No. 12-60668

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DOLGENCORP, INC., DOLLAR GENERAL CORP.,

Plaintiffs - Appellants

VERSUS

THE MISSISSIPPI BAND OF CHOCTAW INDIANS; THE TRIBAL COURT OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS; CHRISTOPHER A. COLLINS in His Official Capacity; JOHN DOE, A Minor, By and Through His Parents and Next Friends John Doe Sr. and Jane Doe,

Defendants - Appellees

Appeal from the United States District Court
For the Southern District of Mississippi
Civil Case No. 4:08-cv-22
The Honorable Tom S. Lee Presiding

TRIBAL COURT APPELLEES' RESPONSE IN OPPOSITION TO APPELLANTS' PETITION FOR REHEARING *EN BANC*

C. BRYANT ROGERS
VanAMBERG, ROGERS, YEPA, ABEITA & GOMEZ, LLP
POST OFFICE BOX 1447
SANTA FE, NM 87504
505-988-8979
MS BAR # 5638

DONALD L. KILGORE,
CHOCTAW ATTORNEY GENERAL
MISSISSIPPI BAND OF CHOCTAW INDIANS
OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 6358
CHOCTAW, MS 39350
601-656-4507
MS BAR # 3758

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case.

1. Dollar General Corp.

2. Dolgencorp, Inc.

3. KKR and Co. (owner of ore than 10% of Dollar General Corp.)

4. The Mississippi Band of Choctaw Indians

5. The Honorable Christopher Collins

6. John Doe

7. John Doe's Parents

8. Edward F. Harold, Esq.

9. Fisher & Phillips, LLP

10. Carl Bryant Rogers, Esq.

11. VanAmberg, Rogers, Yepa, Abeita & Gomez, LLP

12. Terry Jordan, Esq.

13. Brian Dover, Esq.

14. Donald Kilgore, Attorney General, Mississippi Band of Choctaw Indians

These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal.

s/ C. Bryant Rogers
C. BRYANT ROGERS

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

SUPPLEMENT TO COURSE OF PROCEEDINGS AND DISPOSITION BELOW 1

ARGUMENT 2

I. The Panel Opinion Properly Applied the *Montana* Test 2

II. *Plains Commerce* Did Not Change the Consensual Relationship Exception 8

III. The Panel Correctly Ruled That Tribal Jurisdiction May Extend to Tort Claims Which Otherwise Satisfy the *Montana* Test and the Nexus Requirement 14

CONCLUSION 15

CERTIFICATE OF SERVICE 16

CERTIFICATE OF COMPLIANCE 17

TABLE OF AUTHORITIES

CASES:

Atkinson Trading Co., Inc. v. Shirley,
532 U.S. 645 (2001) 3, 4, 5, 7

A*ttorney's Process & Investigation Services, Inc. v. Sac & Fox Tribe of the Mississippi in Iowa,*
609 F.3d 927 (8th Cir. 2010) 4, 11, 15

Bank One, N.A. v. Shumake,
281 F.3d 507 (5th Cir. 2002).....15

Buster v. Wright,
135 F. 947 (8th Cir. 1905).....5

Crowe & Dunlevy, P.C. v. Stidham,
640 F.3d 1140 (10th Cir. 2011) 11

Dolgen Corp., Inc. v. The Mississippi Band of Choctaw Indians,
2008 WL 5381906 (S.D. Miss.).....1

Dolgencorp, Inc. v. The Mississippi Band of Choctaw Indians,
846 F.Supp.2d 646 (S.D. Miss. 2011) 2, 4

FMC v. Shoshone-Bannock Tribes,
905 F.2d 1311 (9th Cir. 1990).....13

Farmers Union Oil Co. v. Guggolz,
2008 WL 216321 (D.S.D.).....15

Grand Canyon Skywalk Development, LLC v. 'SA' NYU WA Incorporated,
715 F.3d 1196 (9th Cir. 2013).....10

Iowa Mutual Ins. Co. v. LaPlante,
480 U.S. 9 (1987).....7

MacArthur v. San Juan County,
497 F.3d 1057, 1071 (10th Cir. 2007) 13

Merrion v. Jicarilla Apache Tribe,
455 U.S. 130 (1982).....3

Montana v. U.S.,
450 U.S. 544 (1981).....*passim*

Nevada v. Hicks,
533 U.S. 353 (2001).....3, 6

Phillip Morris USA, Inc. v. King Mountain Tobacco,
509 F.3d 932 (9th Cir. 2009).....11

Plains Commerce Bank v. Long Family Land & Cattle Co.,
554 U.S. 316 (2008).....*passim*

Salt River Project Agricultural Improvement and Power District v. Lee,
2013 WL 321884 (D. Ariz.).....13

Santa Clara Pueblo v. Martinez,
436 U.S. 49 (1978).....7

Strate v. A-1 Contractors,
520 U.S. 438 (1997).....3, 11, 14

TTEA v. Ysleta del Sur Pueblo,
181 F.3d 676 (5th cir. 1999) 7

Walls v. North Mississippi Medical Center,
568 So.2d 712 (Miss. 1990).....13

Water Wheel Camp Recreational Area, Inc., et al. v. Gary LaRance, et al.,
642 F.3d 802 (9th Cir. 2011).....3, 11

Williams v. Lee,
358 U.S. 217 (1959).....6

Wilson v. Marchington,
127 F.3d 805 (9th Cir. 1997.....4, 10

OTHER

Krakoff, "Tribal Civil Jurisdiction over Nonmembers:
A Practical Guide for Judges," 81 University of Colorado Law
Review, 1187, 1223 (2010).....5

Note: Sorting out Civil Jurisdiction in Indian Country after Plains Commerce
Bank: State Courts and the Judicial Sovereignty of the Navajo Nation,
33 American Indian Law Rev. 385 (2008-2009).....5

SUPPLEMENT TO COURSE OF PROCEEDINGS AND DISPOSITION BELOW

The Choctaw Supreme Court's Order granting the Dollar General entities and Dale Townsend's Petition for Permission to Appeal and its Order affirming Tribal Court jurisdiction over them (Pet., p. 1) followed oral argument and briefing on the issues in connection with the Petition.[1]

The U.S. District Court's ruling denying Dollar General's request for preliminary injunction and granting Dale Townsend's request for preliminary injunction (Pet., p. 2) is at *Dolgen Corp., Inc. v. The Mississippi Band of Choctaw Indians*, 2008 WL 5381906 (S.D. Miss.). The U.S. District Court later ruled that Dolgen had by and through its store manager agreed to participate in the Choctaw YOP program,[2] that the YOP agreement constituted a qualifying consensual relationship with the Tribe and John Doe, a tribal member and Dollar General, under *Montana's* first exception;[3] and, that the Does' tort claims had a direct logical nexus to that consensual relationship. [4]

The District Court then entered summary judgment for the Tribal Court Defendants and against Dolgen on the *Montana* jurisdictional test, ruling that the

---

1 Vol. 1 USCA5, pp. 42-187; Vol. 1 USCA5, p. 320.

2 Vol. 1 USCA5 p. 1058. In its final submission in the summary judgment proceedings, Dolgen abandoned its argument that Townsend had no authority to bind Dolgen to participate in the YOP: "Dollar General has not argued at this juncture that it did not consent to participate in the YOP." (Emphasis added). Vol. 1, USCA5 p. 1001.

3 Vol. 1 USCA5 p. 1064.

4 Vol. 1 USCA5 pp. 1059, 1065.

Tribal Court could properly exercise jurisdiction over the Does' claims pled there against Dolgen under *Montana's* first ("consensual relationship") exception.[5] *Dolgencorp, Inc. v. The Mississippi Band of Choctaw Indians*, 846 F.Supp.2d 646 (S.D. Miss. 2011). The Panel affirmed. Appellants sought *en banc* review. This Court ordered a response. This response is submitted for all Appellees except the Does (the Tribal Court Plaintiffs). They are represented by separate counsel.

ARGUMENT

I. The Panel Opinion Properly Applied the *Montana* Test

Appellants (hereinafter "Dollar General") have fundamentally misstated the current law governing tribal court civil jurisdiction. Specifically, no federal appellate case applying the "consensual relationship" of *Montana v. United States*, 450 U.S. 544 (1981) exception since *Plains Commerce v. Long Family Land and Cattle Co.*, 554 U.S. 316 (2008) has adopted the position here advanced by Dollar General. Instead, they all have properly applied that exception in the same way after *Plains Commerce* as before, just as was done by the Panel. *See,* pp. 9-10, *infra.*

The law governing the reach of tribal court jurisdiction over cases involving disputes and causes of action arising on an Indian reservation between a non-Indian party and a tribal party of that reservation is set out in *Montana v. United*

[5] Vol. 1 USCA5 pp. 1066, 1067; Vol. 2 USCA5 pp. 29-30.

States, supra. *Montana's* general rule is that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." (*Montana,* 565). The Court held that where nonmembers are concerned, the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Id.* at 564; but, then carved out two exceptions to that general rule[6]:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the

[6] *Montana's* general rule originally applied only when a tribe sought to regulate or adjudicate non-Indian conduct occurring on non-Indian owned fee land. *Montana, supra* at 557, 566; *Strate v. A-1 Contractors,* 520 U.S. 438, 445-447, 454 (1997); *Atkinson Trading Co., Inc. v. Shirley,* 532 U.S. 645, 646 and 653 (2001). Now, although there has never been a clear U.S. Supreme Court holding to that effect, *dicta* in *Nevada v. Hicks*, 533 U.S. 353, 373 (2001) (Souter, J. concurring) and in *Plains Commerce, supra* at 328-331 (2008) have given rise to the view that *Montana's* general rule now also applies to non-Indian conduct occurring on reservation trust land. Both the Choctaw Supreme Court and the U.S. District Court have so ruled.

Nonetheless, when the dispute in question arises on reservation trust land (as here), the Tribe faces a lower bar in sustaining its jurisdiction than when the tribe is attempting to regulate non-Indian conduct on non-Indian fee land, because in the reservation trust land circumstance tribal jurisdiction is bolstered by the tribe's inherent authority to exclude or condition entry of non-members onto reservation lands. *Plains Commerce, infra* at 328-331; *Nevada v. Hicks,* 533 U.S. 353, 359-360 (2001); *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 148-149 (1982) (tribe had inherent power to impose oil and gas severance tax on non-Indian lessee of reservation land over and above lease payments under oil and gas lease which was silent as to tribe's taxation authority); A*ttorney's Process & Investigation Services, Inc. v. Sac & Fox Tribe of the Mississippi in Iowa,* 609 F.3d 927, 938-940 (8th Cir. 2010) (reiterating that "tribal civil authority is at its zenith when the tribe seeks to enforce regulations stemming from its traditional powers as a landowner" whether it does so via positive law or adjudication of civil tort claims). The Ninth Circuit has held after *Plains Commerce* that where the suit involves non-Indian activity on reservation trust land, the tribe's power to exclude (and set conditions on entry) will anchor tribal court jurisdiction independent of the *Montana* test. *Water Wheel Camp Recreational Area, Inc., et al. v. Gary LaRance, et al.,* 642 F.3d 802 (9th Cir. 2011).

> tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security or the health and welfare of the tribe.
>
> *Montana*, *supra* at 566

The Court in *Atkinson, supra* at 656 later ruled that to invoke *Montana's* first exception also requires that the exercise of tribal authority "have a nexus to the consensual relationship itself;" or, as the Court later observed "[a] nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another–it is not "in for a penny, in for a pound'". *Id.*

Dollar General suggests that the Panel Opinion will subject the many casual recreational visitors to reservations in the Fifth Circuit to a litany of tort claims in tribal court. (Pet., pp. 6-7). This is vastly overstated. To the contrary, the absence of the requisite consensual relationship ("C/R") and/or the required nexus between a qualifying C/R and the potential tort claims to which Dollar General refers will bar the exercise of tribal court jurisdiction over non-Indian defendants in virtually all circumstances for those kinds of tort claims. Under the Panel Opinion (p. 12), tribal jurisdiction is not sustainable over a non-Indian defendant solely because he committed a tort on the reservation harming a tribal party. *Wilson v. Marchington,* 127 F.3d 805, 815 (9th Cir. 1997); *Dolgencorp, Inc., supra* at 649.

Plains Commerce did not change anything about these rules as regards the C/R exception.[7] As the District Court ruled, and the Panel affirmed, the C/R exception (the only *Montana* exception here at issue) is anchored in the recognition that a core attribute of tribal sovereignty and tribal rights of self-government is the tribal right to "make their own laws and be ruled by them;" and, that an essential component of that right of self-government is the right to have on-reservation disputes arising from such C/Rs involving tribal parties resolved in the tribes' own forums—even if one of the parties to such disputes is a non-Indian—so long as the *Atkinson* nexus test is satisfied. *See,* p. 653-654 of the decision appealed from and the Panel Opinion pp. 3-9.

This linkage has been repeatedly acknowledged by the Court, both in *Montana* and post-*Montana cases* (and key cases they cite as paradigms supporting tribal jurisdiction). Those paradigm cases include *Buster v. Wright*, 135 F. 947, 949 (8th Cir. 1905) (held: the tribal interest of self-government authorized a tribe to

[7] Dollar General (Pet., p.10 and fn.38) cites some Law Review commentary which it finds supportive of its *Plains Commerce* interpretation. Other law review commentary flatly rejects Dollar General's position. Krakoff, "Tribal Civil Jurisdiction over Nonmembers: A Practical Guide for Judges," 81 University of Colorado Law Review, 1187, 1223 (2010) ("Plains Commerce left Strate's doctrinal approach intact, but carved out one particular category of nonmember action—ownership of non-Indian land—from qualifying for the Montana exceptions"); "Note: Sorting out Civil Jurisdiction in Indian Country after Plains Commerce Bank: State Courts and the Judicial Sovereignty of the Navajo Nation," 33 American Indian Law Rev. 385 (2008-2009) ("As it stands, Plains Commerce Bank represents no disagreement over the Strate-Montana doctrine. The two exceptions continue untouched. The five justice majority excluded the first Montana exception by finding that the case involved a sale of fee land between nonmembers. … Lower courts should apply the Strate-Montana doctrine as before, mindful that the Supreme Court of the United States has passed on a chance to overrule that doctrine.").

"prescribe the terms upon which noncitizens may transact business within its borders." [and] "The authority of the Creek Nation to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in acts of Congress, treaty or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty."); *Williams v. Lee*, 358 U.S. 217 (1959), where the Court ruled that a dispute arising from an on-reservation transaction between a tribal member and a nonmember could not be heard in State Court because:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. *Cf* Donnelly v. United States, supra; Williams v. United States, supra. The cases in this Court have consistently guarded the authority of Indian governments over their reservations.

Those cases and their citation in *Montana* and post-*Montana* decisions recognize that it is integral to a tribe's right of self-government that tribes be able to regulate voluntary C/Rs between nonmembers and the tribe (or tribal entities) or tribal members on their reservations, and for their courts to be able to adjudicate claims involving disputes arising from such relationships. *Montana*, *supra* at 565-566; *Nevada v. Hicks*, *supra* at 361 (paramount among the interests the *Montana* exceptions were intended to protect is the right of Indian tribes "to make their own

laws and be governed by them"); *Plains Commerce, supra* at 332-333. This Court has applied these rules to affirm tribal court civil jurisdiction under *Montana's* C/R exception. *TTEA v. Ysleta del Sur Pueblo,* 181 F.3d 676, 679, 683-685 (5th Cir. 1999) (upholding tribal court's jurisdiction to declare that a non-Indian company's contract with a tribe was void under federal law in a suit filed against the non-Indian party in tribal court).

Dollar General's position is fundamentally inconsistent with these rulings. *Accord, Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9, 13-15, 16 (1987) ("Tribal courts play a vital role in tribal self government…tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty…civil jurisdiction over such activities presumptively lies in the tribal courts…"); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 65 (1978) ("Tribal Courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interest of both Indians and non-Indians").

Before and after *Plains Commerce,* the exercise of tribal court jurisdiction over non-Indian defendants is permitted—as a core attribute of tribal rights of self-government—so long as one of the *Montana* exceptions is invoked and the *Atkinson* "nexus" test is satisfied. Thus, the Panel Opinion does not conflict with

any decision of the U. S. Supreme Court (or of this Court) to justify *en banc* review under F.R.A.P. 35(a) and (b)

II. *Plains Commerce* Did Not Change the Consensual Relationship Exception

Did *Plains Commerce* change anything regarding the requirements for invoking the C/R exception? The answer is "no." The exact same principles respecting the requirement for linkage between a given tribal court case and the Tribe's underlying right to self-government established in *Montana* were simply reiterated in *Plains Commerce.*[8]

The Court reaffirmed the *Montana* test and the C/R exception without change.[9] Nothing in *Plains Commerce* imposed on tribes the requirement to make the kind of "special harm to tribal self-government" showing required to invoke

---

[8] To be clear the entirety of the Court's discussion of the *Montana* exceptions in *Plains Commerce* was *dicta.* This is because the court ultimately saw the case as presenting the question whether a tribal court could exercise jurisdiction over and judicially nullify one non-Indian's sale of fee land to another non-Indian. *Plains Commerce, supra* at 323. So viewed, the Court found that neither exception was applicable, in part because they only applied to determine whether a tribe can regulate or exercise jurisdiction over disputes arising from non-Indian *activity* within reservation lands. *Plains Commerce, supra* at 336-337.

[9] Although the tribal parties had not relied on *Montana's* second "political integrity" exception, the Court did in *dicta* redefine that exception and significantly narrowed the circumstances in which it can be invoked to sustain the exercise of tribal jurisdiction. *Plains Commerce, supra* at 340-341:

> The second exception authorized the tribe to exercise civil jurisdiction when non-Indians' "conduct" menaces the "political integrity, the economic security, or the health or welfare of the tribe." *Montana,* 450 U.S. at 566, 101 S.Ct. 1245. The conduct must do more than injure the tribe, it must "imperil the subsistence" of the tribal community. *Ibid.* One commentator has noted that "th[e] elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences." Cohen § 4.02[3][c], at 232, n. 220.

Montana's (second) "political integrity" exception (*see,* footnote 2) in order to invoke *Montana's* (first) C/R exception. But that is what Dollar General has demanded and that is the core error in their misreading of *Plains Commerce.*

Dollar General's entire argument for rehearing rests on the erroneous premise that the Court in *Plains Commerce* collapsed the two *Montana* exceptions into one—requiring a tribal party to satisfy all the requirements for both exceptions to invoke the *Plains Commerce* C/R exception. Dollar General's argument rests upon two words in the *Plains Commerce* opinion at 337:

> … The tribe is able fully to vindicate its sovereign interests in protecting its members and preserving tribal self-government by regulating nonmember activity on the land within the limits set forth in our cases. (Emphasis added).
>
> ****
>
> …Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his action. Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations. *See Montana,* 450 U.S., at 564. (Emphasis added).

Yet the Court in *Plains Commerce* clearly distinguished between the two exceptions and their separate requirements. *Id.* at 337-340 and 391.

In context, the Court's "even then" reference in the *Plains Commerce* passage Dollar General relies upon (Pet., pp. 9, 12) is simply a reminder that the reach of tribal jurisdiction under the C/R exception is restricted to those circumstances when that exception can otherwise be invoked. Thus, the exercise of

tribal court jurisdiction cannot be justified under the C/R exception for stand alone tort claims which are not derivative of an on-reservation C/R into which the non-Indian party has voluntarily entered; or, to any claim which does not have a nexus (a logical connection to) such a C/R. *Wilson v. Marchington, supra.*

What the Court is saying in the quoted passage is that if those requirements are not satisfied, the tribe's assertion of regulatory or adjudicatory jurisdiction cannot be justified as an exercise of a tribal right of self-government; but, if those requirements are met, the exercise of tribal court jurisdiction is justified based on the tribe's right "to make their own laws and be ruled by them." As the Panel correctly ruled, no further showing of special harm to that core right of self-government is required. (Panel Ruling, p. 11).

Tellingly, no case since *Plains Commerce* has held that tribal court jurisdiction based on the C/R exception must also be bolstered by the kind of additional proof of harm to tribal self-government as claimed by Dollar General where the nexus test is satisfied. No federal appellate ruling addressing the issue has accepted the position advanced by Dollar General, hence there exists no basis for *en banc* review per F.R.A.P. 35(a)(2). All have applied the C/R exception after *Plains Commerce* in the same way as before. *Grand Canyon Skywalk Development, LLC v. 'SA' NYU WA Incorporated*, 715 F.3d 1196, 1205-1206 (9th Cir. 2013) (citing *Plains Commerce* and applying *Montana's* C/R exception

without change); *Water Wheel, supra* at 810-820 and n.6 (affirming tribal court jurisdiction over contract and tort claims under *Montana* exceptions as regards on-reservation lease and post-lease disputes between tribe and non-member parties, rejecting arguments that *Plains Commerce* changed the rules regarding the C/R exception); *Crowe & Dunlevy, P.C. v. Stidham,* 640 F.3d 1140 (10th Cir. 2011) (affirming district court's application of the C/R relationship test after *Plains Commerce*; ruling that the *Montana* test is satisfied by proof of a C/R and "a sufficient 'nexus' between that relationship" and the subject tribal court claim, without any suggestion that any separate proof of special harm to the tribe's right of self-governance or internal affairs was required); *Attorney's Process, supra* at 936, 937-946 (8th Cir. 2010) (recognizing that *Plains Commerce* left intact the basic *Montana* framework and its two exceptions); *Phillip Morris USA, Inc. v. King Mountain Tobacco,* 509 F.3d 932, 937, 940-942 (9th Cir. 2009) (*Montana, Strate,* and *Hicks* … are affirmed in important respects by the Court's most recent tribal jurisdiction decision in *Plains Commerce;*" expressly rejecting the argument that a special showing of significant harm to the tribe's political existence or internal relations is required to invoke the C/R exception).

In effect, as found in these cases in the District Court and by the Panel, where the C/R and nexus requirement are satisfied, the underlying self government predicate is deemed satisfied without any additional or special showing that

depriving a tribal court of jurisdiction to decide a particular case would cause serious harm to the tribe's right of self-government. The Panel's approval (Panel Ruling, pp. 4-5 and 10-11) of the District Court's analysis and conclusion on this issue rebuts Dollar General's claim (Pet., p. 12) that "At no point does the panel decision explain how the tribal court's exercise of jurisdiction over the Doe's tort claim stems from the tribe's authority to set conditions or entry, preserve tribal self-government, or control internal relations. It does not because it cannot." To the contrary, the Panel Opinion clearly demonstrated why that requirement was satisfied and why the special showing of "harm to tribal self-government" if the tribal court was barred from hearing this particular case was not required.

Likewise, Dollar General's claim (Pet., p. 10) that the District Court and the Panel "have only paid lip service to the Supreme Court's admonition" (an admonition from *Montana* simply repeated in *Plains Commerce*) that the exercise of tribal jurisdiction under either exception ultimately turns on whether providing a tribal court forum can be tied to tribal rights of self-government, and Dollar General's claim (Pet., p.12) that the Panel Opinion "concludes that all disputes based on all consensual relationships triggers (sic) tribal court jurisdiction" and that the Panel's "conclusion … completely ignores" the *Montana* requirements, are

simply wrong.[10] The Panel Opinion did no such thing. It faithfully enforced the limiting nexus and C/R requirements; and, contrary to Dollar General's claim (Pet., p.11), the Panel applied the appropriate level of generality in applying the C/R and nexus tests. Here the tribal court causes of action derive directly from Dollar General's breach of a core obligation of Dollar General undertaken when it agreed to participate in the Tribal YOP program: to provide a safe working environment for the tribal student interns placed in its care and supervision. The nexus test was clearly satisfied here—as the causes of action pled are logically related to—arise directly from—that C/R.[11] *See,* the decision appealed from at 654-655, and the Panel Opinion at p. 9.

Moreover, in Dollar General's view there now remain essentially no circumstances in which tribal court civil jurisdiction could be sustained under the

---

10 Dollar General's reference in fn. 41 (Pet., p. 11) to the District Court's 2008 decision quoted the Court's observation that the special showing required to invoke *Montana's* second (political integrity) exception was not satisfied. The District Court's later ruling at 846 F.Supp.2d 646, 653-654 (S.D. Miss. 2011)—the decision appealed from—addresses why that special showing is not required to invoke the first (consensual relationship) exception.

11 Contracts and employment-type relationships have long been recognized to constitute qualifying C/Rs under the *Montana* test. *FMC v. Shoshone-Bannock Tribes,* 905 F.2d 1311 (9th Cir. 1990); *MacArthur v. San Juan County*, 497 F.3d 1057, 1071 (10th Cir. 2007); *Salt River Project Agricultural Improvement and Power District v. Lee,* 2013 WL 321884 (D. Ariz.) (requirement that tribal court suit based on C/R exception must "be justified by reference to the tribe's sovereign interest" is deemed satisfied where the suit involved dispute implicating tribal member employment on-reservation); *see, Walls v. North Mississippi Medical Center,* 568 So.2d 712 (Miss. 1990) (student nurse assigned to work at medical center under an unwritten student intern program constituted "a consensual relationship between the parties to the arrangement"). Indeed, Dollar General told the Choctaw Supreme Court in Oral Argument that its relationship with John Doe was in the nature of an employment relationship (Vol. 1 USCA5 p.320).

C/R exception—since it is hard to imagine many situations where depriving a tribal court of the opportunity to adjudicate a particular case would fundamentally undermine a tribe's right of self-government. Instead, it is the deprivation of Indian tribes' ability to provide forums for the resolution of essentially any civil disputes arising from on-reservation C/Rs between tribes or their members and non-Indian parties which poses the real threat to tribal government. What kind of tribal *government* is it that cannot provide a forum for resolution of such local disputes for its members? Barring tribes from providing such forums would be a direct and fundamental assault on tribal rights of self-governance. *Plains Commerce* did not impose this kind of draconian limitation on tribal court civil jurisdiction.

III. The Panel Correctly Ruled That Tribal Jurisdiction May Extend to Tort Claims Which Otherwise Satisfy the *Montana* Test and The Nexus Requirement

Finally, where, as here, the C/R and nexus requirements are satisfied, it does not matter whether the tribal court causes of action at issue sound in tort or in contract. The Panel correctly ruled that adjudication of contract and tort claims which have a logical nexus to a qualifying C/R are a recognized "other means" by which a tribe may regulate the conduct of non-Indians who have entered into such relationships with a tribe or its members on their reservation. Panel Opinion at 9*;* *Strate, supra* at 453 (where the Court read its precedents as standing "for nothing more than the unremarkable proposition that, where tribes possess authority to

regulate the activities of nonmembers civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts."); *Attorney's Process, supra* at 938 ("If the Tribe retains the power under *Montana* to regulate such conduct, we fail to see how it makes any difference whether it does so through precisely tailored regulations or through tort claims such as those at issue here."). *See, Bank One, N.A. v. Shumake,* 281 F.3d 507 (5th Cir. 2002) (requiring exhaustion of tribal remedies on contract and tort claims against non-Indian defendant arising from Bank's on-reservation C/R because the tribal court had colorable jurisdiction over all of those claims); *Farmers Union Oil Company v. Guggolz,* 2008 WL 216321 (D.S.D.) (ruling that adjudicating a tort claim based on a premises liability theory was a kind of "other means" for exercising tribal jurisdiction where the tort claim had a logical nexus to underlying C/Rs between the tribe and tribal members and an on-reservation convenience store operator).

CONCLUSION

The Panel Opinion was correct. *En banc* review is not warranted under any of the standards set out in Rule 35 F.R.A.P. The Petition should be denied.

Respectfully submitted,

TRIBAL COURT APPELLEES

By: s/ Carl Bryant Rogers
CARL. BRYANT ROGERS
(MSB 5638)
Counsel for Mississippi Band of Choctaw Indians, its Courts and Choctaw Civil Judge, Christopher Collins, sued in his official capacity

CERTIFICATE OF SERVICE

I, CARL BRYANT ROGERS, do hereby certify that I have on this 24th of October, 2013 served a copy of the foregoing pleading electronically through the CM/ECF system to:

Edward F. Harold
Fisher & Phillips
201 St. Charles Ave., Suite 3710
New Orleans, LA 70170-3710
eharold@laborlawyers.com

Brian D. Dover
915 South Main Street
Post Office Box 970
Jonesboro, AR 72403
doverlaw@ritternet.com

Terry L. Jordan
Jordan & White, Attorneys
Post Office Box 459
Philadelphia, MS 39350
Tlj_law@bellsouth.net

s/ C. Bryant Rogers
C. BRYANT ROGERS

CERTIFICATE OF COMPLIANCE

This Response complies with the length limitation of Fed. R. App. P. 35(b)(2) because, after excluding the parts of the Response exempted by Rule 32(a)(7)(B)(iii), it does not exceed 15 pages.

It also complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it uses a 14-point Times New Roman, a proportionally spaced font.

s/ C. Bryant Rogers
C. BRYANT ROGERS