No. 15-1486

In The

Supreme Court of the United States

TUNICA-BILOXI GAMING AUTHORITY, et al.,

Petitioners,

versus

ZACHARY ZAUNBRECHER, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The State Of Louisiana Court Of Appeal, Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Louisiana Supreme Court and the Louisiana Third Circuit Court of Appeal error in allowing the civil tort suit filed by the minor survivor against the Paragon Casino employees, in their individual capacities, due to their overserving of alcoholic beverages to one of its member patrons, recognizing his obvious inebriation to the point of defecating on himself, and then escorting him out of the casino and to his car, only to have him drive approximately two (2) miles down the road and kill an innocent oncoming motorist?

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BRIEF IN OPPOSITION

Zachary Zaunbrecher, individually and on behalf of his deceased father, Michael Blake Zaunbrecher, respectfully submits this brief in opposition to the *Petition for a Writ of Certiorari* filed by Tunica-Biloxi Gaming Authority d/b/a Paragon Casino Resort, et al.

OPINIONS BELOW

The opinion of the Louisiana Third Circuit Court of Appeal (Petitioners' App. 1) is published at 2015-769 (La. App. 3 Cir. 12/9/15), 181 So. 3d 885. The Louisiana District Court opinion (Petitioners' App. 13) is unpublished. The Louisiana Supreme Court *Writ denial* without reasons is published at 2016-0049 (La. 2/26/16), 187 So. 3d 1002 (Mem). (Petitioners' App. 16).

JURISDICTION

The judgment of the Court of Appeal was entered December 9, 2015. (Petitioners' App. 1). The Louisiana Supreme Court denied Petitioners' timely *Petition for Writ of Certiorari* on February 26, 2016. (Petitioners' App. 16). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATEMENT

Leo J. David (David), a player's club member of the Paragon Casino (hereinafter "the Casino"), had been partaking in his membership benefits at the Casino on July 10, 2013. He had arrived at the Casino at 5:30 p.m., on the evening before the tragic motor vehicle incident. While at the Paragon, David was offered various inducements, gifts, and special treatment due to his loyalty as a club member to the Paragon, including alcohol at a reduced rate or completely free of charge. Ms. Marissa Martin (Martin), one of the named defendants, was bartending and serving David that night.

Surveillance evidence shows after twelve (12) hours of intense binge drinking, David was confronted by the defendant security guards, Mr. Jeremy Ponthieux (Ponthieux) and Mr. Nathan Ponthier (Ponthier), for the Paragon, due to his severe and obvious intoxication.

David's intoxication was obvious in that David had defecated on himself. Both Ponthieux and Ponthier informed David that due to his intoxication he had to vacate the premises. Ponthieux and Ponthier physically escorted David from the Casino and forced him into his automobile.

After David was forced to vacate the premises in his automobile, he proceeded in a southerly direction and then for some unknown reason turned around and began traveling in a northerly direction in his 2001 Toyota Tundra on Louisiana Highway 1, in Avoyelles Parish, Louisiana. Within a couple of miles of the Casino, David crossed the center line of Louisiana

Highway 1, and slammed head-on into the vehicle driven by Mr. Blake Zaunbrecher, ultimately causing Mr. Blake Zaunbrecher's death, as well as that of himself.

The Petition for Damages was filed on July 24, 2013, by Mr. Zachary Zaunbrecher (Zaunbrecher), son of Mr. Blake Zaunbrecher. The Petition for Damages named as defendants The Estate of Leo J. David and the insurance companies for both David and Mr. Blake Zaunbrecher.

On July 14, 2014, Zaunbrecher filed his First Supplemental and Amending Petition naming as defendants, Martin, Ponthieux, Ponthier, and Tunica-Biloxi Gaming Authority d/b/a Paragon Casino Resort.

On or about November 13, 2015, the defendants the Tunica-Biloxi Indians of Louisiana through the Tunica-Biloxi Gaming Authority, Martin, Ponthieux, and Ponthier filed an Exception of Lack of Subject Matter Jurisdiction based on the tribe's sovereign immunity.

On May 12, 2015, the appellant, Zaunbrecher, filed his opposition to the Exception of Lack of Subject Matter Jurisdiction which indicated that there was no objection to the dismissal of the Tunica-Biloxi Indians of Louisiana. However, plaintiff argued that the exception should be denied as to the individuals Martin, Ponthieux, and Ponthier.

On May 18, 2015, the exception was heard and the trial court granted the exception with regards to both the Tunica-Biloxi Indians of Louisiana and the

individuals Martin, Ponthieux, and Ponthier. This ruling dismissed said defendants from the cause of action. The trial court's judgment was signed on June 4, 2015, which designed the judgment as a partial final judgment holding there is no just cause of delaying appellate review of the judgment.

On June 25, 2015, the appellant, Zaunbrecher, filed a Notice and Order for Devolutive Appeal. On September 8, 2015, an appeal was taken to the Louisiana Third Circuit Court of Appeal.

On December 9, 2015, the Third Circuit Court of Appeal found that the trial court erred in granting an exception of subject matter jurisdiction as to Martin, Ponthieux and Ponthier holding:

> *Mr. Zaunbrecher has asserted personal liability claims against these three individuals by alleging that they had knowledge of his intoxicated condition and owed personal duties to Mr. David while he was drinking which led to the death of his father, Blake Zaunbrecher. We find that sovereign immunity in this case does not bar the suit against the Paragon Casino employees in their individual capacities.*

On January 8, 2016, an application for *Writ of Certiorari* to the Supreme Court of the State of Louisiana was taken and was ultimately denied on February 26, 2016.

REASONS FOR DENYING THE PETITION

The *Petition for Writ of Certiorari* should be denied because the court of appeal's decision striking down the notion of an expansion of sovereign immunity to an individual's tortious actions aligns with prior holdings of courts.

Martin, Ponthieux and Ponthier are individual defendants, not a Tribe, and should enjoy no such sovereign immunity.

"As a general matter, individual or '[p]ersonal-capacity suits seek to impose personal liability upon a government official for [wrongful] actions he takes under color of . . . law,' and that were taken in the course of his official duties."[1] However, "an officer sued in his individual capacity, in contrast, although entitled to certain 'personal immunity defenses['], . . . cannot claim sovereign immunity from suit, 'so long as the relief is sought not from the [government] treasury but from the officer personally."[2]

Here, the plaintiff is seeking relief from Martin, Ponthieux and Ponthier personally, for their individual tortious acts.

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[1] *Pistor v. Garcia*, 791 F.3d 1104, 1112 (9th Cir. 2015) (quoting *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S.Ct. 3099, 3105 (1985)).

[2] *Id.* (quoting *Alden v. Maine*, 527 U.S. 706, 757, 119 S.Ct. 2240, 2267-68 (1999)).

I. Trial immunity does not extend to tribal employees sued in their individual capacities.

Courts have found that the same principles apply to tribal sovereign immunity. "Tribal defendants sued in their *individual* capacities for money damages are ***not*** entitled to sovereign immunity, even though they are sued for actions taken in their official duties."[3]

"The general bar against official-capacity claims, however, does not mean that tribal officials are immunized from individual-capacity suits *arising out of* actions they took in their official capacities, as the district court held. . . . Rather, it means that tribal officials are immunized from suits brought against them *because of* their official capacities that is, because the powers they possess in those capacities enable them to grant the plaintiffs relief on behalf of the tribe."[4]

Applying those standards, tribal employees are immunized when their duties are *the* cause of action as opposed to when tribal employees act *beyond* their duties. This standard is illustrated in *Chayoon v. Sherlock* which petitioners attempted to relate to this matter.[5] In *Chayoon v. Sherlock*,

> *"the plaintiff claims in his complaint . . . that the individual defendants are being sued in their 'personal' capacities as well as in their*

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[3] *Id.* (quoting *Maxwell v. County of San Diego*, 708 F.3d 1075, 1089 (9th Cir. 2013)).

[4] *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1296 (10th Cir. 2008).

[5] *Chayoon v. Sherlock*, 877 A.2d 4, 9 (2005).

> *'professional' capacities. He alleges that by denying him a promotion and then by terminating his employment, the defendants violated the FMLA and tribal policy. The plaintiff claims that because the defendants violated the FMLA, they necessarily acted beyond the scope of their authority and in their individual capacities.*"

The court concluded that the complaint "patently demonstrates that in terminating the plaintiff's employment, the defendants were acting as employees . . . within the scope of their authority."[6] It is clear that terminating employment was within the defendant's duties and the plaintiff failed to state any allegations that the court could use to evaluate whether sovereign immunity did not apply.

This case is distinguishable from *Chayoon*. Here, plaintiff is alleging that the defendants Martin, Ponthieux, and Ponthier acted *beyond* their scope of authority. Their negligent actions do not fall within the immunization that courts have previously upheld and sovereign immunity should not apply as to the tribal employees in this case.

II. The plaintiff has alleged specific acts of negligence against Martin, Ponthieux, and Ponthier sufficient to exclude sovereign immunity.

Jurisprudence has interpreted that an extension of sovereign immunity to tribal employees exists when

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[6] *Id.* at 10.

allegations of personal liability are *not* alleged in a complaint.[7,8] However, in the present case, plaintiff alleged personal liability against Martin, Ponthieux and Ponthier. Specifically, with regards to each defendant, the plaintiff has alleged in the Petition:

> *"Martin . . . is responsible for the death of Blake Zaunbrecher as a result of her continued* ***acts of negligence*** *. . . in the following non exclusive respects:*
>
> *a) Martin has been trained by, and received certification as to her ability to recognize impairment of individuals, and has been trained that upon such recognition is to refrain from serving alcohol to said individuals;*
>
> *b) Failure to recognize the impairment of David, and for continuing to serve said individual after his impairment was obvious;*
>
> *c) Failing to notify Tribal leaders of his impairment;*
>
> *d) Failing to cease in the serving of alcohol to an individual obviously impaired; and,*
>
> *e) All other acts of negligence to be shown more specifically at a trial on this matter."*
>
> *"Ponthieux . . . is responsible for the death of Blake Zaunbrecher as a result of his continued*

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[7] *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004).

[8] *Lewis v. Clarke*, 320 Conn. 706 (2016).

acts of negligence *. . . in the following non exclusive respects:*

a) Ponthieux has been trained by, and received certification as to his ability to recognize impairment of individuals, and has been trained as to the handling of such individuals;

b) In escorting David from the Casino due to his impairment thereby allowing him to gain access to a vehicle which ultimately was used in the death of Zaunbrecher;

c) Failing to notify Tribal leaders of David's impairment;

d) Failing to stop the service of alcohol to David once his impairment had become obvious; and,

e) All other acts of negligence to be shown more specifically at a trial on this matter."

"Ponthier . . . is responsible for the death of Blake Zaunbrecher as a result of his continued acts of negligence . . . in the following non exclusive respects:

a) Ponthier has been trained by, and received certification as to his ability to recognize impairment of individuals, and has been trained as to the handling of such individuals;

b) In escorting David from the Casino due to his impairment thereby allowing him to gain access to a vehicle which ultimately was used in the death of Zaunbrecher;

c) *Failing to notify Tribal leaders of David's impairment;*

d) *Failing to stop the service of alcohol to David once his impairment had become obvious; and,*

e) *All other acts of negligence to be shown more specifically at a trial on this matter."*

Petitioners reference *Chayoon* and *Lewis* which held that the plaintiff could not *merely* name employees of a Tribe when the defendants act in their official capacities while the complaint does not allege that the defendants acted outside the scope of their authority.[9, 10]

However, the present case is distinguishable from both *Chayoon* and *Lewis*. Here, the plaintiff did not *merely* name employees as defendants in the supplemental petition. Instead, as stated above, plaintiff alleged that the defendants Martin, Ponthieux, and Ponthier acted outside of their official capacities and are personally liable for their actions when they continued to serve alcohol to an intoxicated person such that he defecated on himself and was unable to leave the premises voluntarily.

Clearly, the acts of the defendants should be evaluated to determine if sovereign immunity exits. The petitioners have cited *Bassett*,[11] wherein the court stated that "a claim for damages against a tribal official lies

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[9] *Chayoon v. Chao*, 355 F.3d at 143.

[10] *Lewis*, 320 Conn. at 706.

[11] *Bassett v. Mashantucket Pequot Museum & Research Center, Inc.*, 221 F.Supp.2d 271, 281 (D. Conn. 2002).

outside the scope of tribal immunity only where the complaint pleads – and it is shown – that *a tribal official acted beyond the scope of his authority to act on behalf of the tribe*.[12]

In addition, the court in *Lewis* stated that instead of simply naming a defendant in the pleadings, "[t]he sounder approach is to examine the actions of the individual tribal defendants."[13]

The Louisiana Supreme Court set out four criteria that must be satisfied to impose individual liability on an employee for injury to a third person caused by the employee's breach of an employment-imposed duty:

> 1. The principal or employer owes a duty of care to the third person, breach of which has caused the damage for which recovery is sought.
>
> 2. This duty is delegated by the principal or employer to the defendant.
>
> 3. The defendant officer . . . has breached this duty through personal fault. *The breach occurs when the defendant has failed to discharge the obligation with the degree of care required by ordinary prudence under the same or similar circumstances – whether such failure to be due to malfeasance, misfeasance, or*

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[12] *Bassett v. Mashantucket Pequot Museum & Research Center, Inc.*, 221 F.Supp.2d 271, 281 (D. Conn. 2002).

[13] *Lewis*, 320 Conn. at 706 (quoting *Bassett v. Mashantucket Pequot Museum & Research Center, Inc.*, 221 F.Supp.2d 271, 280 (D. Conn. 2002)).

> *nonfeasance, including when the failure results from not acting upon actual knowledge of the risk to others as well as from a lack of ordinary care in discovering and avoiding such risk of harm which has resulted from the breach of the duty.*
>
> 4. With regard to the personal fault, personal liability cannot be imposed upon the officer . . . simply because of his general administrative responsibility for performance of some function of the employment. He must have a personal duty towards the inured plaintiff, breach of which superficially has caused the plaintiff's damages. If the defendant's general responsibility has been delegated with due care to some responsible subordinate or subordinates, he is not himself personally at fault and liable for the negligent performance of this responsibility unless he personally knows or personally should know of its non-performance or mal-performance and has nevertheless failed to cure the risk of harm.

The Louisiana Third Circuit Court of Appeal has applied the criteria discussed and as *Lewis* suggested, applied an approach to examine the actions of the individual tribal defendants when it reviewed the individual liability claims of each defendant as follows:

> Regarding Ms. Martin's individual liability, Mr. Zaunbrecher alleged that she was specifically trained in the ability to recognize impairment of individuals and had a duty to

> refrain from serving alcohol to such individuals. He claims that Ms. Martin's failure to recognize Mr. David's impairment, continuing to serve him, and failure to notify tribal leaders was negligent. From these facts alleged, a trier of fact could determine that Ms. Martine had a personal duty toward Mr. David to stop serving him alcohol, preventing him from causing injury to himself or another person.
>
> Regarding Mr. Zaunbrecher's claims against Mr. Ponthieux and Mr. Ponthier, he specifically alleged that they were trained to recognize impaired individuals and how to handle such individuals. In his negligent entrustment claim, Mr. Zaunbrecher further alleged that the security guards escorted Mr. David from the casino due to his intoxication, granting him access to his car, which led to the death of Mr. Zaunbrecher's father.
>
> In light of the allegations in the petition, we conclude that Mr. Zaunbrecher has asserted personal liability claims against these three individuals by alleging that they had knowledge of his intoxicated condition and owed personal duties to Mr. David while he was drinking which led to the death of his father, Blake Zaunbrecher.

The court's evaluation of the defendant's actions and conclusion that allegations of personal fault are present bars the claim of sovereign immunity for these tribal employees.

It is important to note that if the court were to conclude that the actions of the defendants, Martin, Ponthieux and Ponthier are within their scope and authority as tribal employees, the ruling would be significant. This conclusion and ruling would undermine and contradict the purpose of the server training courses in Louisiana which includes "methods of identifying and dealing with underage and intoxicated persons, including strategies for delaying and denying sales and service to intoxicated and underage persons"[14] as well as the requirement for servers that "if you have any doubts about whether a person is intoxicated you must refuse to sell alcohol to them."[15]

III. The tribal employees, individually and personally, are the real, substantial parties in interest.

In addition to the factors discussed above, courts have also asked whether the sovereign "is the real, substantial party in interest" in suits brought against the official or agent of a sovereign.[16] They went on to state that this "turns on the relief sought by the plaintiffs."[17]

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[14] Louisiana Office of Alcohol & Tobacco Control (2016), Responsible Vendor Handbook. Page 7. Retrieved from http://www.atc.rev.state.la.us/docs/rv%20handbook.pdf.

[15] Louisiana Office of Alcohol & Tobacco Control (2016), Responsible Vendor Handbook. Page 25. Retrieved from http://www.atc.rev.state.la.us/docs/rv%20handbook.pdf.

[16] *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1296 (10th Cir. 2008) (quoting *Frazier v. Simmons*, 254 F.3d 1247, 1253 (10th Cir. 2001)).

[17] *Id.* at 1297.

"[T]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter."[18]

Where, however, the plaintiffs' suit seeks money damages from the officer "in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself," sovereign immunity does not bar the suit "so long as the relief is sought not from the [sovereign's] treasury but from the officer personally."[19]

In the present case, the plaintiff is seeking damages from Martin, Ponthieux, and Ponthier; not the Tribal treasury. The law does not require a sovereign to satisfy a judgment rendered against officers in their individual capacity.

However, it should be noted that the Paragon had an insurance policy in effect at the time of this accident which includes insuring agreements such as Liquor Liability as well as Employment Practices Liability.[20]

According to their policy regarding Liquor Liability, the insurance policy would "indemnify the 'insured' against any 'loss' and 'expense' because of 'injury' if liability for such 'injury' is imposed on the 'Assured' by

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[18] *Id.* (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984)).

[19] *Id.* (quoting *Alden v. Maine*, 527 U.S. 706, 757 (1999)).

[20] App. 1, Excerpt of Insurance Policy (page 4 and 5).

reason of the selling, serving, distribution or furnishing of any alcoholic beverages and if such 'injury' occurs during the 'policy period.'"[21]

The Employment Practices insuring agreement states that the insurance policy agrees "to indemnify the 'Assured' against 'loss' and 'expense' arising from a 'wrongful employment practice' committed by the 'Assured' and which results in a 'claim.'"[22] Each of these agreements have a limit of liability of $10,000,000 each. Thus, the claim that defendants have made that tribal treasury will be affected is misleading.

Certainly the Casino has contemplated a scenario wherein an insurance policy would be required and sovereign immunity does not exist. A scenario such as when their employees could act beyond their duties required by the Tribe (personal liability) in which the insurance policy would protect the tribal treasury or a scenario in which the Paragon has created a custom of behaviors which Martin, Ponthieux, and Ponthier have been instructed to adhere to negligent behaviors which would allow for the policy to protect the treasury as well.

In either instance, plaintiffs are not seeking tribal treasury to satisfy a judgment. The Casino may satisfy, if they wish, a judgment which has been rendered against their employees, personally using the insurance policy. Again, there are no laws that require the

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[21] App. 1, Excerpt of Insurance Policy (page 6).

[22] App. 1, Excerpt of Insurance Policy (page 8).

tribe to satisfy a judgment for which they are not a party.

IV. Third Circuit Ruling of Lis Pendens.

Respondent is requesting this Honorable Court affirm the decision of the *Louisiana Supreme Court* and the *Louisiana Third Circuit Court of Appeal* in denying the request to stay proceedings pending exhaustion of tribal court.

The third circuit has found that the Casino is not a necessary party to this suit as Martin, Ponthieux and Ponthier are defendants *in their personal capacity*. Although the Casino is arguing that a stay should be granted because they will be required to defend the exact same claim in two separate forums, they have not cited any law which permits the court to stay these proceedings.

In fact, the Louisiana Third Circuit stated that Louisiana laws only allow a court to stay proceedings when suits are pending in federal and state court.[23] Additionally, the court stated that they found "no law, nor have casino defendants cited any to us, which permits a state court to stay proceedings when there is a pending action in tribal court."[24] Thus, a stay should not be granted.

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[23] Louisiana Code of Civil Procedure Article 532.

[24] Petitioners' App. 1.

CONCLUSION

The defendants, Martin, Ponthieux and Ponthier, should not be allowed to escape the obvious personal liability in their actions of inducing, over-serving and escorting an obviously intoxicated patron to the highways of the State of Louisiana only to have him kill an innocent motorist less than two (2) miles from the Casino, when the outcome of their actions was almost certain.

The protections of sovereign immunity which the defendants Martin, Ponthieux and Ponthier wish to invoke are not applicable in this case. Jurisprudence has barred claims wherein plaintiffs have failed to allege that the defendants' conduct was in excess of their authority. However, here, plaintiffs have named the defendants individually and stated the acts for which they allege the defendants' conduct was in excess of their authority.

For the foregoing reasons, the *Petition for Writ of Certiorari* should not be granted.

Respectfully submitted,

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July 11, 2016

App. 1

[LOGO]

HUDSON INSURANCE COMPANY

A DELAWARE CORPORATION

Administration:
100 William Street, 5th Floor
New York, NY 10038

Sovereign Nation All Lines Aggregate Insurance Policy

* * *

Sovereign Nation All Lines Aggregate Insurance Policy

Policy No.	NAA00037-13	**Renewal of Policy No.**	NAA0003712

DECLARATIONS

1. Named Assured/ Mailing address:	Tunica Biloxi Gaming Authority dba: Paragon Casino Resort, Tamahka Trails Golf Course 711 Paragon Place Marksville, LA 71351-0345
2. Policy Period:	6/1/13 to 6/1/14 both days at 12:01 a.m. Standard Time at the address of the Named Assured
3. Retroactive Date:	As set forth in Item 4., Coverage Part 1B

In consideration of the premium paid hereon, and subject to the policy terms and conditions, Hudson agrees to provide the Named Assured with the coverage specified herein:

4. Limits of Liability

COVERAGE PART IA
(Occurrence basis)

A. Comprehensive General Liability, Products/Completed Operations, Contractual Liability, Special Events Liability, Sexual Misconduct Liability, Fire Legal Liability, Cemetery Malpractice, Medical Payments excepting those coverage lines specifically listed below:
$10,000,000 each Occurrence

B. Police or Law Enforcement Officials Liability:
$10,000,000 each Occurrence

C. Medical Malpractice including Hospital/Clinic Malpractice:
$10,000,000 each Occurrence

D. Liquor Liability:
$10,000,000 each Occurrence

E. Innkeepers Liability:
$10,000,000 each
Occurrence

F. Automobile liability including Non-Owned Automobile Liability
$10,000,000 each
Occurrence

Auto Medical Payments:
$100,000 each Occurrence

Uninsured and Underinsured Motorists:
$1,000,000 each
Occurrence

G. Auto Physical Damage and Garage Keepers Liability and Valet Parking Liability,
$10,000,000 each
Occurrence

COVERAGE PART 1B
(Claims Made Basis)

H. Tribal Officials Liability:
$10,000,000 each Claim and in the Aggregate
Retroactive Date: 6/1/09

I. Miscellaneous Professional Errors and Omissions Liability:
$10,000,000 each Claim and in the Aggregate
Retroactive Date: 6/1/09

J. Employee Benefit Liability:
$10,000,000 each Claim
and in the Aggregate.
Retroactive Date: 6/1/09

K. Employment Practices
Liability:
$10,000,000 each Claim
and in the Aggregate
Retroactive Date: 6/1/04

L. Fiduciary Liability –
Not Covered
$N/A each Claim and
in the Aggregate
Retroactive Date: N/A

M. E-Commerce Liability –
Not Covered
$N/A each Claim and in
the Aggregate
Retroactive Date: N/A

COVERAGE PART II –
Not Covered

A. Sovereign Nation Workers
Compensation, Occupa-
tional Disease:
$N/A per person/per
claim

B. Employers Liability:
$N/A per person/per
claim

COVERAGE PART 1A
OCCURRENCE BASED COVERAGES

* * *

D. INSURING AGREEMENT D – LIQUOR LIABILITY

"Hudson" agrees, subject to the terms, conditions and exclusions of this policy to indemnify the "Assured" against "loss" and "expense" because of "injury" if liability for such "injury" is imposed on the "Assured" by reason of the selling, serving, distribution or furnishing of any alcoholic beverages and if such "injury" occurs during the "policy period".

Definitions Applicable to Insuring Agreement D. – Liquor Liability:

The term "injury" means "property damage", "bodily injury" as defined in this policy and damages for care, loss of services or loss of support.

* * *

K. INSURING AGREEMENT K. – EMPLOYMENT PRACTICES LIABILITY

"Hudson" agrees, subject to the terms, conditions and exclusions of this policy, to indemnify the "Assured" against "loss" and "expense" arising from a "wrongful employment practice" committed by the "Assured" and which results in a "claim"; provided however, that Condition C. Claims Made and Reported is satisfied.

Definitions applicable to Insuring Agreement K – Employment Practices Liability:

The term "wrongful employment practice" shall mean any of the following acts alleged by or committed against an employment applicant, "employee", or former "employee" of the "Named Assured":

1. Employment discrimination in connection with hiring, promotion, advancement or opportunity, demotion, discipline, pay, layoff or termination, including breach of any written or implied employment contract on the basis of race, color, sex, age, religion, national origin, disability, sexual orientation, marital status or pregnancy, or any conduct that violates federal or local law prohibiting employment discrimination;

2. Sexual or other workplace harassment, including unwelcome advances, requests for sexual favors or other verbal or physical conduct of a sexual nature that;

   a. Is made an explicit term or condition or employment;

   b. Is used as the basis of employment decisions; or

   c. Creates a work environment that is intimidating, hostile or offensive; and

3. Any of the following employment-related acts: misrepresentation, invasion of privacy, defamation, retaliation, negligent infliction of

emotional distress, wrongful discipline, negligent evaluation, negligent hiring, negligent supervision or wrongful termination.

Exclusion(s) Applicable to Insuring Agreement K. – Employment Practices liability:

This Insuring Agreement does not provide coverage for:

1. any liability assumed under any contract or agreement other than a written contract of employment.
2. any "claim" made against the "Assured" arising out of or in any way involving any "employee benefit program" of the "Assured."
3. the "Assured's" failure to comply with any tribal law concerning Sovereign Nation Workers' Compensation, Unemployment Insurance Social Security or Disability Benefits.
4. any "claim" resulting in "bodily injury" or "property damage."
5. any "wrongful employment practice" which has been the subject of any notice given to the "assured" prior to the effective date of this Policy.
6. claims, suits or actions brought or commenced by the "Named Assured".

* * *