UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI

| | |
|---|---|
| DOLGEN CORP INC., DOLLAR GENERAL CORPORATION, AND DALE TOWNSEND,<br><br>Plaintiffs,<br><br>VERSUS<br><br>THE MISSISSIPPI BAND OF CHOCTAW INDIANS, THE TRIBAL COURT OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS, THE HONORABLE CHRISTOPHER A. COLLINS (in his Official capacity), and JOHN DOE, A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS JOHN DOE SR. AND JANE DOE,<br><br>Defendants. | CIVIL ACTION NO.:<br>4:08-cv-00022-TSL-JCS<br><br>JUDGE: TOM S. LEE<br><br>MAGISTRATE: JAMES C. SUMMER |

**MEMORANDUM IN OPPOSITION TO ALL PLAINTIFFS' MOTIONS FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

## INTRODUCTION

### A.

This Memorandum is filed by the Defendants, the Mississippi Band of Choctaw Indians, the Tribal Court of the Mississippi Band of Choctaw Indians, the Honorable Christopher A. Collins (in his official capacity) (hereinafter the "Tribal Defendants"), in support of their Responses in Opposition to all pending Motions for Temporary Restraining Order and Preliminary Injunction filed by the several Plaintiffs in this action.

Those Motions ultimately seek to have this Court enjoin Defendants (both the Tribal Defendants and the John Doe tribal court plaintiffs) from proceeding with adjudication of CV-02-05 in the Choctaw Tribal Courts (Complaint, p.7; DG and Townsend Motions, p.3).

The central question posed by Plaintiffs' Complaint and their Motions is their request for this Court to rule upon the federal question whether the Choctaw Tribal Court may under *Montana v. United States,* 450 U.S. 544 (1981) and its progeny properly exercise civil jurisdiction over the tort claims pled on behalf of John Doe, a minor Mississippi Choctaw tribal member, against the Plaintiffs in CV-02-05, including their claim for punitive damages.

The Tribal Defendants agree that the Plaintiffs here have fully exhausted their tribal remedies on those central questions and that the Complaint (to the extent it raises those issues) pleads federal questions properly cognizable in this Court under 28 U.S.C. § 1331. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985); *Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9 (1987); *Martha Williams-Willis v. Carmel Financial Corporation*, 139 F.Supp.2d 773 (S.D.Miss. 2001); *Bank One, N.A. v. Lewis,* 144 F.Supp.2d 640 (S.D.Miss. 2001), *aff'd Bank One, N.A. v. Shumake*, 281 F.3d 507 (5th Cir. 2002).

Since those underlying jurisdictional questions will have been fully briefed and argued to this Court in connection with the Plaintiffs' pending Motions, the Tribal Defendants (out of considerations of judicial economy and to minimize the legal cost required to conclude this litigation) respectfully request that the Court rule upon those questions based upon that briefing and argument without requiring the parties to file separate Motions to Dismiss or for Summary Judgment on those questions.

However, as will be shown below, Plaintiffs here have also injected into their Complaint or their Motions and Memoranda some other legal questions or claims as to which this Court does not have subject-matter jurisdiction, which are barred by the Tribal Defendants' unwaived sovereign immunity, which fail to state claims on which relief can be granted and as to which Plaintiffs have not exhausted their tribal remedies. For the reasons more fully shown in their

Responses and in part VII *infra*, the Tribal Defendants also request (again out of considerations of judicial economy and to minimize the legal cost required to conclude this litigation) that this Court dismiss or not reach or rule upon or not otherwise take into account those claims and issues in ruling upon the *Montana* jurisdictional questions which are properly before this Court, again without requiring the Tribal Defendants to file separate Motions to Dismiss or for Summary Judgment seeking that relief.

**B.**

The Choctaw Supreme Court has ruled that the Choctaw Courts may properly exercise jurisdiction over CV-02-05 under tribal law and under federal law. *John Doe v. Dollar General Corporation, et al.,* No. SC 2006-6 (CV-02-05), Memorandum Opinion and Order (February 8, 2008) a copy of which is appended to the Dollar General Plaintiffs' Complaint as pp. 170-181 of Exhibit 1.[1] Plaintiff's argue that the Choctaw Supreme Court's ultimate ruling on that issue was erroneous. However, Plaintiffs cannot prevail here on that federal question by simply attacking the jurisprudence or legal reasoning of the Choctaw Supreme Court on that issue. *See*, DG Memo, pp. 5-14.

Instead, the real question is whether this Court—giving due consideration to the Choctaw Supreme Court's federal law ruling under *Montana*—believes that such jurisdiction is proper under *Montana*; and, by analogy to the rules applicable in federal appellate review, this Court may find that tribal jurisdiction is proper here on any grounds sustainable based on the record of the Tribal Court proceedings, whether or not that ground was raised or ruled upon in those proceedings. *See, United Industries, Inc. v. Simon-Hartley, Ltd.,* 91 F.3d 762, n.6 (5th Cir. 1996)

[1] As noted in the Tribe's pending Motion to Vacate the Choctaw Supreme Court's later Order of March 3, 2008 (Exhibit A to the Tribal Defendants' Answer), at some point all the parties (and the Choctaw Supreme Court itself) inadvertently began using the Choctaw Tribal Court's Case No. CV-02-05, rather than the Supreme Court case number (SC-2005-6) originally assigned to those appellate proceedings.

("We will not reverse a judgment if the district court can be affirmed on any ground, regardless of whether the district court articulated the ground."); *Lifecare Hospitals, Inc. v. Health Plus of Louisiana*, 418 F.3d 436, 439 (5th Cir. 2005) (citing *Forsyth v. Barr*, 19 F.3d 1527, 1534, n.12 (5th Cir. 1994) for the rule that "even if we do not agree with the reasons given by the district court to support summary judgment, we may affirm the district court's ruling on any grounds supported by the record.").

However, in order to ensure that due respect is accorded the Choctaw judiciary, and to avoid undermining the policies giving rise to the requirement that parties seeking a federal court determination on the *Montana* jurisdictional question must first exhaust their tribal remedies as to that question, the parties to the underlying tribal court civil lawsuits in which that question arises should be confined to arguments based on the record of those proceedings and any related Choctaw Court proceedings. *See, Iowa Mutual, supra* at 14-18; *National Farmers Union Ins. Co., supra* at 857.

Finally, Plaintiffs' *Montana* based attacks on the Choctaw Courts' subject matter jurisdiction occurred before answer, summary judgment or trial. *See,* the Choctaw Courts' Docket in CV-02-05 at Exhibit 1, pp. 1-2 to the Complaint. Plaintiffs argue that even if all factual allegations of the Complaint were true that the Choctaw Courts would not have jurisdiction under *Montana*. Thus, Plaintiffs' *Montana* jurisdictional arguments were (in the Choctaw Courts) and are (in this Court) the legal equivalent of Rule 12(b)(1) facial attacks on the Choctaw Courts' subject-matter jurisdiction. Accordingly, both in the Choctaw Courts and in this Court the factual allegations of John Doe's Complaint in CV-02-05 must be taken as true. *Crawford v. U.S. Dept. of Justice,* 123 F.Supp.2d 1012 (S.D. Miss. 2000) (on Rule 12(b)(1) motion asserting facial attack on jurisdiction factual allegations of complaint "are taken as true");

*Benton v. U.S.*, 960 F.2d 19 (5th Cir. 1992) (a claim may not be dismissed based on facial attack on jurisdiction "unless it appears certain that the plaintiff cannot prove any set of facts that would entitle him to relief").

As will be shown in the argument below, the factual allegations of ¶¶ I-III and VI of that Complaint (copy of original and amended Choctaw Court Complaint attached as pp. 1-5, 59-50 of Exhibit 1 to the Plaintiff's Complaint) without more establish a sufficient consensual relationship to sustain the Choctaw Courts' jurisdiction in this action. Paragraphs I-III and VI of that Complaint pled:

> I.
>
> Your Plaintiff alleges and charges that as a thirteen year old minor on July 14, 2003, that he was employed with the Youth Opportunity Program and was assigned to the Dollar General Store at Choctaw Towne Center on the Pearl River Reservation located within the exterior boundaries of the Choctaw Indian Reservation. Further, this Honorable Court has jurisdiction of the parties and subject matter in that all occurrences giving rise to Plaintiff's cause of action occurred within the confines of the Choctaw Indian Reservation.
>
> II.
>
> That the minor Plaintiff was assigned to Dollar General's store and that Dale Townsend was the immediate supervisor of the minor at Dollar General Store.
>
> * * * *
>
> III.
>
> That at all times complained of herein, the Defendant, Dale Townsend, an adult, was the manager in charge of the Dollar General Store at Choctaw Towne Center, and at all times acted as the agent, servant, and alter-ego of the Defendant, Dollar General Corporation, and that all acts complained of were intentional and amounted to gross negligence on the parts of Dale Townsend and Dollar General Corporation, jointly and severally.
>
> * * * *
>
> VI.
>
> Defendant, Dollar General Corporation, negligently hired, trained or supervised Defendant Townsend. (Emphasis added)

Paragraphs IV, V and VII of John Doe's Choctaw Court Complaint then set out John Does' factual allegation respecting the several sexual assaults he sustained at the Dollar General store at the hands of Dale Townsend, and their aftermath.

## ARGUMENT

### I.

Before addressing Plaintiffs' *Montana* arguments, some consideration of key pre-*Montana* and post-*Montana* case law is warranted. Initially, in *Williams v. Lee*, 358 U.S. 217 (1959) the Court barred the exercise of state court jurisdiction over causes of action arising on Indian reservations in which non-Indians sought to sue Indians for such causes of action. In this regard, the Court stated at pp. 220, 223:

> Essentially, absent governing Acts of Congress the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.
>
> * * * *
>
> 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 rights 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.. . .The cases in this court have consistently guarded the authority of Indian governments over their reservations. (Citations omitted).

Likewise, in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-72 (1978), the Court ruled *inter alia* that the Indian Civil Rights Act, 25 U.S.C. § 1301 *et seq.*, ("ICRA") did not create any private right of action for ICRA violations in the federal courts, other than habeas relief. The Court also emphasized that:

> Tribal forums are available to vindicate rights created by ICRA and § 1302 has a substantial and intended effect of changing the law which these forums are obliged to apply. Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians."

*United States v. Montana, supra,* building on those cases, originally enunciated a Main rule with two exceptions, and a Secondary rule, all addressing the circumstances when the exercise of tribal civil jurisdiction over the activities of non-Indians occurring within Indian reservations was proper. Under *Montana's* Main rule, tribal civil jurisdiction over non-Indians for non-Indian conduct *on non-Indian fee land* could only be sustained when one of the two exceptions to that Main rule were established. *Id.* at 565-566. The first was the "consensual relationship" exception ("a tribe may regulate, through taxation, licensing or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases or other arrangements."). *Id.* at 565. The second was the "health and welfare" exception. ("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."). *Id.* at 566.

*Montana's* Secondary rule presumed the authority of tribes to regulate the behavior of non-Indians on tribal trust/reservation lands which remained in tribal/federal title. *Id.* at 557 ("The Court of Appeals held that the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the tribe, . . . and with this holding we can readily agree.").

Subsequently, in *Iowa Mutual Insurance Company, supra* the Court reiterated that:

> Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. *See, Montana v. United States,* 450 U.S. 544, 565-566 . . . Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by specific treaty provision or federal statute. "Because the tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government the proper inference from silence . . . is that the sovereign power . . . remains intact." (Emphasis added) (citations omitted).

It was against this backdrop that later rulings construed *Montana's* Main rule and its exceptions as applying only when the cause of action arose on non-Indian fee land within reservation boundaries and did not apply—but instead the Secondary rule invoking the presumption of tribal jurisdiction applied—where the cause of action arose on tribal trust or reservation lands.[2] *Brendale v. Confederated Yakima Nation,* 492 U.S. 408 (1989) (distinguishing between tribal regulatory authority over non-Indians on fee lands within reservation *versus* on reservation lands); *South Dakota v. Bourland*, 508 U.S. 679 (1993) (ruling that tribe could not exercise civil authority over non-Indians on fee lands owned by the U.S. Corps of Engineers acquired for a dam within reservation boundaries); *Strate v. A-1 Contractors, Inc.*, 520 U.S. 438, 446-447, n.6 (1997) ("*Montana* thus described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation subject to two exceptions. . . "); *El Paso Natural Gas Company vs. Neztsosie*, 526 U.S. 473, 482, n.4 (1999) (". . .*Strate* dealt with claims against nonmembers arising on state highways. . . By contrast, the events in question here occurred on tribal land"); and in *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 651-654 (2001) (holding tribe had no jurisdiction to tax hotel operations on non-Indian fee land within reservation where neither *Montana* exception was met in contrast to tax upheld in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) where the activities taxed occurred on reservation lands); *Allstate Indemnity Company v. Stump*, 191 F.3d 1071 (9th Cir. 1999) ("Generally

[2] There is no dispute in this case that the cause of action here arose on Choctaw Reservation/trust lands. Indeed, all Choctaw trust lands also constitute "reservation" lands, both because the Supreme Court so held in *U.S. v. John*, 437 U.S. 634 (1978) (all lands taken into trust for Mississippi Choctaws constitute informal reservation lands), and because Congress subsequently confirmed the formal reservation status of all Mississippi Choctaw trust lands by statute at Public Law 106-228, 114 Stat. 228, Act of June 29, 2000, Section 1(a)(1) which provided that "All lands taken into trust by the United States for the benefit of the Mississippi Band of Choctaw Indians on or after December 13, 1944, shall be part of the Mississippi Choctaw Indian Reservation."

speaking, the *Montana* rule governs only disputes arising on non-Indian fee land, not disputes on tribal lands; otherwise, the *Strate* court's analysis of why a state highway on tribal land was equivalent to non-tribal land would have been unnecessary;" held: Allstate Insurance must exhaust its remedies in tribal court because there was a colorable basis for the assertion of tribal jurisdiction even though the Court questioned whether the tribal court lawsuit actually arose from the underlying contractual relationship.).

Subsequently, the U.S. Supreme Court in *Nevada v. Hicks*, 533 U.S. 353 (2001) held that Indian tribal courts cannot adjudicate 42 U.S.C. § 1983 claims or tort claims filed against state officers for conduct occurring during the performance of their official duties on Indian reservations. *Id.* at 369. *Hicks* left open the question whether state officers could be subject to private tort claims in tribal courts based on conduct occurring on-reservation in their private capacities: "We do not say state officers cannot be regulated; we say they cannot be regulated in the performance of their law enforcement duties. Action unrelated to that is potentially subject to tribal control depending on the outcome of *Montana* analysis." *Id.* at 373. Moreover, the Court made clear (*Id.* at 358, fn.2) that its holding in *Hicks* was "limited to the question of tribal-court jurisdiction over state officers enforcing state law. We leave open the question of tribal-court jurisdiction over nonmember defendants in general." Hence, *Hicks* contains no holding changing the Court's prior interpretation of *Montana.*

Six members of the Court in *Hicks* did express *in dicta* the view that *Montana's* Main rule and the requirement to satisfy one of the exceptions thereto should be extended to apply even on reservation lands rather than being restricted to cases arising on non-Indian fee lands within the reservation. *Id.* at 354, 359-360. However, as made clear by fn.2, at 358, this *dicta* was not a ruling or holding of the Court, and, it is clear that the facts pled in John Doe's Choctaw

Court Complaint would be sufficient without more to validate the exercise of tribal court civil jurisdiction over CV-02-05 under the pre-*Hicks* interpretation of *Montana* without satisfying either of the *Montana* exceptions.

This is the view of the Ninth Circuit as originally expressed in the same ruling on which Plaintiffs so heavily rely (and in which that Court initially declined to require exhaustion of tribal remedies on the *Montana* jurisdiction question), prior to the withdrawal of that ruling. *Ford Motor Credit Co. v. Todecheene,* 394 F.3d 1170 (9thCir. 2005), withdrawn to require exhaustion of tribal remedies, 488 F.3d 1215 (9th Cir. 2007). In its 2005 opinion, the Ninth Circuit had this to say about *Hicks:*

> Six justices in Nevada v. Hicks endorsed the premise first articulated by Justice Souter in Atkinson that the general Montana rule applies equally to conduct by nonmembers on tribal land and on non-Indian land within a reservation. Id. at 381 (Souter, J., concurring, joined by Kennedy, J., and Thomas, J.) . . . Justice Scalia's majority opinion is somewhat equivocal on the point, stating in footnote two that it is leaving the question open, but later seemingly applying the general Montana rule, despite the fact that the search occurred on Indian land. Justice Ginsburg published a separate concurrence in order to note that the Court had not created any general rule concerning nonmember defendants in tribal courts. Id. at 386 (Ginsburg, J., concurring) ("The Court's decision explicitly 'leaves open the question of tribal-court jurisdiction over nonmember defendants in general.'" (quoting id. at 358 n.2)).

It is in any event well-settled that *dicta* in Supreme Court cases do not have the same force as holdings. In fact *dicta in* Supreme Court cases have been recognized as not constituting "clearly established" law for purposes of the qualified immunity standard or for habeas corpus. *Williams v. Taylor,* 529 U.S. 362 (2000) (clearly established law refers to holdings as opposed to *dicta* in Supreme Court's decisions); *accord, Salazar v. Dretke,* 419 F.3d 384 (5th Cir. 2005). Nonetheless, the Choctaw Supreme Court accepted Plaintiffs' *Hicks* arguments in *Doe v. Dollar General Corporation, supra,* at pp. 6-7 requiring the John Doe Plaintiff to prove that one of the *Montana* exceptions was satisfied to sustain tribal court jurisdiction over CV-02-05. The

remainder of this Memorandum will assume *arguendo* that the Choctaw Supreme Court's ruling as to the effect of *Hicks* on *Montana* was correct.[3] However, even after *Hicks* the fact that the torts here at issue are alleged to have occurred on Choctaw Reservation lands (rather than on non-Indian fee lands) still makes a difference even under Plaintiffs' post-*Hicks* interpretation; and, that difference lowers the bar on what circumstances are required to satisfy the *Montana* exceptions and the "nexus" assessment to sustain tribal jurisdictions for claims arising on reservation lands rather than on non-Indian fee lands. *Cf. Nevada v. Hicks, supra* at 359-360, and 382, n.4 (Souter, J. concurring) ("Thus, it is not that land status is irrelevant to a proper *Montana* calculus, only that it is not determinative in the first instance. Land status, for instance, might well have an impact under one (or perhaps both) of the *Montana* exceptions."); *Bank One, N.A. v. Shumake, supra* at 312 and notes 12 and 13 (distinguishing between Choctaw reservation lands and non-Indian fee lands under *Montana* test), *r'hrg and r'hrg en banc den'd*, 34 Fed. Appx. 965 (5th Cir. 2002) (declining to overturn panel's ruling despite argument that *Hicks* changed the *Montana* rules even where private tort claims arising from on-reservation consensual relationships are involved), *cert. den'd.*, 537 U.S. 818 (2002).

**II.**

Plaintiffs argue that under *Montana v. United States* and its progeny the Choctaw Tribal Courts cannot lawfully exercise civil jurisdiction over the tort claims filed against them in CV-02-05 on behalf of John Doe, a minor tribal member. Plaintiffs contend that they have never

[3] If the Tribe had been a party in CV-02-05 in the Choctaw Courts below, the Tribe would have argued that *Hicks* did not change the *Montana* rules as previously construed; and, therefore that it would not be necessary to establish one of the *Montana* exceptions to sustain Tribal Court jurisdiction. However, the Choctaw Supreme Court has now joined other courts in viewing *Hicks* as changing that rule requiring satisfaction of one of the *Montana* exceptions to sustain Tribal Court jurisdiction even for claims arising on reservation lands. *Doe v. Dolgen Corp., supra.* That interpretation is the law of the land in proceedings before the Choctaw Courts unless the Choctaw Supreme Court can be persuaded otherwise. However, the pre-*Hicks* interpretation of *Montana* set out above remains an alternative ground upon which this Court can in this proceeding sustain the Choctaw Court's jurisdiction.

entered into any consensual relationship with the Tribe or its members which would satisfy the "consensual relationship" exception to *Montana's* Main rule. Plaintiffs are mistaken.

Plaintiffs in fact entered into multiple consensual relationships with the Tribe and tribal member John Doe in connection with the Dollar General store operations on the Choctaw Indian Reservation; and, there exists a direct nexus between those consensual relationships and the injuries received by John Doe. Specifically, Dollar General's agreement to participate in the Tribe's Youth Opportunity (job training) Program arrangement and to accept the placement at its store of John Doe and to supervise (and benefit from) his work there; and, to assign store manager Dale Townsend to handle that supervision; and, John Does' acceptance of a job training placement at that store; and, Dale Townsend's agreement as store manager to undertake John Doe's supervision pursuant to that program, all evidence voluntary consensual relationships between the Tribe and the John Doe tribal member on the one hand and the Dollar General Plaintiffs and Dale Townsend on the other, over and above the other consensual relationships between Dollar General and the Tribe itself evidenced by the business lease and business license Dollar General received from the Tribe. All of these consensual relationships arose in a commercial context.

Participation in that work experience placement arrangement was not imposed upon Dollar General or Dale Townsend. As found by the Choctaw Supreme Court, in *Doe v. Dollar General Corp., supra* at pp. 8-9, that arrangement was implemented by Dollar General based on "an (unwritten) consensual agreement between the Tribe and Dollar General. . .[involving the placement of] . . . a tribal minor with Dollar General; for job training purposes." Moreover, Dollar General financially benefited from its decision to participate in the Tribe's Youth Opportunity Program by receiving work from John Doe that Dollar General didn't have to pay

for and because John Doe's presence at the store on the reservation as a Choctaw tribal member working there likely provided positive public relations for Dollar General which could be reasonably expected to lead to increased patronage by tribal members there. It is, in any event, generally recognized that businesses which participate in such job training programs do benefit from them over and above the benefits flowing to the placement agency or the student. *Walls v. North Mississippi Medical Center*, 568 So.2d 712, 717 (Miss. 1990) (discussing cases which recognize the "mutually beneficial nature" of student intern work experience programs.).

Plaintiffs contend (DG Memo, p. 11) that "there is not . . . any evidence of the existence of an agreement between Dollar General and the Tribe for the placement of minors for training." To the contrary, the Complaint alleges that arrangement, and those allegations must be taken as true for purposes of the Choctaw Courts' and this Court's rulings on the *Montana* jurisdictional question. *See*, authorities cited *supra* at part I.B; *see also*, the Dollar General Plaintiffs' express admission on this point addressed *infra*.

The Choctaw Supreme Court also ruled that by that (unwritten) agreement Dollar General should be deemed to have agreed "that any issues relative to Dollar General's relationship to the minor regarding such things as training, wages, or potential harm would be resolved in tribal court." *Id.* at 8-9. Dollar General disagrees (DG Memo, p. 11), but that ruling did not (and need not to support jurisdiction under *Montana*) reflect a finding that Dollar General's agreement to participate in that program included a conscious or explicit agreement that such disputes would be heard in the Choctaw Courts. Instead, that ruling properly construed was a holding that Plaintiffs had voluntarily agreed to participate in that Youth Opportunity Program on the reservation at the Dollar General store and that such agreement (and the parties implementation thereof) evidence a consensual relationship sufficient to invoke *Montana's* consensual

relationship exception. The federal case law then answers the jurisdictional question of whether the Tribal Court can properly exercise jurisdiction over John Doe's tort claim which arose from that consensual relationship; and, this is so whether or not the parties realized that entering into that agreement would have that jurisdictional result. *See, Carden v. De la Cruz*, 671 F.2d 363 (9th Cir.), *cert. den'd*, 459 U.S. 967 (1982) (held: to satisfy "consensual relationship" test a direct link must exist between the tribal regulation and the particular activity regulated (foreshadowing Justice Scalia's nexus test in *Atkinson*) and ruled that "a non-Indian owner of a grocery store on fee land inside the reservation was subject to the enforcement of tribal health regulations because he had "entered into (unwritten) 'consensual relations' with tribal members 'through commercial dealings' manifested by the store owner's invitation to tribal members to come into the store for his products.").

Despite Plaintiffs' suggestions to the contrary (DG Memo, pp. 10-11), nothing in *Montana* or its progeny asks the question whether there was a conscious agreement to subject future disputes arising from such voluntary consensual relationships to tribal court civil jurisdiction. The sole relevant questions are whether such relationships exist and whether there is a direct logical nexus between those relationships and the injury for which tribal court relief is sought. *Atkinson Trading Co., Inc. v. Shirley*, *supra* at 657. In that sense, then, the Choctaw Supreme Court's ruling on this issue was correct: *Implicit* in the consensual relationship evidenced by Plaintiffs voluntary agreements with the Tribe and John Doe to participate in the Youth Opportunity Program was the legal result that jurisdiction over claims based on injuries sustained by John Doe derivative of that arrangement would be subject to tribal court civil jurisdiction. *See,* additional argument in support of this proposition at part VI, *infra.*

The Tribal Defendants acknowledge that as found by the Choctaw Supreme Court at *Doe v. Dolgen, supra* at 8, John Doe was not an ordinary "private employee hired directly by Dollar General, but a tribal minor placed at the store by the Tribe to receive job training." However, though John Doe was not an ordinary "private employee" of Dollar General, his relationship with Plaintiffs nonetheless constituted a form of consensual *employment* relationship under Mississippi law (borrowed as tribal law per § 1-1-4 Choctaw Tribal Code[4]) and a consensual relationship within the meaning of the "consensual relationship" exception under *Montana*. *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 found by the Court to constitute "a consensual relationship between the parties to the arrangement," and under which she performed services in the hospital under the supervision of the hospital's nurses, was an apprentice employee of the hospital as a matter of law for purposes of workers compensation benefits even though she was not paid any wages by the medical center).

Indeed, as shown by p. 6 of the transcript of oral argument before the Choctaw Supreme Court on Plaintiffs' Interlocutory Appeal (in SC 2005-06 from denial of their Motion to Dismiss

---

[4] Section 1-1-4 (Law Applicable in Civil Actions), Choctaw Tribal Code ("C.T.C.") provides:

> In all civil actions the Choctaw Court shall apply applicable laws of the United States and authorized regulations of the Secretary of the Interior, and ordinances, customs, and usages of the Tribe. Where doubt arises as to the customs and usages of the Tribe, the court may request the advice of persons generally recognized in the community as being familiar with such customs and usages. Any matter not covered by applicable federal law and regulations or by ordinances, customs, and usages of the Tribe, shall be decided by the court according to the laws of the State of Mississippi.

The entire Choctaw Tribal Code is available at http://www.Choctaw.org. This Court may (and is hereby requested to) take judicial notice of this tribal code provision, and the Choctaw Rules of Civil Procedure as referenced at p. 4, *supra*, and at ¶ 1.4. of the Tribal Defendants' Response to the Dollar General Motion and of the Revised Constitution and Bylaws of the Mississippi Band of Choctaw Indians (under "History" on the same website). *See, U.S. v. City of Miami, Florida*, 664 F.2d 435 (5th Cir. 1981) and n's. 16 and 21 (taking judicial notice of city ordinance which had "never been introduced as evidence but had been referenced in appellate briefs"), and authorities there cited.

in CV-02-05) (copy attached to Tribal Defendants' Answer as Exhibit C), the Dollar General Plaintiffs' (there Defendants') counsel admitted that there existed a relationship of employment between the minor child and Dolgen Corp./Dollar General which they expected to support a worker's compensation exclusive remedy defense which they planned to raise in CV-02-05 if their jurisdictional motion was denied:

> The Plaintiff filed a complaint in Choctaw Tribal Court alleging that he was assaulted at a Dollar General Store that is located on the Reservation. Dollar General operates a store on the Reservation. There was, at that time, an employee by the name of Dale Townsend; and the Plaintiff alleges that Mr. Townsend had assaulted him. We respectfully submit that Dollar General would not have any liability in this case, regardless, under the Plaintiff's allegations due to worker's comp. exclusive remedy and the fact that if, in fact, it did happen—if, in fact, there was an assault that occurred, that would have been an intentional tort that obviously could not be in the course and scope of his employment, Mr. Townsend's employment.

It is well-settled that any kind of on-reservation employment relationship between a tribal member and a non-Indian business constitutes a consensual relationship validating the exercise of tribal court jurisdiction under *Montana's* consensual relationship exception as to all claims by such tribal members against the employer arising from that relationship. *State of Montana v. Bremner*, 971 F.Supp. 436 (D.Mont. 1997) (Non-Indian defendant contractor's voluntary employment of tribal member plaintiff for on-reservation work was consensual relationship which validated exercise of tribal court civil jurisdiction under *Montana* over tribal members tort claims against contractor for on the job injury); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1990) (FMC's leases with the Tribes or their members for raw materials and FMC's employment of tribal members in its on-reservation businesses were consensual relations sustaining tribal regulation of FMC's employment activities under *Montana*); *MacArthur v. San Juan County*, 497 F.3d 1057, 1071 (10th Cir. 2007):

> There is no doubt that an employment relationship between two parties is contractual in nature. . .. In fact, the common law tort cause of action for interference with contractual relations encompasses interference with employment, even where the employment is at will.. . . Consequentially, Montana's consensual relationship exception applies to a nonmember who enters into an employment relationship with a member of the tribe. (Citations omitted).

Moreover, being subjected to an assault by a co-employee during business hours at the employer's place of business (as John Doe claims occurred here) is a known risk incident to all such employment relationships as to which Mississippi law (and derivatively Choctaw law), *see*, fn. 4, *supra*, permits a common law tort remedy. *Goodman v. Coast Materials Company,* 858 So.2d 923 (Miss. App. 2003) ("After Newell there is still a recognized right to bring a civil suit against an employer for some intentional torts committed by co-employees.. . . Miller and subsequent cases have held that intentional acts by those who are not strangers to the employment relationship may be the basis for such tort suits. Goodman has brought suit for what he alleges was an intentional assault by his co-employee. We find no argument under the present state of the law to dismiss this suit."); *Gulledge v. Shaw,* 880 So.2d 288 (Miss. 2004) ("The doctrine of respondeat superior has its basis in the fact that the employer has the right to supervise and direct the performance of the work by his employee in all its details; this right carries with it the correlative obligation to see to it that no torts shall be committed by the employee in the course of the performance of the character of work which the employee was appointed to do."); *Davis v. Pioneer, Inc.,* 834 So.2d 739 (Miss. App. 2003):

> Nevertheless, in our opinion, receipt of these medical benefits [awarded under the workers compensation program] does not preclude compensation for the damages that are not compensable under the Act because they are alleged to have been caused by wilful [sic] and intentional acts [of a co-employee]. The damages stemming from the assault and battery are not compensable under the Act because they stem from a wilful [sic] and intentional act, not a negligent or grossly negligent act. *Blailock,* 795 So.2d at (¶ 6). Of course, any claim for injuries that are compensable under the Act are still subject to the jurisdiction of the Workers' Compensation Commission. *Id.* (Inserts added).

Dollar General's tribal lease and business license—additional commercial consensual relationships with the Tribe—were necessary for Dollar General to engage in business through its Dollar General store operations on the reservation. Engaging in a retail business necessarily involves hiring employees. Inherent in such employment relationships is the risk of one employee assaulting another, as John Doe claims occurred here. *See*, authorities cited *supra.*

Thus, contrary to Plaintiffs' assertion (DG Memo, p. 12) that "the nature of John Doe's claim has nothing to do with the business Dollar General was doing on the reservation," there in fact exists a direct nexus between the several consensual relationships which existed as between the Tribe or tribal member John Doe and the Plaintiffs here and the tort claim based on injuries John Doe claims were inflicted upon him by his co-employee supervisor (store manager) Dale Townsend while on the Dollar General store premises on the Choctaw Indian Reservation during business hours.

**III.**

In regard to *Montana's* health and welfare exception, the Tribal Defendants adopt the Choctaw Supreme Court's analysis on this issue as set forth at *Doe v. Dolgen Corp.,* pp. 9-11. Basically, for this exception to have any meaning Tribal Court jurisdiction to adjudicate individual tribal member tort claims arising from non-Indian misconduct on reservation lands must be permitted even absent proof of consensual relations. While the Ninth Circuit in *Todecheene, supra,* initially ruled that that exception would not permit an individual tort claim against a non-Indian defendant to proceed in tribal court in the absence of satisfaction of the consensual relation exception and a direct nexus between the tort claims at issue and that consensual relationship, that opinion was later vacated to allow for tribal court exhaustion on the *Montana* issues. *Todecheene, supra* at 488 F.3d 1215. Moreover, unlike here, the non-Indians

who the tribal member plaintiffs tried to sue in *Todecheene* had never actually engaged in direct tortious conduct on the reservation through any kind of physical activity there.

The Tribal Defendants have been unable to locate any federal case holding that an individual tort claim of the type here involved would be sufficient to invoke the health and welfare exception to *Montana* to sustain tribal jurisdiction (where the consensual relationship exception is not invoked). However, the Tribal Defendants submit that a proper interpretation of that exception would permit such cases to proceed under that standard as an alternative to satisfying the consensual relations exception; and further submit that the facts of this case involving allegations of sexual assault on a minor tribal member on the reservation would and should be deemed to satisfy that exception. *Child Physical and Sexual Abuse in Indian Country: Hearings on S. 1783 Indian Child Sexual Abuse and Prevention Act Before the Comm. On Interior and Insular Affairs*, 101st Cong. 349 (1990) (statement of Bernie Teba, Executive Director of Eight Northern Indian Pueblo Council). ("Society views as especially heinous a crime in which the victim is a child. Generally lacking both the physical and psychological strength to resist or defend themselves adequately, children can suffer trauma that leaves physical and mental scars lasting a lifetime. Our response to a crime when a child is the victim is, therefore, a matter of great concern."); *cf, Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) (Indian Child Welfare Act case emphasizing high priority Mississippi Choctaws place on protecting minor tribal members).

**IV.**

Plaintiffs also argue (DG Memo, pp. 7-8) that even if there exists consensual relationships or other grounds which *arguendo* would validate the tribal regulation of Plaintiffs under *Montana*, that *Montana* does not authorize private tort litigation in the Choctaw Courts by

tribal members against non-members as an "other means" by which a tribe can exercise such regulatory authority under *Montana*. (DG Memo, pp. 7-8).[5]

To the contrary, government authorization or permission to pursue private tort litigation is a recognized form of government regulation which has the salutary purpose of providing private remedies for tortious conduct without requiring more direct governmental involvement (and expenditure of limited governmental resources) by executive action or litigation initiated by the government itself. *See, e.g., Riegel v. Medtronic, Inc.*, 128 S.Ct. 999, 1008 (2008), ("*citing San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) for the proposition that "a liability award [for common law tort] can be, indeed is designed to be, a potent method of governing conduct and controlling policy") (internal quotation marks omitted); *Doe v. Santa Clara Pueblo*, 154 P.3d 644 (N.M. 2007) (Provisions in state-tribal gaming compacts to permit tort claims filed against tribes arising from tortious conduct at their casinos to be heard in State courts if such jurisdiction shifting provisions were authorized by Indian Gaming Regulatory Act (IGRA) 25 U.S.C. § 2710(d)(3)(C), were enforceable since private tort litigation process was a form of regulation within the meaning of § 2710(d)(3)(C) of the IGRA which permits tribes and states to agree to jurisdiction shifting provisions in gaming compacts as to private tort claims against tribes (based on patron injuries because such provisions "are directly related to, and necessary for, the licensing and regulation" of gaming); *Plains Commerce Bank v. Long Family Land and Cattle Company, Inc.*, 491 F.3d 878 (8th Cir. 2007) (affirming tribal court jurisdiction

[5] The Dollar General Plaintiffs (at page 8, note 11 of their Memo) refer the Court to a "more thorough examination of this issue" in the Petitioner's Brief and in the Amicus Brief of the State of Idaho, et al. filed in *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, No. 07-411, now pending before the U.S. Supreme Court which briefs are available on the U.S. Supreme Court's website. The counter to that argument as articulated in the *Plains Commerce Bank* case by the Respondents, by the National Congress of American Indians, by the Cheyenne River Sioux Tribe and by the United States Solicitor General—siding with the Respondents' claim that Tribal Court jurisdiction was properly exercised over the tort claims involved in that case—can likewise be found in their briefs which are also available on the U.S. Supreme Court website at http://www.abanet.org/publiced/preview/briefs/april08.shtnl#plains.

over civil tort claims filed by tribal members against nonmember defendant arising from consensual relationships involving nonmembers' conduct within reservation boundaries.), *cert. granted*, ___ U.S. ___ (2008). Oral argument on this case in the U.S. Supreme Court is scheduled for April 14, 2008.

As noted by the Choctaw Supreme Court in *Doe v. Dolgen*, *supra* at p. 9, "In *Plains Commerce Bank*, *supra* at 887, the Eight Circuit held that "a non-Indian entity bank is subject to Tribal court jurisdiction for a *tort* that occurred in the context of a consensual commercial relationship":

> Here, the Tribe was doing just that and exercising its inherent authority. By subjecting the [non-Indian] bank to liability for violating tribal anti-discrimination law in the course of its business dealings [with tribal members] with the Longs, the tribe was setting limits on how nonmembers may engage in commercial transactions with members inside the reservation.

Further, as the U.S. Supreme Court has long recognized requiring tribal members to litigate such claims in state or federal courts would infringe upon the tribes' authority to control the making of their own laws through the common law litigation process. *See, Williams v. Lee*, *supra* at 220-223**;** *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, *supra; Iowa Mutual Ins. Co. v. LaPlante*, *supra.*

Under § 1-1-4, C.T.C., the Tribal Courts follow Mississippi law to the extent that there is no tribal law or federal law which supplies the rule of decision in a particular civil case. *Ben v. Ben*, Cause No. DI 054-99, p.4 (July 10, 2000, Choctaw Tribal Court); Jackson & Miller, *Encyclopedia of Mississippi Law*, Vol. 8, Chapter 72—Tribal Law, pp. 389-390 (2001):

> In accordance with Choctaw Tribal Code 1-1-4, the Choctaw Courts are now developing a body of Choctaw common law. Civil actions filed in the Tribal Court may involve claims based upon contract or in tort, or may arise under various statutory schemes or under the common law. . .. By this process the Choctaw common law is being developed as the Choctaw Courts decide in particular cases, consistent with Choctaw Tribal Code 1-1-4, whether the legal

> issues presented are governed by any "ordinances, customs and usages of the tribe" or whether the Court will turn to borrowed state law to decide those issues.
>
> The Tribal Council has also begun to enact additional Tribal statutory law. The Choctaw Tribal Code is the statutory body of law governing the Choctaw Indian Reservation . . .

Thus, the Mississippi Choctaw Courts (like the courts of many other tribes) are developing a body of tribal common law to fill in the gaps left by otherwise applicable codified law. *Id.*;. *see, e.g.*, Bethany R. Berger, *Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems*, 37 Ariz. St. L.J. 1047, 1085 (2005) (finding Navajo common law has been used to provide protections comparable "to those in state courts" even when tribal codes do not).

There is no practical way to distinguish between tribal authority to regulate and make law applicable to non-Indian conduct on their reservations by legislation *versus* by the common law civil litigation process and preserve any meaningful degree of tribal lawmaking authority over reservations . The Court in *A-1 Contractors* recognized as much when it 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." 520 U.S. at 453. Recognizing that tribal authority to civilly regulate the conduct of non-members on their reservations through the common law trial process when tribal jurisdiction is otherwise proper under *Montana* is central to preservation of the tribes' right "to make their own laws and be ruled by them" under *Williams v. Lee.*

Where, as here, a tribal member's tortious injury stems directly from voluntary consensual relationships between the non-member defendants and a tribe or its members and that tortious conduct occurred on reservation lands during the course of performance of agreements

evidencing those consensual relationships, and the tortious conduct (and injury) is a usual and ordinary risk attendant to such consensual relationships, permitting such tort claims to proceed in tribal courts is clearly authorized under *Montana.*

**V.**

Plaintiffs also argue (DG Memo, pp. 15-16) that even if the Tribal Court could under *Montana* properly exercise jurisdiction over John Doe's tort claims as regards actual damages, that John Doe's punitive damage claim falls outside the Tribe's civil jurisdiction under *Montana.* They rely on *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978) (Indian tribes have been divested of criminal jurisdiction over non-Indians containing no ruling on punitive damages ) *and Nevada v. Hicks, supra* (Indian tribes cannot adjudicate 42 U.S.C. § 1983 claims or tort claims filed against state officers for conduct occurring during the performance of their official duties; containing no ruling on punitive damages, and making clear that the courts' holding was "limited to the question of tribal-court jurisdiction over state officers enforcing state law. We leave open the question of tribal-court jurisdiction over nonmember defendants in general").

Initially, punitive damages are awarded in civil tort litigation. Awarding punitive damages in such litigation does not in any sense involve the exercise of criminal jurisdiction or manifest punitive governmental action. *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.,* 492 U.S. 257, 263-276 (1989) (punitive damage award 100 times actual damages did not violate 8th Amendment's prohibition on excessive fines because that prohibition only applies to fines imposed in proceedings involving the "prosecutorial powers of government" and private tort plaintiffs are not part of the "criminal law functions of government.") The Court in *Browning-Ferris* repeatedly emphasized the distinction between fines imposed in criminal proceedings and punitive damages imposed in civil proceedings. *Id.*

Thus, nothing in the *Oliphant* prohibition against Indian tribes' exercise of criminal jurisdiction over non-Indians or in the *Hicks* prohibition against the exercise of tribal court civil jurisdiction over state officers for their official conduct on reservations is implicated by John Doe's prayer for punitive damages in CV-02-05.

Moreover, in none of the post-*Montana*, post-*Oliphant* cases in which actual and punitive damages were sought against non-Indians in Tribal Court civil proceedings has there been any ruling that punitive damages claims would not be permissible in a case over which a Tribal Court would otherwise have jurisdiction under *Montana*. *See, El Paso Natural Gas Company vs. Neztsosie, supra* at 477-485 (holding that since Price Anderson Act made federal courts' exclusive forum for adjudicating tort claims involving exposure to radioactive materials from mining operations, Navajo Courts could not hear private tort claims filed by tribal members seeking compensatory and punitive damages under Navajo tort law based on injury from radioactive waste from uranium mining, and therefore exhaustion of tribal remedy was not required; but expressing no view that tribal courts could not otherwise have adjudicated such tort claims, including claims for punitive damages claims, in cases otherwise properly before those courts under *Montana*), *see, Bank One, N.A. v. Lewis, supra* and *Bank One, N.A. v. Shumake, supra*, requiring exhaustion of tribal remedies as to non-Indian Bank's argument that the Choctaw Tribal Court could not properly exercise jurisdiction over a civil suit in which tribal members sought actual and punitive damages against non-Indian business on contract and fraud claims. If it were true (as argued by Plaintiffs) that based on *Oliphant, Montana* and *Hicks* tribal courts can never adjudicate tort cases in which plaintiffs seek punitive damages, then exhaustion of tribal remedies would not have been required as to that aspect of those arguments. Yet, exhaustion was required in the *Bank One* cases and would have been required in *Neztsosie* but

for the Price Anderson Act provision which forbad adjudication in the tribal courts of the particular kind of tort claims there at issue.

The Tribal Defendants acknowledge that there exist due process concerns as regards the potential for imposition of "excessive" punitive damages in civil cases. *BMW of North America v. Gore*, 517 U.S. 559 (1996) (establishing "guideposts" for evaluating whether punitive damages awards are excessive). However, as recognized by the Choctaw Supreme Court, essentially the same due process protections as inhere in the Due Process clauses of the U.S. Constitution in the Fifth and Fourteenth Amendments (which do not directly apply to Indian tribes) are found in the Indian Civil Rights Act, 25 U.S.C. § 1302(8) and in the Tribe's own Constitution, and the Choctaw Courts are duty bound to enforce those protections. *Doe v. Dollar General Corporation, supra* at 11.

If at some point in the future a punitive damage award were made and upheld in the Choctaw Tribal Courts in CV-02-05, any argument that such award violated the (presently) amorphous "excessive" punitive damages standard as articulated by the U.S. Supreme Court, would have to be addressed in the Choctaw Courts if and when such an award and an "excessive" punitive damages argument were made. Plaintiffs cannot evade the jurisdiction of the Choctaw Courts on this issue by speculative arguments that *they may in the future be subjected to an excessive punitive damage award* or by accusations (DG Pl. Memo. pp. 4, 17-19) that the Choctaw Tribal Courts are or will be biased or prejudiced in favor of tribal members as to such issues if and when such issues arise. *Iowa Mutual Ins. Co. v. LaPlante, supra* at 18-19; *Martha Williams-Willis v. Carmel Financial Corporation*, 139 F.Supp.2d 773, 780-781 (S.D. Miss. 2001).

The Tribal Defendants reject (and this Court should reject) as wholly unfounded Plaintiffs' allegations of bias against the Choctaw Supreme Court (DG Memo, pp. 18-19). The Choctaw Supreme Court (despite its procedural error re the March 3, 2008 Order) has gone to great lengths to fairly address the merits of Dale Townsend's (and John Doe's) Due Process concerns and other tribal law arguments respecting the Stipulated Order entered in CV-1318-2003. That Court went so far as to bar the John Doe Plaintiff from proceeding to trial in CV-02-05 until those due process concerns were addressed; and, even accepted Plaintiffs' post-*Hicks* interpretation of *Montana* argument (*see*, DG Memo at pp. 4-6), a change from that Court's prior ruling on *Hicks* in *Williams v. Parke-Davis*, Civ. Action #1142-01 (April 27, 2004) (upholding the Choctaw Courts jurisdiction to adjudicate civil tort claims arising from Rezulin sales to tribal members on the reservation under both pre-*Hicks* and post-*Hicks* interpretations of *Montana*, but also ruling that *Hicks* did not change the basic pre-*Hicks* distinction between reservation lands and non-Indian fee lands). That change alone belies any claim of bias.

**VI.**

Plaintiffs also argue (without citation to authority) that "Because these [federal Due process] protections are not present in Tribal Court, federal recognition of Tribal Court jurisdiction over non-Indians in claims for punitive damages would in and of itself violate the Due Process clause. The federal government simply cannot waive a citizen's constitutional right by making them subject to the jurisdiction of a court where constitutional rights do not apply."[6] (Emphasis added). (DG Memo, pp. 15-16; and, Townsend Motion, ¶ 4.b.).

[6] The Dollar General Plaintiffs (at page 16, note 19 of their Memo) do refer the Court to a "fuller discussion of this issue" in the Brief of Amicus Curiae Mountain States Legal Defense Fund in the *Plains Commerce Bank* case on the U.S. Supreme Court's website. The counter to that argument as articulated by the Respondents, by the National Congress of American Indians, and by the U.S. Solicitor General—siding with the Respondent's claim that Tribal Court jurisdiction was properly exercised in that case—can

Initially, Plaintiffs have not exhausted their tribal remedies as to these arguments. Instead, as shown in their briefs as filed in the Choctaw Trial Court and the Choctaw Supreme Court, and in the transcript of oral argument before that Court (Exhibit C to the Tribal Defendants' Answer) this argument was never properly raised there. *See,* Record of Tribal Court proceedings in CV-02-05 at Exhibit 1 to Complaint. Plaintiffs did allude to this point in one sentence of their oral argument before the Choctaw Supreme Court, (*see,* p.12, Tr. of Oral Argument, Exhibit C), but never briefed that argument nor otherwise presented any authority to that Court to support it and that Court issued no ruling on it. This is not an adequate exhaustion of tribal remedies as to that issue. *Iowa Mutual, supra* at 17-18 (". . . *National Farmers Union* . . . requires that [tribal courts] be given a 'full opportunity' to consider the issues before them. . ." including tribal appellate review); *see, General Universal Systems, Inc. v. Lee,* 379 F.3d (2004) (applying rules that "[A]rguments presented for the first time at oral argument are waived" to reject consideration of argument not briefed; and rule that "to preserve error for appeal, 'the litigant must press and not merely intimate the argument during the proceedings before the district court. If an argument is not raised to such a degree that the district court has an opportunity to rule on it, [the appellate court] will not address it on appeal.'").

Moreover, the federal government has not forcibly subjected Plaintiffs to the jurisdiction of "a court where constitutional rights do not apply." The federal government did not force Dollar General or Dale Townsend to go to the Choctaw Reservation or to obtain a business lease and business license to operate a store there or to voluntarily enter into the further consensual relationships with the Tribe and tribal member John Doe in connection with his placement to work at Dollar General's store per the Tribe's Youth Opportunity Program and, notwithstanding

---

likewise be found in their briefs which are also available on the U.S. Supreme Court website. *See,* fn 5, *supra.*

Plaintiffs' argument to the contrary (DG Memo, pp. 10-11), it has never been a requirement for subjecting a non-Indian to Tribal Court jurisdiction under *Montana* based on the "consensual relationship" exception that the terms of that consensual relationship also include an express consent to Tribal Court jurisdiction. Instead, all that is required to invoke jurisdiction based on that exception is proof of that relationship and the existence of a direct nexus between that relationship and the legal claims pled in the Tribal Courts. *See,* further elaboration on this point, *supra* at pp. 13-14.

Plaintiffs argument (DG Memo, p. 11) that if this were the rule, there would have been no need to include an express consent to Tribal Court jurisdiction in Dollar General's lease, is easily answered. It is precisely to avoid costly jurisdictional disputes *viz* claims deriving from those leases based on the evolving *Montana* rules as evidenced by these proceedings that the Tribe insists on including such explicit consent to jurisdiction clauses in its leases; but, it is clear even under the Court's current interpretation of *Montana* that even absent that express jurisdictional provision, Dollar General would be subject to Tribal Court civil jurisdiction over all disputes arising from such leases under *Montana. E.g., FMC v. Shoshone-Bannock Tribes,* 905 F.2d 1311 (9th Cir. 1990).

Plaintiffs voluntarily entered into the several consensual relations with the Tribe and tribal member John Doe as addressed above two decades after the Supreme Court's "pathmarking" decision in *Montana,* which made clear that entering into such relationships could subject them to tribal court civil jurisdiction over disputes arising from those consensual relationships. Holding them to the jurisdictional consequences of those voluntary decisions is analogous to the established rule that no express consent to jurisdiction is required to subject a private party domiciled in one state to suit in the courts of a different state for conduct occurring

there. Fair warning of the prospect of such jurisdiction arises from the occurrence of sufficient purposeful contacts with a forum and its citizens, as long as the dispute arises out of those contacts. *See generally Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). The same should be true as to suits in tribal courts based on a non-member's on-reservation conduct in the circumstances where tribal court jurisdiction is otherwise proper under *Montana* or its exceptions.

This is but a specialized application of the well established legal principle that "ignorance of the law is no excuse." *See, Felder v. Johnson*, 204 F.3d 168 (5th Cir. 2000) (applying rule to deny equitable tolling, and citing many other cases for the proposition that "ignorance of the law is no excuse"); *Whirl v. Kern*, 407 F.2d 781 (5th Cir. 1968) (applying same rule to deny qualified immunity defense to warden sued under 42 U.S.C. § 1983 for keeping a prisoner in custody nine months after warden was duty bound to release prisoner).

**VII.**

Plaintiffs have raised a number of arguments, either in their Complaint (¶¶ 21-31) or in their Motions (DG Memo, pp. 16-19; Townsend Memo, pp. 2-13), as regards ongoing disputes between the several parties respecting the meaning and effect under tribal law of the terms of the Stipulated Order entered in CV-1318-2003 and what representations were or were not made by the Choctaw Attorney General's Office in negotiations leading to that order, and the various tribal public policy and tribal law or tribal constitutional or ICRA "Due Process" arguments raised there and in CV-02-05 by John Doe and by Townsend (and Townsend's estoppel and waiver arguments) that bear on that interpretation, *see*, the Townsend Motion and Memorandum and Exhibits thereto and Exhibits A and B to the Tribal Defendants' Answer; and, whether and to what extent that Order may be (or has been) lawfully modified by the Choctaw (Trial) Courts

under Rule 60(b) of the Choctaw Rules of Civil Procedure or otherwise, or by the Choctaw Supreme Court's Order of March 3, 2008, all of which present issues of tribal law (not federal law), none of which are properly before this Court; but, instead, must be left to the Choctaw Courts to sort out in CV-1318-2003 and CV-02-05, for the following reasons:

The Indian Civil Rights Act, 25 U.S.C. § 1301 *et seq.* and its Due Process clause as set out at § 1302(8) do not create a private right of action as to any civil claim respecting the meaning and effect of that stipulated order or any modification that might have occurred or might occur as to that order. *Santa Clara Pueblo v. Martinez;* 436 U.S. 49, 72 (1978) (ICRA does not create any private right of action in federal court save for habeas corpus relief); *Wheeler v. Swimmer,* 835 F.2d 259, 261 (10th Cir. 1987) (holding that ICRA "confers 'no subject matter jurisdiction . . . for declaratory, injunctive, and money damage remedies.'")

No allegation that the Tribe's or the U.S. Constitutions' Due Process clauses have been or might be violated by anything that has occurred or might occur respecting that Stipulated Order state claims arising under federal law which would permit the exercise of this Court's jurisdiction under 28 U.S.C. § 1331. *Santa Clara Pueblo, supra* at 57; *Runs After v. United States,* 766 F.2d 347 (8th Cir. 1985) (dismissing claims arising under tribal constitution and tribal law for lack of subject-matter jurisdiction because such claims "would necessarily require the district court to interpret the tribal constitution and tribal law is not within the jurisdiction of the district court."); *Morongo Band of Mission Indians v. Rose,* 893 F.2d 1074, 1077 (9th Cir. 1990) ("An ordinance enacted by a federally recognized Indian tribe is not itself a federal law; the mere fact that a claim is based upon a tribal ordinance consequently does not give rise to federal question jurisdiction."); *Basil Cook Enterprises, Inc. v. St. Regis Mohawk Tribe,* 117 F.3d 61 (2nd Cir. 1997) (Federal appellate court declined to enter "interpretive thicket" of tribal law dispute

because "[t]he Supreme Court has long recognized the exclusive responsibility of Native American tribes to construe their own law . . . and with that responsibility comes the parallel responsibility of Federal Courts to abide by those constructions . . . Federal Courts, as a general matter, lack competence to decide matter of tribal law and for us to do so offends notions of comity underscored in *National Farmers*.") (Citations Omitted)).

Further, to the extent that the terms of the Stipulated Order may be construed as contractual in nature, *Telephone Man, Inc. v. Hinds County, Mississippi*, 791 So.2d 208 (Miss. 2001) (upholding Rule 60(b)(6) vacation of agreed order the terms of which were analogized to a "private contract" between the parties), it is well-settled that the rights and obligations of the parties based on contractual relations arising under tribal law do not present federal questions. *TTEA Corporation v. Ysleta Del Sur Pueblo*, 181 F.3d 676 (5th Cir. 1999) (The federal courts do not have jurisdiction to entertain routine contract actions involving Indian tribes); *Tamiami Partners, Ltd. V. Miccosukee Tribe of Indians*, 999 F.2d 503 (11th Cir. 1993) (finding no federal question where plaintiff only presented facts establishing a breach of contract claim); *Stock West, Inc. v. Confed. Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989) (breach of contract claim brought tribe against nonmember contractor who entered contract to construct sawmill on tribal land does not raise federal question); *Compare, Comstock Oil & Gas, Inc. v. Alabama & Coushatta Indian Tribes of Texas*, 261 F.3d 567 (5th Cir. 2001) (claim for equitable and declaratory relief challenging tribal court's jurisdiction to determine validity of oil and gas leases of tribal lands under federal statute pled federal question under *National Farmers Union*, but exhaustion of tribal remedies not required since such leases "represent a very specialized subset of contracts" subject to extensive federal regulatory scheme); *see, Peabody Coal Co. v. Navajo Nation*, 373 F.3d 945 (10th Cir. 2004) (distinguishing *Comstock* as applicable only to claims challenging

tribal court jurisdiction to rule on validity of Indian oil and gas leases; dismissing suit against Navajo Nation to enforce arbitration agreement re oil and gas lease dispute for failure to plead federal question where claim did not "allege any problem with the underlying leases" and tribal court had not asserted jurisdiction.).

Even if *arguendo* some basis for federal court jurisdiction did exist as to such claims, Plaintiffs' claims would be barred by the Tribal Defendants' unwaived sovereign immunity. *Santa Clara Pueblo v. Martinez, supra* at 58-59. Tribal sovereign immunity shields Indian tribes from unconsented civil lawsuits, whether seeking monetary or equitable relief. That immunity also extends to their officials for actions taken in their official capacities (even if they somehow erred in those actions) where no allegation of conduct in violation of federal law is alleged. *Kiowa Tribe v. Manufacturing Technologies,* 523 U.S. 751 (1998) (sovereign immunity bars suits against tribes for money damages); *Santa Clara Pueblo, supra* at 58-59 (same as to suits against tribes seeking prospective declaratory and equitable relief alleging violations of federal law, but noting (by reference to *Ex Parte Young*) that such claims against tribal officials are not barred by tribe's immunity)*; Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* 498 U.S. 505, 514 (1991) (Tribal sovereign immunity barred state's claims for equitable relief against Indian tribe, but noting by analogy to *Ex Parte Young,* 209 U.S. 123 (1908), that tribal immunity shield would not protect tribal officials sued in their official capacities on claims alleging violation of federal law); *Puyallup Tribe, Inc. v. Department of Game of Washington,* 433 U.S. 165, 172 (1977) (affirming that tribe's sovereign immunity barred state's equitable relief claims against tribe as to off-reservation treaty fishing dispute, but not as to claims against individual tribal members who were not tribal officials); *Dry v. United States,* 235 F.3d 1249, 1253 (10th Cir. 2000) ("Due to their sovereign status, suits against tribes

or tribal officials in their official capacity 'are barred in the absence of an unequivocally expressed waiver by the tribe or abrogation by congress'"); *Burlington N.R.R. Co. v. Vaughn,* 509 F.3d 1085, 1092 (9th Cir. 2007) (tribal immunity extends to tribal officials sued in their official capacity, but "tribal sovereign immunity does not bar a suit for prospective relief against tribal officials allegedly acting in violation of federal law."); *United States v. Oregon,* 657 F.2d 1009, 1013, n.8 (9th Cir. 1981) (Tribal sovereign immunity "extends to tribal officials when acting in their official capacity and within the scope of their authority"); *accord, Linneen v. Gila River Indian Community*, 276 F.3d 489 (9th Cir. 2002) (dismissing claims against tribe and tribal officials); *compare, Comstock Oil & Gas, Inc. v. Alabama and Coushatta Indian Tribes of Texas, supra* (sovereign immunity does not shield tribe or tribal officials from action for declaratory and equitable relief challenging tribal court jurisdiction to rule on validity of heavily regulated tribal oil and gas leases); *TTEA v. Ysleta Del Sur Pueblo*, *supra* (tribe and tribal officials had no immunity from suit seeking declaratory and equitable relief on claims challenging tribal court's jurisdiction to rule that contracts were invalid under federal statute).

None of Plaintiffs' "Due Process" and Constitutional or (ICRA) claims allege violations of federal law applicable to the Tribal Defendants as to which any private right of action exists in this Court. Thus, all of those other claims are barred by the Tribe's sovereign immunity, even as against the sole tribal official here sued on those claims—the Honorable Christopher Collins, Choctaw Civil Court Judge, *Santa Clara Pueblo, supra*. The sovereign immunity defense has not been raised as against Plaintiffs' basic *Montana* jurisdictional claims.

Plaintiffs have in any event failed to exhaust tribal remedies as to such claims as required by *National Farmers Union, supra; Bank One, supra*. This is because the Motion to Amend the original exclusion Order entered in CV-1318-2003 still remains pending in the Choctaw (Trial)

Courts in that case, and other proceedings respecting that order are still pending in the Choctaw Supreme Court, which expressly reserved jurisdiction in its February 8, 2008, Memorandum Opinion and Order to rule upon the validity of any modification to said Order. The Court ruled at p. 12 and n.8 of that Order as follows: "For all the above-stated reasons, the (interlocutory) appeal is dismissed and the case is remanded[8] for immediate trial on the merits." Footnote 8 states: "Note that no actual trial shall be scheduled until the Tribe's Attorney General's office has responded to its position on the 'exclusion' order, discussed at pp. 4-5, and this court has ruled on any potential modification of said order."

Plaintiffs themselves argue[7] that the original Stipulated Order entered in CV-1318-2003 has not been properly modified, that the Choctaw Attorney General's Motion of December 2007 seeking to modify that Order is still pending and has not yet been ruled upon by the Choctaw Trial Court, and that the Choctaw Attorney General's Office has sound grounds for requesting the Choctaw Supreme Court to rescind its Order of March 3, 2008, purporting to modify that Stipulated Order:[8] Townsend Motion, pp. 10-11. To like effect is the Dollar General Plaintiffs' argument, that the Choctaw Supreme Court's entry of its Order of March 3, 2008 was because it was entered by the wrong court in the wrong case. DG Memo, pp. 18-19.

Unfortunately, Plaintiffs have not raised these arguments about the March 3, 2008 Order before the Choctaw Supreme Court, but instead have brought them straight to this Court. This is

[7] Indeed, as admitted by Plaintiffs (DG Memo, p. 10, n.5; Exhibit 1, pp. 127-128 to Complaint), the Choctaw Trial Court in CV-02-05 had requested additional briefing on Dale Townsend's tribal law waiver-of-jurisdiction arguments based on entry of the 2003 Stipulated Order in CV-1318-2003, but Mr. Townsend decided to ignore that request when he moved to join Dollar General's Petition for Interlocutory Appeal to the Choctaw Supreme Court.

[8] The Choctaw Attorney General's Motion asking the Choctaw Supreme Court to vacate its Order of March 3, 2008 as improvidently granted is attached to the Tribal Defendants' Answer as Exhibit A. As this Memorandum is filed, Plaintiffs have not yet taken a position in the Choctaw Supreme Court on that Motion, although the Tribal Defendants do not see any way in which Plaintiffs could legitimately oppose that Motion.

a classic example of failure to exhaust remedies as to the claims pled at ¶¶ 22-31 of the Complaint. *Basil Cook Enterprises, Inc., supra.*

Nor have Plaintiffs ever raised their "subpoena" argument (Complaint ¶ 18) in the Choctaw Courts. Thus, they have also failed to exhaust their tribal remedies as to that claim nor (as shown in part VI, *supra*) have they done so as to their broader Due Process argument that permitting the Choctaw Courts to hear any claim involving punitive damages would violate their Due Process right as guaranteed by the United States Constitution. This is distinct from the narrower Due Process claim addressed at Part V, *supra,* which they did raise in the Tribal Court. *See, Doe v. Dolgen, supra* at p. 11 and Plaintiffs' Trial Court Briefs at Exhibit 1 to the Complaint, but which are premature for them to raise here, since no such "excessive" punitive damage award has been assessed.

Further, for the reasons set out above, none of Plaintiffs Due Process claims—whether based on the U.S. Constitution, the ICRA or the Tribe's own Constitution—otherwise state claims upon which relief can be granted by this Court even if all the allegations of the Complaint respecting those claims are taken as true *e.g., Scanlan v. Texas A&M University,* 343 F.3d 533 (5th Cir. 2003) (Rule 12(b)(6) dismissals are disfavored but are proper "where it is beyond doubt that the plaintiff can prove no set of facts in support of his claim that entitle him to relief").

**CONCLUSION**

Based on the arguments set out above and in the Tribal Defendants' Responses and Answer, this Court should rule that Tribal Court jurisdiction is proper under the *Montana* analysis. This will moot Plaintiffs' claims for any kind of injunctive relief and would warrant disposing of Plaintiffs' Complaint and Motions as requested in the Tribal Defendants' Answer and Responses thereto.

Respectfully submitted,

s/Joshua J. Breedlove
Joshua J. Breedlove, Esq.
Attorney for the Tribal Defendants
MS Bar: 102535
Office of the Attorney General
Mississippi Band of Choctaw Indians
PO Box 6258
Choctaw MS 39350
(601) 656-4507
Fax: (601) 656-5861

s/C. Bryant Rogers
C. Bryant Rogers, Esq.
Attorney for the Tribal Defendants
MS Bar: 5638
VanAmberg, Rogers, Yepa, Abeita & Gomez, LLP
Post Office Box 1447
Santa Fe, NM 87504-1447
(505) 988-8979
Fax: (505) 983-7508

**CERTIFICATE OF SERVICE**

I hereby certify that on the 14th day of April, 2008, I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:.

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

William I. Gault, Jr.
Law Offices of William I. Gault, Jr., PLLC
401 Fontaine Place, Suite 101
Ridgeland, MS 39157
bgault@billgaultlaw.com

And I certify that I have on the 14th day of April 2008, mailed via United States Postal Service the document to the following:

Brian D. Dover
915 South Main Street
Post Office 970
Jonesboro, AR 72403

Terry L. Jordan
Jordan & White, Attorneys
Post Office Drawer 459
Philadelphia, MS 39350

s/C. Bryant Rogers
C. BRYANT ROGERS