrepresented the applicability of *Rush Creek*. There, the court considered a contractual agreement between the parties that contained a forum selection clause (but no

[4] The Court assumes, without necessarily finding, that the Tribe itself can be held to the terms of this agreement, even though the agreement was entered into by an agent of the Casino.

arbitration provision) vesting exclusive jurisdiction in Colorado courts, but did not have occasion to consider whether that clause was sufficient to waive the tribe's sovereign immunity because "[although] the tribe contended in its opening brief that the default clause in the contract did not constitute an express waiver of sovereign immunity, in oral argument it conceded the issue." 107 P.3d at 406.

The Plaintiff then goes on to argue that "mere inclusion of a choice of law provision — standing alone — has been held sufficient to constitute a waiver of tribal immunity." *Citing Building Inspector and Zoning Officer of Aquinnah v. Wampanoag Aquinnah Shellfish Hatchery Corp.*, 818 N.E.2d 1040 (Mass. 2004). As with Rush Creek, the Plaintiff has overstated the holding of Wampanoag. There, the court found a waiver of sovereign immunity in an agreement that provided that the Tribe would hold certain lands "in the same manner, and subject to the same laws, as any other Massachusetts corporation." *Id.* at 1048-49. The court was particularly persuaded by the agreement's use of the first four quoted words, explaining that "the words 'in the same manner' convey a special, known, and obvious meaning" in the sovereign immunity context, because they are the words used by the U.S. government and Commonwealth of Massachusetts to waive their own sovereign immunity. *Id* Indeed, as in *Rush Creek*, the court in *Wamapanoag* expressly refused to reach the argument the Plaintiff makes here, explaining that "we need not discuss in detail the additional argument that the tribe waived its sovereign immunity by executing a settlement agreement that incorporated by reference the town's

zoning bylaw, which, in turn, expressly provides for judicial review and enforcement."[5] *Id* at 1051.

Whether a forum selection clause, by itself, can operate as a waiver of sovereign immunity is a question that has no clear answer. In *Ninigret Development Corp. v. Naraganset Indian Wetuomuck Housing Auth.,* 207 F.3d 21, 30-31 (1st Cir. 2000), a pre-*C&L* case, the court stated that "whether, and to what extent, an arbitration or forum-selection clause constitutes a waiver of a tribe's sovereign immunity turns on the terms of that clause." It noted that "The courts are not consistent on the degree of specificity that must be employed," and compares *Val- U-Const. Co. v. Rosebud Sioux Tribe,* 146 F.3d 573, 566-68 (8th Cir. 1998) (waiver found where Tribe agreed to arbitration clause) with *Pan American Co. v. Sycuan Band of Mission Indians,* 884 F.2d 416, 418-20 (9th Cir. 1989) (finding no waiver on similar arbitration clause). The juxtaposition between *Val-U* and *Pan American* — courts reaching disparate results on effectively identical facts — confuses, rather than clarifies, the issue.

This Court draws more guidance from *Val-U's* own discussion comparing its holding to *American*

[5] The court does make a passing observation that "[t]his argument . . . has persuasive force and further supports our conclusion that, with respect to sovereign immunity, the Tribe knowingly bargained for . . . judicial action, where necessary." 818 N.E.2d at 1050. Besides being dicta, this observation is of little persuasive value, as it does not reveal the court's reasoning as to why this aspect of the agreement indicated a waiver of immunity, nor does it indicate whether the court would have been prepared to rule against the Tribe solely on that basis if as here, the "in the same manner" language did not exist.

Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe, 780 F.2d 1374 (8th Cir. 1985). In *Standing Rock,* the Tribe was party to a promissory note that, among other things, provided that "in the event of a collection action . . . the law of the District of Columbia would apply." *Val-U,* 146 F.3d at 577. In finding this agreement insufficient to waive the tribe's sovereign immunity, the court found that the tribe "did not explicitly consent to submit any dispute . . . to a particular forum, or to be bound by its judgment." The Court in *Val-U* noted that this differed from the situation before it because, unlike *Standing Rock,* "the parties .. . specifically designated an arbitral forum to settle disputes under the contract as well as arbitration rules. . . The parties clearly manifested their intent to resolve disputes by arbitration, and the tribe waived its sovereign immunity with respect to disputes under the contract." 146 F.3d at 577.

From these cases, this Court can discern the outlines of a rule that resolves the issue presented here. First, it is clear from *C&L* that a contractual provision agreeing to arbitrate disputes and agreeing to the rules that will govern the arbitral body constitutes a waiver of sovereign immunity. This rule finds two important components: (i) an agreement to submit disputes to a body for adjudication; and (ii) an agreement as to what particular body will hear such disputes. In this respect, it matches the observation of the Second Circuit in *Garcia v. Akwesasne Housing Authority,* 268 F.3d 76, 86 (2d Cir. 2001), that inquiry into a purported waiver "encompasses not merely whether it may be sued, but where it may be sued." (Quotation marks omitted, emphasis in

original).

Here, the language of the parties' agreement is that "the sole and exclusive venue for any and all disputes involving . . .this Agreement shall be the state and federal courts located within the state of Colorado." (Emphasis added.) Notably, the parties' agreement here speaks only to where a suit may be brought, but it does not expressly or impliedly address whether a suit may be brought. Unlike cases such as *C&L,* the Tribe here did not expressly agree to submit any dispute for adjudication; it merely agreed as to where such adjudication would take place, if an adjudication were to occur. In this respect, the case is more akin to *Standing Rock,* where the tribe agreed that District of Columbia law would apply to any dispute, but did not necessarily agree to submit any such dispute to adjudication.

At first blush, it seems awkward to read a contract to specify where disputes may be resolved, but not to read it as providing whether disputes may be resolved. However, any awkwardness in this interpretation vanishes when one recognizes the peculiar circumstances of this case. Here, unlike the ordinary citizen that the Plaintiff typically enters into contracts with, the Tribe possesses a special cloak of immunity from suit. Thus, Language in the Plaintiff's standard contract that would be sufficient to bind ordinary citizens to a particular dispute-resolution mechanism is not necessarily sufficient to bind the Tribe. Put simply, the Plaintiff's EULA does not specifically state that a purchaser agrees to be subject to suit because, in most instances, the purchaser does not otherwise enjoy the ability to

avoid suit. This difficulty is compounded by the fact that, by all appearances, the Plaintiff never negotiated the terms of the contract with the Tribe. As the Complaint and supplemental evidentiary material attached to the motions make clear, the EULA was presented on a take-it-or-leave-it basis before a user could access the Plaintiff's course content. There is no indication that the Plaintiff and the Tribe discussed the unique legal status enjoyed by the Tribe and crafted special contractual terms to account for the Tribe's immunity. As a result, it should not be surprising that the standard terms of the EULA yield seemingly awkward results in this peculiar factual circumstance. Nevertheless, the Court finds that the venue provision of the EULA is insufficient, of itself; to demonstrate that the Tribe clearly waived its sovereign immunity.

This finding is sufficient to grant the Tribe's motion to dismiss, as it indisputably enjoys sovereign immunity. However, the Plaintiff argues that, even if sovereign immunity applies, the remaining Defendants do not enjoy its protection for various reasons. Thus, the Court turns to the issue of which other Defendants, if any, are swept up in the Tribe's immunity.

First, the Plaintiff contends that the Casino and the Tribe's Economic Development Authority do not enjoy the Tribe's immunity, because any judgment against them will not reach the Tribe's assets. In support of this position, the Plaintiff relies on *Runyon v. Association of Village Council Presidents,* 84 P.3d 437, 440 (Ak. 2004), which examined the question of whether a non-profit

association of native villages, formed to provide various services to the villages, was entitled to the sovereign immunity that the villages themselves enjoyed. Finding that such immunity extended to subdivisions of tribal government that are "closely allied with and dependent upon the tribe," the court postulated a test which examined whether the entity's "connection to the tribe . . . is so close that allowing suit against the entity will damage the tribal interest that immunity protects." *Id.* In *Runyon,* the court ultimately found that the tribes had formally insulated themselves from any liability for the non-profit association's acts, and thus, the court held that the association could not avail itself of the tribes' immunity.

This Court notes that the rule in *Runyon* has not enjoyed particularly broad adoption. According to Westlaw, only three cases have ever cited *Runyon,* and only one of them, an unpublished case from the District of Kansas, *Johnson v. Harrah's Kansas Casino Corp.,* 2006 WL 463138 (D. Kan. 2006) (unpublished), comes from a federal court. *Johnson* involved an employment dispute between a casino worker, employed at a casino owned by the Potowatomi Nation, and her employer, a non-Indian entity that managed the casino for the tribe in exchange for payment of a management fee. The employer attempted to invoke the tribe's sovereign immunity to the suit, forcing the court to examine the circumstances under which a non-tribal entity could enjoy the tribe's sovereign immunity. After distinguishing cases awarding impunity to tribal agencies and tribal housing authorities, the court was left to consider those cases that examined the

immunity of "subordinate economic organizations" of a tribe. The court found that "[c]ourts have adopted various tests for determining whether" tribal immunity extends to a tribe's subordinate economic enterprise, and that most of the courts examine one or more of 10 separate factors, including economic interdependence.[6] The *Johnson* court treated *Runyon's* single-issue analysis of economic interdependence as a threshold issue, such that, if the tribe's assets were potentially at risk, an examination of the remaining nine factors was appropriate.

Obviously, this Court is more persuaded by *Johnson's* multi-factor analysis than it is by *Runyon's* single-factor focus, and in the absence of persuasive law suggesting otherwise, this Court will adopt the *Johnson* analysis. Because that analysis is heavily fact-driven, and because the parties' submissions on the instant motions do not address the relevant facts,[7] the Court finds that an

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[6] The factors are: (i) the announced purpose for which the entity was formed; (ii) whether the entity was formed to manage or exploit specific tribal resources; (iii) whether federal policy protecting Indian assets is furthered by extending sovereign immunity to the entity; (iv) whether the entity is organized under the Tribe's laws or under federal law; (v) whether the entities purposes are similar to or serve tribal government; (vi) whether the entity's governance is drawn mainly from tribal officials; (viii) whether tribal officials exercise control over the organization; (ix) whether the Tribe has the power to dismiss members of the organization's governance; and (x) whether suit against the entity would impact the Tribe's fiscal resources.

[7] Attached to the Chukchansi Defendants' brief (# 33) is a document purporting to be an affidavit of Dixie Jackson. The document appears to relate the history of the Tribe and/or describe how it came to organize its gaining activities, but the document in the

evidentiary hearing is necessary to determine whether the Economic Development Authority and the Casino enjoy a connection to the Tribe close enough to enjoy the Tribe's own immunity. The Court will set aside two hours for this hearing on **Tuesday, October 23, 2007 at 1:30 p.m.**[8]

Finally, each of the individual Defendants seek to invoke the Tribe's immunity for the claims against them_ Whether tribal employees enjoy sovereign immunity for their actions turns on the question of whether the relief requested as a result of those employees' actions would run against the Tribe itself *Fletcher,* 116 F.3d at 1324. Where employees

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Court's electronic system is largely illegible.

[8] The Court declines to specifically authorize discovery in advance of this hearing. Given the substantial potential that the Defendants at issue may ultimately be entitled to sovereign immunity, the Court is reluctant to chip away at the benefits of such immunity by exposing them to the burdens of unnecessary discovery. *See e.g. Crawford-El v. Britton,* 523 U.S. 574, 598 (1998) (immunity from suit also protects party from burdensome discovery). More importantly, the factual issues to be resolved are simple and not generally the types of facts as to whose existence (*c.f.* significance) the parties can have widely divergent views.

The Court is cognizant of the Plaintiff's position that the Defendants have refused to provide important tribal documents bearing on the issues and that the Defendants feel prejudiced by the lack of access to this information. To ensure that both sides have a full and fair opportunity to examine the relevant documents and prepare their case, the Court will require that no later than 10 days prior to the hearing, the parties exchange copies all exhibits they intend to present. Further, any party intending to subpoena any other documents may direct the production of those documents occur up to three days before the hearing. Objections to the scope of such subpoenas shall be reserved to the date of the hearing, and will be adjudicated mindful of the extent to which the objecting party attempted to comply in good faith with the subpoena's requests.

are sued in their official capacities as officers of the Tribe, immunity is available. *Id.* However, sovereign immunity does not protect tribal employees against claims asserted against them in their individual capacities. *Id.* at n. 12. Moreover, an official who might otherwise be entitled to sovereign immunity loses that protection for acts taken outside the scope of the powers that have been delegated to him. *Burrell v. Armijo,* 456 F.3d 1159, 1176 (10th Cir. 2006).

The Plaintiff's Complaint does not clearly indicate whether it is asserting "official capacity" and "individual capacity" claims,[9] but the manner in which the case is captioned and pled, it appears that the Plaintiff is asserting individual capacity claims against the individual Defendants. It alleges that the individual defendants each engaged in discrete

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[9] The conceptual difference between these two types of claims are not well-understood by many practitioners. In *Kentucky v. Graham,* 473 U.S. 159, 165 (1985), the Supreme Court explained that an "official capacity" suit is simply an alternative way of pleading a claim against the entity employing the official. The real party in interest is not the named defendant, but the entity employing him or her, and indeed, when the named defendant leaves the office he or she occupies, the defendant's successor automatically assumes his or her predecessor's role in the litigation. *Hafer v. Melo,* 502 U.S. 21, 25 (1991). By contrast, an individual capacity suit names the individual defendant as the real party in interest, and seeks relief against the individual for his or her own conduct. *Id.* at 27. Contrary to common misconception, the individual/official capacity designation does not turn on what capacity (as an official or as an individual, or within or outside the scope of employment) the individual was acting in when the challenged action occurred. *Id.* at 27-28. For example, an individual admittedly acting within the scope of his or her employment may still be subject to an individual capacity suit. *Id*

tortious acts and statutory violations, and seeks to hold each individual defendant personally liable for such acts. The key to analyzing an official vs. individual capacity issue is to inquire whether, upon the death or resignation of one of the individual Defendants, would the action likely continue against his successor. Here, the Court understands the Plaintiff to be challenging the discrete acts of these individual Defendants, not asserting claims against any individual that occupies the position of Casino General Manager or Casino Director. Thus, is it clear to the Court that the Plaintiff is asserting individual capacity claims against the individual Defendants, and sovereign immunity does not extend to such claims.[10]

Accordingly, the motions to dismiss premised upon sovereign immunity are granted in part, insofar as the claims against the Tribe are dismissed on the grounds of immunity; denied in part, insofar as the individual Defendants are not entitled to immunity; and reserved in part pending an evidentiary hearing regarding the Casino and Economic Development Authority.

B. Personal Jurisdiction

The three individual Defendants each assert that this Court lacks personal jurisdiction over them because they do not have the minimum contacts with the State of Colorado.

[10] As the preceding footnote makes clear, the fact that the Plaintiff has alleged that the individual Defendants were acting in the scope of their employment at the time of the challenged acts does not bear on the official vs. individual capacity inquiry.

Faced with a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(2), the Plaintiff bears the burden of establishing that personal jurisdiction exists. *Soma Medical Intern. v. Standard Chartered Bank,* 196 F.3d 1292, 1295 (10th Cir. 1999); *Omi Holdings, Inc. v. Royal Ins. of Canada,* 149 F.3d 1086, 1091 (10th Cir. 1998). The Court may conduct an evidentiary hearing as to any disputed jurisdictional facts, or, if the Court chooses not to conduct a hearing, the Plaintiff need only make *a prima facie* showing of jurisdiction by showing, through affidavits or otherwise, facts that, if true, would support jurisdiction over the defendant. *Omi Holdings,* 149 F.3d at 1091; *Soma,* 196 F.3d at 1295. The allegations of the Complaint must be taken as true unless contradicted by the defendant's affidavits, *Behagen v. Amateur Basketball Ass'n. of U.S.A.,* 744 F.2d 731, 733 (10th Cir.1984), and to the extent that the affidavits contradict allegations in the Complaint or opposing affidavits, all disputes must be resolved in the Plaintiff's favor and the Plaintiff's *prima facie* showing is sufficient. *Id.*

Here, there is no significant dispute as to the operative facts, thus, the Court need not conduct an evidentiary hearing. It is undisputed that none of the individual Defendants reside in Colorado, have assets in Colorado, or have any connection with the state other than as a result of the specific actions alleged in the Complaint and supporting affidavits. The issue presented is whether any of the actions alleged in the Complaint are sufficient to subject any of the individual Defendants to personal jurisdiction in Colorado.

Colorado's long-arm statute provides that a non-resident party subjects itself to the jurisdiction of Colorado courts for claims arising from the party's "(a) transaction of any business within this state; [or] (b) the commission of a tortious act within this state." C.R.S. § 13-1124(1)(a) and (b). The statute codifies the "minimum contacts" test of *International Shoe Co. v. Washington,* 326 U.S. 310 (1945), and extends the courts' jurisdiction to the maximum extent consistent with the Due Process clause of the 14th Amendment. *Brownlow v. Aman,* 740 F.2d 1476, 1481 (10* Cir. 1984). The focus of the court's inquiry is simply whether the exercise of jurisdiction over the individual Defendants comports with the principles of Due Process. *OpenLCR.com, Inc. v. Rates Technology, Inc.,* 112 F.Supp.2d 1223, 1227 (D. Colo. 2000); *Wise v. Lindamood,* 89 F.Supp.2d 1187, 1189 (D. Colo. 1999).

For purposes of personal jurisdiction, due process is satisfied when the defendant has sufficient "minimum contacts" with the forum state to suffice such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Ina Shoe,* 326 U.S. at 316. The "minimum contacts" test examines whether the defendant has purposefully directed its activities at residents of the forum state, whether the claims asserted arise out of that purposeful direction of activity, and whether the assertion of jurisdiction under the circumstances is reasonable and fair. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 474 (1985); *Teierweiler v. Croxton and Trench Holding Co.,* 90 F.3d 1523, 1532-33 (10th Cir. 1996).

Merely entering into a contract with a Colorado resident, without more, does not amount to purposeful activity in the state. *Burger King,* 471 U.S. at 478 ("If the question is whether an individual's contract with an out-of-state party alone can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot.") (emphasis in original); *National Business Brokers, Ltd. v. Jim Williamson Productions, Inc.,* 115 F.Supp.2d 1250, 1254 (D. Colo. 2000), *aff'd,* 16 Fed.Appx. 959 (10th Cir. 2001) (unpublished) ("[t]he law is clear that a party does not submit itself to personal jurisdiction in a distant forum simply by entering into a contract with a party that resides in that forum"), citing *Ruggieri v. General Well Serv., Inc.,* 535 F.Supp. 525, 535 (D. Colo. 1982); *Encore Productions, Inc. v. Promise Keepers,* 53 F.Supp.2d 1101, 1117 (D. Colo. 1999). Indeed, representatives of a defendant can even enter into Colorado to discuss details of the agreement, *id, citing Associated Inns & Restaurant Co. v. Development Assocs.,* 516 F.Supp. 1023, 1026 (D. Colo. 1981); *Encore Productions,* 53 F.Supp.2d at 1117-18, or make telephone calls and direct correspondence into the state without necessarily subjecting themselves to personal *jurisdiction. Far W. Capital, Inc. v. Towne,* 46 F.3d 1071, 1077 (10th Cir. 1995); *Encore Productions,* 53 F.Supp.2d at 1117; *F.D.I.C. v. First Interstate Bank of Denver,* 937 F.Supp. 1461, 1468 (D. Colo. 1996).

Here, there is evidence that Defendant Stanley went beyond simply entering into a contract with the Plaintiff. Affidavits attached to the

Plaintiffs response to Defendant Stanley's motion establish that Defendant Stanley initiated contact with the Plaintiffs offices in Colorado to discuss the purchase of training programs; had other phone discussions with the Plaintiff's employees prior to purchasing a course; called the Plaintiff to purchase a course license for himself; requested that the Plaintiff bill the Casino by invoice sent to Defendant Stanley's e-mail address and caused those invoices to be paid by the Casino; later called the Plaintiff to enroll in two additional courses; physically traveled to Colorado on two occasions to attend the additional courses; and engaged in several other phone calls and e-mail communications concerning the Casino's purchase of the Plaintiff's services.

Of particular significance is Defendant Stanley's physical presence at two courses taught in Colorado. Unlike the contracts in cases like *Encore Productions,* some of the agreements between the Plaintiff and Defendant Stanley called for the Plaintiff's performance to occur in Colorado, and Defendant Stanley's travel to the state was for the purpose of receiving the performance called for by the contract. This is sufficient to permit the Court to find that Defendant Stanley purposefully availed himself of the privileges and protections of transacting business in Colorado, and thus, the exercise of jurisdiction over Defendant Stanley is consistent with due process.

The same cannot be said of Defendants Livingston and D'Mello. The Plaintiff alleges no

contact whatsoever between Livingston and itself,[11] and alleges only that D'Mello called the Plaintiff seeking to enroll in a course, sent an e-mail to the Plaintiff accepting a EULA for the course, and received a telephone call from the Plaintiff regarding his failure to complete the course's tests. Unlike Defendant Stanley's regular contacts with the Plaintiff and physical visits to Colorado, Defendant D'Mello's communications with the Plaintiff were limited and sporadic. Although D'Mello entered into a contract with the Plaintiff that contract called for performance to take place in California (or, presumably, wherever D'Mello chose to log on to the Plaintiff's website), and other than initiating the single transaction, there is no indication that D'Mello ever directed any activities towards the Plaintiff in Colorado. D'Mello's contacts with Colorado consisted of nothing more than entering into a contract with a party that happened to be located in Colorado, and does not rise to the level of purposeful availment of the privileges of doing business in Colorado.

The Plaintiff argues that all three Defendants also committed a tort in Colorado, namely, fraudulent misrepresentation and/or conversion, permitting the exercise of jurisdiction over them pursuant to C.R.S. § 13-1-124(1)(b). Jurisdiction under the statute arises from tortious act committed outside the state of Colorado if that act causes a

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[11] In the Plaintiff's response to Defendant Livingston's motion, the Plaintiff characterizes Defendant Livingston's actions as "having the company he headed contract with BMG," "having his employees attend two weeks of training," and "causing his company to mail checks." None of these actions allege Defendant Livingston himself having any direct contact with Colorado.

direct and consequential injury to be felt within the state. *National Business Brokers,* 115 F.Supp.2d at 1255 (D. Cola. 2000). Notably, however, that injury must be something more than a Colorado resident feeling some economic consequence as a result of the conduct. *Id., citing Amax Potash Corp. v. Trans-Resources, Inc.,* 817 P.2d 598, 600 (Colo. Ct. App. 1991), *and Wenz v. Memety Crystal,* 55 F.3d 1503, 1508 (10 Cir. 1995). Here, both the offending conduct and the direct injury occurred to the Plaintiff in California, where its copyrighted materials were impermissibly used. Its only injury in Colorado arises from the fact that, had the Defendants properly paid for the classes for their employees, that revenue would have flowed to the Plaintiffs headquarters in Colorado. This is precisely the situation found in *National Business Brokers, Amax,* and many of the other cases cited therein, and in each instance, the court found that the economic injury was insufficient to confer jurisdiction under C.R.S. § 13-1-124(1)(b).

The Plaintiff cites to *Classic Auto Sales, Inc. v. Schocket,* 832 P.2d 233, 235-36 (Colo.. 1992), a case in which the Colorado Supreme Court found a basis for personal jurisdiction based on a tortious act where an auto dealer in Nebraska had made several misrepresentations of fact over the phone and in writing to a Colorado resident, inducing the Colorado resident to travel to Nebraska and purchase a car. The court held that the various misrepresentations "formed an important part of the basis of the commission of a tortious act," and that they were "received within this state." *Id.* at 236 (internal punctuation omitted). Noting that the auto dealer

never left Nebraska, the court nevertheless found that "the misrepresentations were not complete until received . . . in Colorado," and that this was sufficient to find that the tortious act occurred in this state. *Id.*

The Court finds that *Classic Auto* does not warrant exercising personal jurisdiction over Defendants Livingston and D'Mello in Colorado. First, the Court notes that the Complaint does not appear to adequately state any tort claim against Defendants Livingston and D'Mello. The Plaintiff does not plead the alleged fraudulent statements with any particularity as required by Fed. R. Civ. P. 9(b), and couches most of its factual averments as against "Defendants" generally and collectively. Although the Defendants have not specifically moved to dismiss the tort claims under Fed. R. Civ. P. 9(b) or 12(b)(6), the Plaintiff has relied upon its pleading of these torts to demonstrate personal jurisdiction, and thus, the Court considers whether that pleading is sufficient.

Assuming, however, that the Plaintiffs tort claims are sufficiently pled, the Court finds that *Classic Auto* is distinguishable on its facts. There, the Colorado Supreme Court found that the tort of misrepresentation was committed in Colorado, not that merely the harm was felt here. It observed that the auto dealer made numerous misrepresentations to the buyer, and that "the misrepresentations were not complete until received by Schocket in Colorado." *Id.* at 236. The Plaintiff suggests that each of the individual Defendants made the same sort of misrepresentations to it in Colorado, but the Complaint does not allege that. Although the fraud

claim is captioned as being asserted against "All Defendants," its body states only that "Defendants Casino, Stanley, and D'Mello" made false representations; it makes no allegation of a false statement by Defendant Livingston. Moreover, the reference to a false statement by D'Mello is curious, in that there is no substantive allegation anywhere in the Complaint of any false statement having been made by D'Mello.[12] Accordingly, as to these two Defendants, the Court finds that personal jurisdiction based upon these Defendants' commission of a tort in Colorado is not supported by the allegations in the Complaint.

The Court has considered the remainder of the Plaintiffs arguments with regard to the issue of personal jurisdiction over Defendants Livingston and D'Mello and finds them to be without merit. Accordingly, Defendant Livingston and D'Mello's motions to dismiss for lack of personal jurisdiction are granted, and Defendant Stanley's motion to dismiss on this ground is denied.

C. Sufficiency of pleading specific claims

The Chukchansi Defendants move to dismiss the RICO claim against them, stating that as governmental entities, they are categorically immune

[12] The Complaint makes no mention whatsoever of D'Mello separately agreeing to a EULA and taking a course from the Plaintiff. Although those facts are asserted in the evidentiary material in support of the motion here, the Court will not deem the Complaint to be amended by this evidentiary material. The Court declines to speculate as to whether its findings as to personal jurisdiction over D'Mello might differ if the Complaint were properly amended.

from such claims. Defendant Stanley moves to dismiss the RICO claim as insufficiently pled. Because the Chukchansi Defendants' arguments are mooted if the RICO claim is dismissed as insufficient, the Court will address the sufficiency of pleading first.

To plead a claim for civil RICO, the Plaintiff must allege: (i) that the Defendants participated in the conduct; (ii) of an "enterprise"; (iii) through a pattern; (iv) of racketeering activity. *Garrett v. Selby Connor Maddux & Janer,* 425 F.3d 836, 838 (10th Cir. 2005); *Banc Oklahoma Mortg. Corp. v. Capital Title Co.,* 194 F.3d 1089, 1100 (10th Cir. 1999). An "enterprise" is "an entity [comprised of] a group of persons associated together for a common purpose of engaging in a course of conduct," and is shown by "evidence of an ongoing organization, formal or informal, and by evidence that the various associates function a as a continuing unit." *U.S.* v. *Turkette,* 452 U.S.. 576, 582-83 (1981). "Racketeering activity" is defined as being any one of several violations of law set forth in 18 U.S.C. § 1961(1), among them acts of mail and wire fraud and criminal copyright infringement. A "pattern" of such activity consists of two or more acts of racketeering activity within a period of 10 years that are related and demonstrate a threat of continued criminal activity. *Duran v. Canis,* 238 F.3d 1268, 1272 (10th Cir. 2001); *Gotfredson* v. *Larsen LP,* 432 F.Supp.2d 1163, 1174-76 (D. Colo. 2006). Predicate acts are "related" if they share the same or similar purposes, results, participants, victims, or methods of commission. *Gotfredson,* 432 F.Supp.2d at 1174. A threat of continued criminal activity is demonstrated by means of showing either

open-ended or closed-ended continuity. *Id.* "Closed-ended continuity" is established by showing a series of related predicate acts extending over a substantial period of time; a pattern of acts over a few weeks or months and threatening no future criminal conduct do not satisfy the requirement. *Id.* "Open-ended continuity" is shown by demonstrating that the predicate acts, by their very nature, involve a distinct threat of ongoing racketeering activity, or that the predicates are a regular way of conducting the business of the Defendants or of the RICO enterprise. *Id.* A set of predicate acts constituting a single scheme to accomplish a discrete goal against a discrete victim, with no potential to extend to other persons or entities, is insufficient to show either type of continuity. *Id.*

The Complaint fails to adequately allege the existence and nature of the enterprise, or a pattern of activity. With regard to the enterprise requirement, the Plaintiff pleads, in six consecutive and otherwise identical paragraphs, "Defendant _____ acquired control, maintained control, conducted, and participated in the conduct alleged in this Complaint through a pattern of racketeering activities." This does not allege an "enterprise," as it does not assert that these Defendants associated together for a common purpose, nor that they functioned as a unit. Moreover, the Complaint does not allege a pattern of activity, insofar as it does not allege a threat of continuing racketeering activity or either open- or closed-ended continuity of the racketeering activity. Accordingly, the RICO claim is dismissed without

prejudice pursuant to Fed. R. Civ. P. 12(b)(6).[13]

The Chukchansi Defendants also move to dismiss the Plaintiffs tort claims of conversion and misappropriation claims as being preempted by federal law. 17 U.S.C. § 301(a) provides that "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright" are preempted by the Copyright Act. Preemption occurs if (i) the work is within the scope of the "subject matter of copyright" under 17 U.S.C. § 102 and 103; and (ii) the rights granted under state law are equivalent to the exclusive rights established by federal copyright law. *La Resolana Architects, PA v. Clay Realtors Angel Fire,* 416 F.3d 1195, 1199 n. 2 (10`h Cir. 2005), *citing Gates Rubber Co. v. Bando Chem. Indus.,* 9 F.3d 823, 847 (10th Cir. 1993). On the other hand, a state-law cause of action which requires an extra element beyond mere copying or preparation of a derivative work — *e.g.* a claim for unfair competition, tortious interference, or breach of contract — is qualitatively different from a copyright claim, and thus, is not preempted. *Id.*

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[13] The Court will not reflexively grant the Plaintiff leave to amend the Complaint to re-plead the RICO claim, as it has some doubt that, under the facts suggested here, a valid RICO claim could ever be alleged. By all appearances, the Plaintiff alleges a single scheme with a discrete goal and a single victim — *i.e.* that the Defendants conspired solely for the purpose of obtaining the Plaintiffs copyrighted content for subsequent re-use without paying for it. As discussed above, this type of single-focus conduct, however unlawful it may be in other respects, does not constitute a RICO violation. If, after full consideration of the governing law and available facts, the Plaintiff still believes that it can assert a viable RICO claim, it may move for leave to amend to do so.

Turning to the first element, the Plaintiff clearly alleges that the content of its courses is within the scope of copyright protection.[14] The Plaintiff's claim for conversion under Colorado law has essentially one element: that the Defendants asserted dominion or ownership over personal property belonging to another. *Glen Arms Assocs. v. Century Mortg. & Inv. Co.,* 680 P.2d 1315, 1317 (Colo. App. 1984). In the context presented here, this claim would be established by showing: (i) that the Plaintiff was entitled to assert control over the contents of the course as the result of its copyright, and (ii) that the Defendants exercised improper dominion over the contents of the course by copying and altering them. There are no additional elements to the claim beyond the existence of a copyright and a copying, and thus, this claim is preempted. Similarly, a claim for misappropriation under Colorado law occurs "when one either wrongfully profits from another's expenditure of labor, skill, or money, or capitalizes wrongfully on commercial values earned over a period of time." *Heller v. Lexton-Ancira Real Estate Fund,* Ltd., 809 P.2d 1016, 1021 (Colo. App. 1990). Once again, in the context presented here, the only element to be proven on this claim is that the Defendants wrongfully appropriated the Plaintiff's copyrighted content. This claim, too, is thus preempted.

[14] The Plaintiff argues that because the Defendants have not answered, it does not know whether they will contest whether the content is copyrightable. This is irrelevant, as a motion to dismiss is based on the allegations in the Complaint. If the Court eventually determines that the content of the courses is not copyrightable, the Plaintiff may amend the Complaint to reassert the common law claims.

The Plaintiff argues that their claims are not preempted because they allege more than mere copying; that they allege that the Defendants "branded [the Plaintiff's] work as their own and misrepresented to everyone participating in their employee training program that they were the true owners of the content." Although this may be an accurate statement of the Plaintiff's position, it is clear from the discussion above that the Defendants' actions of "branding the work as their own" and misrepresenting to others their ownership are not required elements of a claim of conversion or misappropriation. Interestingly, the Plaintiff cites to several cases for the proposition that "palming off claims [are] not preempted." However, neither a conversion nor a misappropriation claim is the equivalent of a "palming off" claim. Accordingly, the conversion and misappropriation claims are dismissed as preempted.

D. Venue

Defendant Stanley moves to dismiss the Complaint for improper venue. Without belaboring the analysis, the Court finds that venue is proper in this District pursuant to 28 U.S.0 § 1391(a)(3) and (b)(3), in that Defendant Stanley is subject to personal jurisdiction in this District. The Court does not construe Defendant Stanley's motion as one to transfer venue for convenience under 28 U.S.C. § 1404, and expresses no opinion as to whether such a motion might be appropriate under the facts here.

CONCLUSION

For the foregoing reasons, the Chukchansi Defendants' Motion to Dismiss (# 19) is GRANTED IN PART, insofar as the claims against Defendant Picayune Rancheria of the Chukchansi Indians are DISMISSED on the grounds of sovereign immunity, and insofar as the Plaintiff's common-law claims for conversion and misappropriation are DISMISSED as preempted by federal law, and RULING IS RESERVED IN PART,'[5] as to the immunity of Defendants Chukchansi Gold Casino and Resort and Chukchansi Economic Development

'For administrative purposes under the Civil Justice Reporting Act, the Clerk of the Court shall deem this motion resolved. Authority, which will be determined at an evidentiary hearing on **October 23, 2007 at 1:30 p.m.** on the terms set forth herein. Defendant Livingston's Motion to Dismiss for Lack of Jurisdiction (# 23) is **GRANTED**, and the claims against Defendant Livingston are **DISMISSED** for lack of personal jurisdiction. Defendant Stanley's Motion to Dismiss for Lack of Jurisdiction (# 28) is **GRANTED IN PART**, insofar as the Plaintiff's RICO claim is **DISMISSED** without prejudice pursuant to Fed. R. Civ. P. 12(b)(6), and **DENIED IN PART**, in all other respects; the Plaintiff's Motion to Convert (# 41) the Defendants' motions to dismiss to summary judgment motions pursuant to Fed. R. Civ. P. 12 and 56 is **DENIED AS MOOT**; Defendant D'Mello's Motion to Dismiss (# 61) is **GRANTED**, and the claims against Defendant D'Mello are **DISMISSED** for lack of personal jurisdiction; the Plaintiff's Motion to Convert (# 72) Defendant D'Mello's motion to dismiss to a summary judgment motion is **DENIED**

AS MOOT. Defendant Stanley's Motion to Join (# 80) is **DENIED AS MOOT**. The caption of the case is **AMENDED** to remove Defendants Picayune Rancheria of the Chukchansi Indians, Livingston, and D'Mello.

Dated this 12th day of September, 2007

BY THE COURT:

Marcia S. Krieger
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BREAKTHROUGH MANAGEMENT GROUP, INC.,	Nos. 08-1298,
Plaintiff-Appellee-Cross-Appellant,	08-1305, 08-1317
V.	
CHUKCHANSI GOLD CASINO AND RESORT; CHUKCHANSI ECONOMIC DEVELOPMENT AUTHORITY,	
Defendants-AppellantsCross-Appellees,	
and	
RYAN STANLEY,	
Defendant-Appellant-Cross-Appellee.	

ORDER

Before MURPHY, HOLMES, Circuit Judges, and ARMIJO, District Judge.*

*The Honorable M. Christina Armijo, District Judge, United States District Court for the District of New Mexico, sitting by designation.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court this 8th day of February, 2011

___/s/_____
ELISABETH A. SHUMAKER, Clerk