UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF MISSISSIPPI

EASTERN DIVISION

DOLGENCORP INC., DOLLAR GENERAL CORPORATION, AND DALE TOWNSEND, **Plaintiffs,** **VERSUS** **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** **Defendants.**	**CIVIL ACTION NO. 4:08-cv-22-TSL - JCS**

DOLLAR GENERAL CORPORATION AND DOLGENCORP, LLC'S[1]
MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiffs Dolgencorp, LLC and Dollar General Corporation (hereinafter "Dollar General") have been sued in the Tribal Court for the Mississippi Band of Choctaw Indians by tribal member John Doe. Mr. Doe seeks to hold them liable for torts allegedly committed against him by Dale Townsend, a former Dolgencorp, LLC employee. He asserts claims against Dollar General both for its own alleged acts of negligence as well as vicarious liability for the alleged actions of Mr. Townsend. This suit challenges the propriety of Tribal Court jurisdiction over

[1] Since the filing of this action, Dolgencorp, Inc. has become Dolgencorp, LLC.

Dollar General and seeks permanent injunctive relief against the Tribe, the Tribal Court and the Does from continuing the underlying Tribal Court lawsuit.

This Court has previously denied Dollar General's request for preliminary injunctive relief concluding the Tribal Court may have jurisdiction over it under the *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981), "consensual relationship exception." Particularly, the Court held that Dollar General's participation in the Choctaw Youth Opportunity Program (the "YOP") implied consent to Tribal Court jurisdiction over the Doe Defendants tort claims. However, at this juncture, the burden of proof now switches to the Defendants to prove the existence of jurisdiction. Additionally, there is new evidence to consider from the testimony of Louise Wilson, the Director of the Youth Opportunity Program. In moving for summary judgment, Dollar General is requesting the Court carefully reexamine its earlier decision in light of the new evidence, the different placement of the burden of proof, and the Supreme Court's *Plains Commerce* decision.

I. STATEMENT OF UNDISPUTED MATERIAL FACTS[2]

Defendant John Doe is a member of the Mississippi Band of Choctaw Indians and was a participant in the YOP.[3] The YOP is conducted by the educational branch of the Choctaw Tribal government. The purpose of the YOP was "to hire young people to get into positions for a short time with mentors or someone who would supervise them and help them with the different job positions. The other thing was the program was designed to not only do that, but also to help them set goals and objectives for their lives."[4]

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[2] Plaintiffs are accepting these facts as true for purposes of this motion only.
[3] Original Tribal Court Complaint, Exhibit 1 Page 5 to the Federal Court Complaint.
[4] Wilson at p. 13. All excerpts of Wilson Deposition are attached *in globo* as Exhibit A.

Each year the YOP would identify employers in the area that might want the additional help of the Choctaw youth by means of a survey sent to local employers.[5] Employers responded to the mailing if they desired to participate.[6] The employers entered into no written contracts relative to their participation in the program.[7] The YOP determined whether or not to assign participants to particular employers.[8] The YOP also employed site monitors who traveled among the various worksites checking on the participants.[9] The employer's role was to teach the participant work skills, to provide work for the participant to perform, to report on his hours, and to provide feedback to the participant.[10]

At the time Doe participated, the Program had 400 youth participating.[11] The job training portion of the YOP lasted only six weeks.[12] The Program had no impact on either the Tribe's governance or internal relations.[13] Businesses participating in the program benefited by receiving six weeks of temporary labor by the youth paid for by the Tribe.[14]

Dolgencorp, LLC operates a store on the Choctaw reservation.[15] In the spring of 2003, the store's then manager, Dale Townsend responded to an inquiry from the YOP seeking to participate in its program.[16] The YOP assigned Doe to the Dollar General store toward the end of the 6 week program.[17] Dollar General did not pay Mr. Doe. Rather, the Youth Opportunity

[5] Wilson Deposition p. 25.
[6] *Id.*
[7] Wilson Deposition pp. 26 – 27.
[8] Wilson Deposition p. 25; 28.
[9] Wilson Deposition pp. 31 – 32.
[10] Wilson Deposition pp. 28 - 29
[11] Wilson Deposition p. 24.
[12] Wilson Deposition p. 22.
[13] Wilson Deposition p. 48; 71.
[14] Wilson Deposition pp. 72 – 73.
[15] Original Tribal Court Complaint, Exhibit 1 to Federal Complaint.
[16] Wilson Deposition pp. 35 – 36.
[17] Doe had previously been assigned and moved from two other workplaces in the first four weeks of the program. Wilson Deposition pp. 57 – 58.

Program paid Mr. Doe's wages.[18] Mr. Doe alleges that during his assignment, he was sexually assaulted at the store by Mr. Townsend.[19]

II. ARGUMENT AND LAW

A. THE ELEMENTS REQUIRED TO OBTAIN A PERMANENT INJUNCTION

"The party seeking a permanent injunction must meet a four-part test. It must establish (1) success on the merits; (2) that a failure to grant the injunction will result in irreparable injury; (3) that said injury outweighs any damage that the injunction will cause the opposing party; and (4) that the injunction will not disserve the public interest." *VRC LLC v. City Of Dallas*, 460 F.3d 607 (5th Cir. 2006) *citing Dresser-Rand, Co. v. Virtual Automation, Inc.*, 361 F.3d 831, 847-48 (5th Cir. 2004) (*citing Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n. 12, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987)).

B. THE MERITS: PARTICIPATION IN THE CHOCTAW YOUTH OPPORTUNITY PROGRAM IS NOT A SUFFICIENT TO PROVIDE CONSENT TO TRIBAL COURT JURISDICTION BECAUSE THE YOUTH OPPORTUNITY PROGRAM DOES NOT BEAR ON INTERNAL RELATIONS OR TRIBAL SELF-RULE

1. The Basic Parameters Of Tribal Court Jurisdiction

Tribal courts are courts of limited, not general, jurisdiction. Particularly, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana v. United States*, 450 U.S. 544, 565, 101 S.Ct. 1245, 1258 (1981).[20] Where nonmembers are concerned, the "exercise of tribal power beyond what is necessary to protect

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[18] Wilson Deposition p. 20.

[19] Original Tribal Court Complaint, Exhibit 1 to Federal Complaint. The Court previously concluded Mr. Townsend was not subject to the jurisdiction of the Tribal Court.

[20] Pursuant to the Tribal Code of the Mississippi Band of Choctaw Indians, the jurisdiction of its courts extends only so far as that jurisdiction is authorized by federal law. The Tribal Code, in Chapter 2, contains specific provisions regarding subject matter jurisdiction and personal jurisdiction expressly stating that they are subject to federal law. See Choctaw Tribal Code §1-2-5(l) (subject matter jurisdiction is subject to limitations contained in federal law); Choctaw Tribal Code §1-2-3 (personal jurisdiction is subject to limitations contained in federal law).

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." *Nevada v. Hicks*, 533 U.S. 353, 358-359, 121 S.Ct. 2304, 2309 - 2310 (200l)(citations omitted, emphasis in original). This statement of Tribal Court authority has become known as the "*Montana* rule."

Under the *Montana* rule, the Choctaw Tribal Court can exercise jurisdiction over Dollar General only in two circumstances:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. … 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 or welfare of the tribe.

Montana, 454 U.S. at 565 - 566.

2. This Court's Decision On The Request For Preliminary Relief

The Court, in its opinion on Dollar General's request for a preliminary injunction, found that the second Montana exception, the "self governance" exception, did not provide a basis for Tribal court jurisdiction over Doe's claims.

> As one court has observed, "virtually every act that occurs on the reservation could be argued to have some political, economic, health or welfare ramification to the tribe," and yet the second *Montana* exception obviously "was not meant to be read so broadly" as to cover every act that occurs on the reservation. *Allen*, 163 F.3d at 515. Instead, "when read 'in its proper context,' the exception allows for tribal jurisdiction only to the extent that such authority 'is necessary to protect self-government or to control internal relations.'" *Bugenig*, 229 F.3d at 1220 (citing *Allen*). *See also Allen*, 163 F.3d at 515 (observing that "the tribal court plaintiff's status as a tribal member alone cannot satisfy the second exception. Nor is it sufficient to argue ... that the exception applies because the tribe has an interest in the safety of its members."). In the case at bar, in no sense can it reasonably be said that the Tribal Court's assuming jurisdiction over the Does' claim against Dolgen or Townsend is necessary to protect tribal self-government or

> control internal relations. Manifestly, this is a far broader application of Montana's second exception than is warranted.[21]

There have been no changes in the law or the evidence developed since that decision which would lead to a different conclusion under this exception.

However, the Court then concluded that Plaintiffs failed to carry their burden of proving the consensual relationship exception did not apply.[22] Particularly, the Court held that Dollar General entered into a consensual employment type relationship with Doe through the Tribe by participating in the Youth Opportunity Program. Of particular importance to the Court was the question "whether John Doe actually performed or was expected to perform services that benefitted Dolgen, *i.e.*, whether Dolgen's participation was essentially gratuitous or whether it received a commercial benefit from the arrangement." Since there was no record evidence on which this question could be answered, the Court concluded Defendants prevailed because Dollar General had not met its burden of proof. "[I]t is Dolgen's burden to establish a substantial likelihood of success on the merits of its own assertion that the Tribal Court lacks jurisdiction. The burden is thus on Dolgen to demonstrate that the Montana exception does not apply. Under the circumstances, Dolgen cannot sustain that burden solely by reliance on the absence of evidence in the Tribal Court record."

3. <u>At This Stage, Defendants, Not Dollar General, Have The Burden of Proving Jurisdiction</u>

The decision on the request for preliminary relief thus turned on the burden of proof. That is, when faced with an absence of evidence to make what the Court considered the critical question, Dollar General was faulted with the lack of evidence and cast as the losers. But that burden was a product of the procedural nature of the request. Because they were seeking

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[21] Opinion at p. 8.

[22] As previously noted, Plaintiffs do not bear any burden to disprove jurisdiction. Defendants bear the burden of

preliminary injunctive relief, Dollar General had the burden of proving a likelihood of success on the merits. Now that the issue is permanent relief, the procedural burden is gone and the Court must consider who has the burden of proof on the merits. *Plains Commerce* made clear that Defendants, as the proponents of jurisdiction, have the burden. The Eighth Circuit explained,

> Because "efforts by a tribe to regulate nonmembers . . . are presumptively invalid," the Tribe bears the burden of showing that its assertion of jurisdiction falls within one of the Montana exceptions. *Plains Commerce Bank*, 128 S.Ct. at 2720 (quotation marks omitted). Those exceptions are narrow ones and "cannot be construed in a manner that would 'swallow the rule'." *Id*. (quoting *Atkinson Trading Co.*, 532 U.S. at 655, 121 S.Ct. 1825).

Atty. Process Invest. v. Sac & Fox, 609 F.3d 927, 936 (8th Cir. 2010). *See also Smith v. Salish Kootenai College*, 378 F.3d 1048 (9th Cir. 2004)("the party asserting tribal jurisdiction has the burden of proving all facts necessary for tribal jurisdiction." c*iting Strate*, 520 U.S. at 456, 117 S.Ct. 1404.)

Because Defendants, not Dollar General, bear the burden of proving the existence of Tribal court jurisdiction, Dollar General can rely on the absence of evidence. The summary judgment standard is controlled by whether the moving or the opposing party bears the burden of proof on the issue. When the non-movant has the burden of proof at trial, he "must come forward with evidence which would be sufficient to enable it to survive a motion for directed verdict at trial." *Stults v. Conoco, Inc.*, 76 F.3d 651, 656 (5th Cir. 1996). Contra, Dollar General, who does not have the burden of proving jurisdiction, may rest on the absence of evidence to support Defendants' claim of jurisdiction in Tribal Court. *Millennium Petrochem. v. Brown & Root Holdings*, 390 F.3d 336, 339 (5th Cir. 2004). Defendants have no evidence that would establish the instant case involves a Tribal interest sufficient to warrant the application of Montana's consensual relationship exception.

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affirmatively establishing jurisdiction.

4. *Plains Commerce* Demands More Than The Existence Of A Consensual Relationship; It Demands A Consensual Relationship That Bears On The Tribe's Internal Relations Or Self Governance

In analyzing the consensual relationship exception here, the Court concluded that if Dollar General received an economic benefit from their consensual relationship with the Tribe, then they had consented to jurisdiction over this tort claim. "If John Doe performed services for Dolgen that had value to Dolgen such that Dolgen enjoyed a commercial benefit from its agreement to allow his placement in its store, then it would be reasonable to conclude that there existed the kind of consensual relationship required by Montana's first exception."

This conclusion did not recognize that *Plains Commerce* said consent to jurisdiction standing alone, even express, is not enough to establish jurisdiction. Rather, because non-Indians have no participation in Indian government, jurisdiction must **also** be based in the need of the Tribe to preserve tribal self-government and control internal relations.

> [N]onmembers have no part in tribal government—they have no say in the laws and regulations that govern tribal territory. Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. **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.**[23]

The Supreme Court explained why the activity must implicate the Tribe's "internal relations or threaten tribal self-rule."

> The logic of *Montana* is that certain activities on non-Indian fee land (say, a business enterprise employing tribal members) or certain uses (say, commercial development) **may intrude on the internal relations of the tribe or threaten tribal self-rule. To the extent they do, such activities or land uses may be regulated.** See *Hicks*, *supra*, at 361 ("Tribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them"). Put

[23] *Id* at 2724. Emphasis added.

> another way, certain forms of nonmember behavior, even on non-Indian fee land, may sufficiently affect the tribe as to justify tribal oversight. While tribes generally have no interest in regulating the conduct of nonmembers, then, they may regulate nonmember behavior that implicates tribal governance and internal relations.[24]

Thus, it is not enough when considering the first exception merely to examine consent, whether express or tacit. The exercise of jurisdiction must also be consistent with "the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations."[25] The consensual relationship must "intrude on the internal relations of the tribe or threaten tribal self-rule."[26]

The critical issue, then, is not whether Dollar General received an economic benefit from its participation in the Choctaw Youth Opportunity Program. The critical issue is whether participating for six weeks in a job training program with three Choctaw youth is a consensual relationship that "intrude[s] on the internal relations of the tribe" or "threaten[s] tribal self rule." This Court, in fact, has already held "In the case at bar, in no sense can it reasonably be said that the Tribal Court's assuming jurisdiction over the Does' claim against Dolgen or Townsend is necessary to protect tribal self-government or control internal relations. Manifestly, this is a far broader application of Montana's second exception than is warranted."[27] Thus, it is clear that the tort claim has no connection tribal self-government and internal relations. Likewise, participation in the six-week Youth Opportunity Program had no bearing on the internal relations and tribal self-governance.

The testimony of the Director of the Youth Opportunity Program bears this out. She explained the purpose of the program.

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[24] *Id. at* 2723.
[25] *Id at* 2724.
[26] *Id.*
[27] Opinion at p. 8.

> The program was designed to hire young people to get into positions for a short time with mentors or someone who would supervise them and help them with the different job positions. The other thing was the program was designed to not only do that, but also to help them set goals and objectives for their lives.[28]

She then explained the role of an employer such as Dollar General in the program.

> the supervisor at The Dollar Store usually makes sure that they -- their time sheets. They sign in and sign out, more or less supervise them on those things, and then give instructions as to what to do while they're employed within their program.
>
> And the other thing that is instructed is to teach them. If there is anything that needs to be taught within that program to teach them. For instance, if it's going to be cash register, to teach them how to use the cash register. Or stamping things or something like that, to teach them all of those and give instructions. It's more or less we expect the supervisors to teach them and to keep their time. The other thing is that if they are not in -- not doing their work or if other things come up that they are -- they are instructed or they should know to inform them that there are consequences to face if they don't do their job.[29]

Nevertheless, it is clear that at all times, the Tribe was the employer of the youth.

> Q. Now, when the youth come to -- for the summertime program, do you consider the youth to be employees of the Choctaw Youth Opportunity Program?
>
> A. Excuse me. When they come or after they've applied?
>
> Q. After they've been accepted into the program.
>
> A. Oh, yes.
>
> Q. And do you make any federal withholdings for taxes from their paychecks?
>
> A. Yes.
>
> Q. And do they make federal -- do y'all make federal withholdings for Social Security?
>
> A. Yes.

[28] Wilson at p. 13.
[29] Wilson at pp. 28 – 29.

> Q. And do y'all make federal withholdings for Medicare?
>
> A. I think all of those, yes, are taken care of when it goes to finance. They take all of that out.
>
> Q. And do you maintain Workers' Compensation insurance for --
>
> A. Yes, yes.
>
> Q. And do y'all set the schedules that they work?
>
> A. As to?
>
> Q. As to we're going to have you work 40 hours a week, 20 hours a week?
>
> A. Oh, yes. Yes.[30]
>
> Q. And y'all actually write the checks for their wages?
>
> A. Yes. When we get a W-2 we send it -- not a W-2, a T&A, we send it to the tribal finance offices whereby they do that for everybody that works.

The Tribe also hired employees whose job was to travel to the various work sites to supervise the participants.[31]

Ms. Miller admitted that the Youth Opportunity Program did not have any direct impact on Tribal self-government, an elected chief, the Miko, and a tribal council.

> Q. And does the operation of the Youth Opportunity Program in any way come into play in the election of council members?
>
> A. None other than our 18-year-olds voting for officials.[32]

While the loss of the Youth Opportunity Program would reduce employment opportunities for tribal youth, it would not impact the Tribe’s viability.

> Q. Would the elimination of the Youth Opportunity Program threaten the financial viability of the tribe?
>
> A. No.

[30] Wilson at pp. 19 – 20.
[31] Wilson at pp. 31 – 33.
[32] Wilson at p. 71

> Q. Would the elimination of the Youth Opportunity Program damage government relations?
>
> A. No.[33]

In *Plains Commerce*, the Court held that a business entity employing Tribal members "**may** intrude on the internal relations of the tribe or threaten tribal self-rule." (emphasis added). The Court did not hold employment relationships always would intrude. The relationship here was for a total of a six-week period. Three tribal youth were placed with Dollar General, two for six weeks, and Doe for less. There is simply no evidence that this relationship had any connection to the tribe's governance or internal relationships and it cannot support a finding of Tribal Court jurisdiction. Even though Dollar General received some small economic benefit in the form of the tribe paying for the youths' work when they were not training, that relationship is not sufficient to establish jurisdiction because it has no bearing on tribal governance and internal relations.

5. The Nexus Between The Alleged Tort and the Relationship Between Doe and Dollar General Is Insufficient to Apply the Consensual Relationship Exception

There must be a "direct logical nexus" between the relationship and the cause of action to support the application of *Montana's* consensual relationship exception. *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 656, 121 S.Ct. 1525 (2001). This Court concluded earlier that "Here, notwithstanding Dolgen's argument to the contrary, the court is of the opinion that the subject matter of the Does' lawsuit, at least to the extent the Does charge that Dolgen was itself negligent in the hiring, training and supervision of Townsend, arises directly from Dolgen's consensual relationship with the Tribe and John Doe."

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[33] Wilson at p. 48.

There is no evidence that anyone other than Mr. Townsend himself agreed to participate in the YOP.[34] There were no written agreements between the company and the Tribe over its participation.[35] In fact, Mr. Townsend's allowing these youth to work in the store violated Dollar General's policies and was grounds for immediate termination.[36] Thus, the Court's opinion means that Dollar General would be subjected to jurisdiction in Tribal Court based on the unauthorized conduct of the same individual whose actions are at issue in the underlying tort claim.

In light of these facts, it is submitted this Court should reevaluate the nexus requirement. In *Plains Commerce,* the Supreme Court very clearly stated that where regulation is based on conduct, the regulation must be a reasonably foreseeable consequence of that conduct. "The Bank may reasonably have anticipated that its various commercial dealings with the Longs could trigger tribal authority to regulate those transactions …."[37] The Court concluded that a lawsuit over the sale of land owned by the Bank in fee simple could not be reasonably anticipated to arise from its commercial dealings with the Longs that involved the very same land.

Under the facts of this case, it cannot be said that it was foreseeable for Dollar General to anticipate in operating a retail outlet on the reservation that: 1) one of its managers would violate its policies on allowing minors to work in the store; 2) that the manager would then allegedly commit a sexual assault against one of those minors. As such, the only nexus between Dollar General's relationship to Doe and the alleged assault is "but for" causation. That is, had Doe not participated in the program, he would not have been harmed. "But for" causation is not enough to support the application of the exception. For example, in *Smith v. Salish Kootenai College*,

[34] Wilson at p. 35.
[35] Wilson at p. 26-27.
[36] Policy Attached as Exhibit B. A declaration authenticating the policy will be filed shortly.
[37] The Court twice expressly stated it was not deciding whether the Tribal Court had jurisdiction over the Longs'

434 F.3d 1127 (9th Cir. 2006), the Ninth Circuit examined Tribal Court jurisdiction over a student's tort claim against SKC, a college owned and operated by the Tribe, arising out of injuries he suffered while driving one of the Tribal college's vehicles. The court held "[a]ny contractual relationship Smith had with SKC as a result of his student status is too remote from his cause of action to serve as the basis for the Tribe's civil jurisdiction." Even though the plaintiff would not have been driving the vehicle, but for his relationship with the college, that relationship was simply not enough to support jurisdiction over his claims. A Tribal member's being injured while in a relationship with a non-Indian is simply not a sufficient nexus, and that is all that is alleged here.

Should this Court not change its prior determination, Dollar General requests clarification on the issue of the Tribal court's jurisdiction over the claims for vicarious liability. In the prior opinion, this Court suggested only claims based on Dollar General's own negligence, not claims based on vicarious liability, would be subject to the Tribal Court jurisdiction. This is a significant issue because the factual underpinnings of the claims are disparate and the amount of work to be done in Tribal Court would be far less. But the memorandum ruling might be open to a different interpretation and so Dollar General requests clarification.

C. DOLLAR GENERAL WILL SUFFER IRREPARABLE HARM IF FORCED TO LITIGATE IN A COURT WITH NO JURISDICTION

Because the Tribal Court has no jurisdiction in this matter, Dollar General will suffer irreparable harm if forced to litigate there. During the process, Dollar General will incur significant costs and fees. Dollar General employees will be called upon to spend significant amounts of time and effort working on the matter. Should Dollar General be subjected to a judgment in Tribal Court, that judgment could be executed upon by Tribal authorities against

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claims for breach of contract and bad faith.

whom Dollar General would have no recourse due to the Tribe's sovereign immunity. Dollar General's constitutional rights are not protected in Tribal Court because a defendant's rights in tribal court are not co-extensive with the rights of a litigant in a state or federal court.[38] Moreover, should Dollar General ultimately prevail at trial in tribal court, the victory could be reversed on appeal due to the lack of jurisdiction giving Doe a second bite at the apple by bringing suit in state court.[39]

Courts have routinely concluded that this situation presents irreparable harm sufficient to support the granting of temporary injunctive relief. One court explained,

> Without an injunction, UNC would be forced to appear and defend in Tribal Court; were it not to appear, the Navajo plaintiffs there could obtain default judgments that the tribe might attempt to execute against UNC's interests on the reservation. The burden on UNC of defending numerous Tribal Court actions would be substantial. Any judgments obtained against UNC after trial might also be executed by the tribe. In such a closed system, it would be difficult if not impossible for UNC to find recourse to another forum that could protect it from the tribe's overreaching jurisdiction. The only way adequately to protect UNC from this potentially irremediable injury is to enjoin the defendants from proceeding further in Tribal Court.

UNC Resources Inc. v. Bennally, 514 F. Supp. 358 (D.N.M. 1981). *See also Kerr-McGee Corporation v. Farley*, 88 F.Supp.2d 1219 (D.N.M. 2000)("The Court finds that Kerr-McGee will suffer irreparable damage if Tribal Claimants are not enjoined from proceeding in Navajo Court, as demonstrated by the expense and time involved in litigating this case in tribal court."); *Seneca-Cayuga Tribe Of Oklahoma v. State of Oklahoma*, 874 F.2d 709 (10th Cir. 1989)("The Tribes would also be forced to expend time and effort on litigation in a court that does not have

[38] *UNC Resources Inc. v. Bennally*, 514 F. Supp. 358 (D.N.M. 1981) *citing, Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978).

[39] It is Plaintiff's understanding that while Doe was a minor, the statute of limitations on bringing a state court action did not run against him.

jurisdiction over them….”); *Chiwewe v. The Burlington Northern and Santa Fe Railway Co.*, 2002 WL 31924768 (D.N.M.)(same).

D. THE BALANCE OF HARMS SUPPORTS ENJOINING THE PROCEEDING IN TRIBAL COURT

John Doe will suffer no unfair prejudice from the proceeding in tribal court from being enjoined. He has always had the ability to bring his claims in Mississippi courts for the same relief he seeks in tribal court where jurisdiction is clear. At most, there is only the delay occasioned by the change in forums about which he can complain. Since what he seeks is money, any damage caused by delay is compensable in interest should he ultimately obtain a judgment.

E. THE PUBLIC INTEREST WILL NOT BE HARMED BY ENJOINING THE TRIBAL COURT PROCEEDING

There is little public interest in a tort dispute between private parties. There is, however, public interest in the resolution of the jurisdictional limits of the tribal court and preventing it from attempting to exercise jurisdiction where it has none. One court posed the question as “Essentially, the Court must weigh the public's interest in permitting the Navajo tribal court to adjudicate any matter brought before it against the extension of civil tribal court jurisdiction to non-consenting nonmembers.” *Ford Motor Company v. Todocheene,* 258 F.Supp.2d 1038, 1057 (D. Ariz. 2002). Courts have routinely answered that the public interest is served by preventing tribal courts from proceeding in cases where they lack jurisdiction. *See, e.g. UNC Resources Inc. v. Bennally*, 514 F. Supp. 358 (D.N.M. 1981) (“Nor will the public interest be harmed by an injunction preventing the defendants from participating in an unlawful exercise of tribal power.”); *Chiwewe v. The Burlington Northern and Santa Fe Railway Co.*, 2002 WL 31924768 (D.N.M.)(same); *Kerr-McGee Corporation v. Farley*, 88 F.Supp.2d 1219 (D.N.M. 2000).

III. CONCLUSION

This case poses a significant question about the scope of Tribal court jurisdiction over non-members for tort claims in a suit for money damages and will have far reaching consequences. The Supreme Court has repeatedly held that tribal court jurisdiction over non-members such as Dollar General is narrow and is limited to matters that bear on the Tribe's right to control entry, internal relations and self-government. Consenting to participate for six weeks in the Choctaw Youth Opportunity Program does not impact those interests. As such, the Tribal Court has no jurisdiction over Dollar General and its request for permanent injunctive relief must be granted.

Wherefore, Plaintiffs Dolgencorp, LLC and Dollar General Corporation request their motion be granted and the Court enter an Order enjoining Defendants forevermore from taking any action or any step in the prosecution of that certain case "*John Doe through his parents and next friends John Doe Sr. and Jane Doe v. Dale Townsend and Dolgencorp Inc.*" Docket No. CV-2-05 currently pending in the Tribal Court for the Mississippi Band of Choctaw Indians.

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CERTIFICATE OF SERVICE

I, Edward F. Harold do hereby certify that I electronically filed the foregoing Memorandum in Support of Motion for Summary Judgment with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

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And I hereby certify that I have mailed via United States the document to the following non-ECF participants:

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This 8th day of April 2011.

s/Edward F. Harold