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,	) **CIVIL ACTION NO.4:08-cv-22-TSL-LRA**
Defendants	)

MEMORANDUM IN OPPOSITION TO DOLGEN'S MOTION FOR SUMAMRY JUDGMENT AND IN SUPPORT OF TRIBAL DEFENDANTSW' CROSS-MOTION FOR S UMMARY JUDGMENT

INTRODUCTION

Dollar General Corporation and Dolgen Corp, LLC ("Dolgen") have asked this Court to grant its Motion for Summary Judgment and to issue a permanent injunction barring the courts of the Mississippi Band of Choctaw Indians from adjudicating claims pled by John Doe, a tribal member, against Dolgen. 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) (the "Tribal Defendants") have by Cross-Motion asked this Court to enter Summary Judgment for them, ruling that the Choctaw Tribal Courts may exercise jurisdiction over John Doe's claims, denying Dolgen any relief and bringing these district court proceedings to a close.

Ruling on these Motions requires re-examination of many of the same questions previously addressed by this Court in the preliminary injunction proceedings. As this Court properly ruled then (Doc. 36, pp. 14-16), the question whether the Choctaw Courts may exercise jurisdiction over John Doe's claims turns on whether Dolgen had entered into consensual relationships with John Doe and/or the Tribe sufficient to invoke one of the exceptions to the general rule of *Montana v. United States,* 450 U.S. 549 (1981). As this Court also previously ruled (Doc. 36, p. 14) "The more pertinent issue for jurisdictional purposes, however, is 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."

That ruling was directly in line with prior rulings of this Court and of the Fifth Circuit on this issue. *Graham v. Applied Geo Technologies, Inc.,* 593 F.Supp.2d 915, 919 (2008) ("Thus, while a tribal court generally does not have jurisdiction over nonmember parties, there is an exception in that the tribe may regulate activities of nonmembers who enter consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements. *TTEA v. Ysleta del Sur Pueblo,* 181 F.3d 676 (5th Cir. 1999) (*citing Montana*)").

Montana's general rule is that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana,* 450 U.S. at 565. The Supreme Court also observed (*Montana, supra* at 564) that, where nonmembers are concerned, the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."

Nonetheless, the Court carried out two exceptions to *Montana's* general rule under which:

> 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 and welfare of the tribe.
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> *Montana, supra* at 566

The Court in *Atkinson Trading Co., Inc. v. Shirley,* 532 U.S. 645, 656 (2001) later ruled that to invoke *Montana's* first excerption also requires that the exercise of tribal authority "have a nexus to the consensual relationship itself," or as the Court later observed:

> [a] nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another–-it is not "in for a penny, in for a pound'.

Montana's general rule originally applied only when a tribe sought to regulate or adjudicate non-Indian conduct occurring on non-Indian owned fee land. *Montana, supra* at 557, 566; *Strate v. A-1 Contractors,* 520 U.S. 438, 445-447, 454 (1997); *Atkinson Trading Co., Inc. v. Shirley,* 532 U.S. 645, 646, 653 (2001). Now, although there has never been a clear U.S. Supreme Court holding to that effect, *dicta* in *Nevada v. Hicks,* 533 U.S. 353, 373 (2001) (Souter, J. concurring) and in *Plains Commerce Bank v. Long Family Land and Cattle Company, Inc.,* 554 U.S. 316, 328-331 (2008) have give rise to the view that *Montana's* main rule now also applies to non-Indian conduct occurring on reservation trust land. Both the Choctaw Supreme Court and this Court have so ruled. Doc. 36, p. 6, n.1. Nonetheless, when the dispute in question arises on reservation trust land, the Tribe faces a lower bar in sustaining its jurisdiction than when the tribe is attempting to regulate non-Indian conduct on non-Indian fee land. *Plains Commerce Bank, supra* 554 U.S. at 328-331.

In applying these rules—in both the pre-exhaustion and post-exhaustion contexts—this Court and the Fifth Circuit have long held that when *Montana's* consensual relationship exception is satisfied, a tribal court is authorized to exercise civil jurisdiction over all claims between members (or a tribe or tribal entity) and nonmembers which have a logical nexus to the consensual relationship involved. *TTEA Corp. v. Ysleta del Sur Pueblo,* 181 F.3d 676 (5th Cir. 1999); *Graham v. Applied Geo Technologies, Inc., supra; Bank One, N.A. v. Lewis,* 144 F.Supp. 2d 640 (S.D.Miss. 2001); *aff'd sub nom Bank One, N.A. v. Shumake,* 281 F.3d 507 (5th Cir. 2002), *r'hrg en banc den'd,* 34 Fe. Appx. 965 (5th Cir. 2002), *cert. den'd.,* 537 U.S. 818 (2002); *accord, Martha Williams-Willis v. Carmel Financial Corporation,* 139 F.Supp.2d 773 (S.D.Miss. 2001). To like effect is *Tribal Smokeshop, Inc. v. Alabama-Coushatta Tribes of Texas,* 72 F.Supp.2d 717 (1999). This Court properly reached the same conclusion during the post-*Plains Commerce Bank* preliminary injunction proceedings in this case. (Doc. 36, p. 16).

Dolgen advocates a radical departure from that approach, arguing that *Plains Commerce Bank* has imposed a new rule which fundamentally departs from how *Montana's* "consensual relationship" exception has historically been interpreted and applied. According to Dolgen, after *Plains Commerce Bank* proof of an express agreement or of an implied agreement (based on the existence of a qualifying "consensual relationship") to tribal court jurisdiction is not enough to support the exercise of such jurisdiction even (as here) over claims which have a logical nexus to an underlying consensual relationship otherwise sufficient to invoke *Montana's* first exception; and, even though in *Plains Commerce Bank* the Court reemphasized that a nonmember can become subject to tribal court jurisdiction either by express agreement or by consent implied from his action. *Id.* at 337..

Instead, Dolgen contends that *Plains Commerce Bank* now requires tribes to make an additional showing of special harm to the tribe's right of self-governance or its internal relations that would occur if its courts were barred from adjudicating cases arising from such consensual relationships. (DG Memo, pp 8-9).

Dolgen has fundamentally misread *Plains Commerce Bank, Montana* and its progeny. *Montana's* consensual relationship exception does not require any such additional showing because *Montana* (and key cases it identifies as paradigms supporting tribal jurisdiction) recognize that it is integral to a tribe's right of self-government that tribes be able to regulate voluntary consensual relationships between nonmembers and the tribe (or tribal entities) or tribal members on their reservations, and that their courts be available to adjudicate claims involving disputes between tribal parties and nonmembers arising from such relationships.

These cases clearly validate the exercise of tribal jurisdiction over all claims arising from the conduct or activities of nonmembers occurring on Indian reservations as evidenced by such consensual relationships. This is clear because several of the cases which the *Montana* court (and later Supreme Court cases) cited as paradigms for the consensual relationship exception expressly so hold. *Montana, supra* at 565-566; *Nevada v. Hicks,* 533 U.S. 353, 372 (2001); *Plains Commerce Bank, supra* at 332-333. Those cases include *Buster v. Wright,* 135 F. 947, 949 (8th Cir. 1905) (held: the tribal interest of self-government authorized a tribe to "prescribe the terms upon which noncitizens may transact business within its borders." [and] "The authority of the Creek Nation to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in acts of Congress, treaty or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty."); *Williams v. Lee*, 358 U.S. 217 (1959) (where the Court ruled that a dispute arising from an on-reservation transaction

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

The Court reinforced this principle in *Nevada v. Hicks,* where it cited *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 137, 142 (1982) (tribe has taxing authority over tribal lands leased by nonmembers) in support of the proposition that "Tribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be ruled by them." The Court then reiterated *Merrion's* ruling (at 137 and 142) that "'The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government,' at least as to 'tribal lands' on which the tribe 'has authority over a nonmember.'" *Nevada v. Hicks, supra* at 361.

Did any holding in *Plains Commerce Bank* alter *Montana's* general rule and exceptions? No. As will be shown in Part III, *infra,* while the U.S. Supreme Court could have directly addressed and ruled upon—affirming, repudiating or altering—the "consensual relationship" exception as it had previously been interpreted and applied—it did none of those things. Instead, by reconfiguring the facts and claims involved, it avoided saying anything which altered the consensual relationship test as applied to nonmember conduct arising in connection with such on-reservation relationships.

I. THE UNDISPUTED MATERIAL FACTS WARRANT ENTRY OF JUDGMENT FOR THE TRIBAL DEFENDANTS AND AGAINST DOLGEN

Dolgen has summarized the undisputed material facts[1] which it believes are necessary for this Court to rule on its Summary Judgment Motion. *See,* DG Memo, pp. 2-4. The Tribal Defendants' Cross-Motion likewise relies on the same undisputed material facts, except as noted below.

The Tribal Defendants do not dispute any of the material facts set out in Dolgen's Memorandum at pages 2-4 under the heading "Statement of Undisputed Facts," but one of the statements there set out is not a statement of fact. It is (in context) a conclusion of law, to-wit: the assertion that "The {Choctaw Youth Opportunity Program ("YOP")] had no impact on either the Tribe's governance or internal relations," supported by reference in Dolgen's Memorandum ("DG Memo.") at fn. 13 to Louise Wilson Deposition pages 48 and 71.

For the reasons set out in the Introduction, and in part III, *infra,* disputes arising from member-nonmember (or tribal-nonmember) consensual relationships on their reservations are (as a matter of law) deemed to impact tribal rights of self-government sufficient to permit the

[1] In light of this Court's ruling allowing Dolgen to pursue discovery in this action (Doc. 46), the Tribal Defendants face a conundrum. They still believe for the reasons set out in their prior objection (Doc. 37) that it was inappropriate for this Court in ruling on the *Montana* jurisdictional question to permit discovery or to consider new evidence not previously presented to or considered by the Choctaw Courts. Yet, the Tribal Defendants now face a summary judgment motion and request for permanent injunction relying in part upon such new evidence plus additional evidence not obtained during that discovery process, but which was also not presented to the Choctaw Court (*see,* Exhibit B to Dolgen's Memorandum). The conundrum is that Tribal Defendants are now obliged to respond to Dolgen's summary judgment motion in connection with which this Court has authorized another look at the nature of the consensual relationships involved here which of necessity requires Tribal Defendants to address and present evidence on that issue that was also not considered by the Tribal Court. The Tribal Defendants raise this to point out that its Response and Cross-Motion and the additional evidence there addressed (whether initially presented by Dolgen or proffered by the Tribal Defendants) is necessitated by these circumstances and should not be construed as a waiver of its continuing objection that none of the current procedures or proceedings (or to the extent they involve the introduction and consideration of new evidence not seen by the Choctaw Courts) are appropriate. Tribal Defendants hereby expressly preserve those objections.

exercise of tribal court jurisdiction to adjudicate such disputes. Thus, nothing in the Louis Wilson deposition or in Dolgen's conclusions therefrom evidence any relevant factual issue which bears on the parties' Motions for Summary Judgment.

The Tribal Defendants have also identified additional excerpts from the Louise Wilson deposition (pp. 75-76) (Exhibit 1) and other YOP program rules (Exhibit 2) produced in discovery to Dolgen. This additional deposition testimony and these YOP documents further support Dolgen's factual statement that "Businesses' participating in the program benefited by receiving six weeks of temporary labor by the youth paid for by the Tribe." *See,* DG Memo, page 3, text accompanying fn. 14. All parties have stipulated to the authenticity of the Exhibit 2 documents.

The Tribal Defendants also rely on two additional undisputed material facts. The first is that other supervisory employees of the Dollar General store on the Choctaw Reservation were aware of Dolgen's involvement with the Choctaw YOP program and themselves participated in supervising various Choctaw YOP students in 2003. This is evidenced by the "supervisor's signatures" on YOP worker timesheets of Dale Townsend, of Amanda Martise [sp?] and of Debbie McGee, all of whom were Dolgen employees having some supervisory authority at the Dollar General Store on the reservation in 2003. (Exhibit 3). All parties have stipulated to the authenticity of the Exhibit 3 documents.

The second is that Dolgen knew in 2003 that it was a foreseeable risk that its employees and supervisors might violate company rules, including company rules on employing minors or sexually assaulting co-employees. This is evidenced both by Dolgen's Exhibit B and by further excerpts from Dollar General's 2003 Employee Handbook. (Exhibit 4). The authenticity of these

documents is not disputed by any party. All parties have stipulated to the authenticity of the Exhibit 4 documents (including Dolgen's Exhibit B).

II. THIS COURT'S RULINGS UPHOLDING TRIBAL JURISDICTION OVER DOE'S CLAIMS AGAINST DOLGEN SHOULD BE REAFFIRMED BASED ON THE UNDISPUTED MATERIAL FACTS AND THE CONTROLLING LAW

In the preliminary injunction proceedings in which the *Montana* jurisdiction issues first came before this Court in this case, Dolgen had the burden to show that it was likely to prevail on the merits. (Doc. 36, p. 15). As regards Dolgen's present Motion (and the Tribal Defendant's Cross-Motion), the ultimate burden of proof on the *Montana* jurisdiction question now falls on the Tribal Defendants, *Plains Commerce Bank, supra,* 554 U.S. at 330. However, many of the prior legal rulings of this Court bearing on the *Montana* question remain equally applicable now.

In particular, during the preliminary injunction proceeding, this Court ruled (Doc. 36, p. 13) that

> 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. In the court's opinion, the fact that he was not in a traditional employment relationship is not necessarily determinative. If, on the other hand, Dolgen has accurately portrayed the arrangement as its merely gratuitously allowing the Tribe to place John Doe for the benefit of the Tribe and John Doe, not Dolgen, through the provision of job training, then one would be hard pressed to find the kind of "commercial dealing, contract, lease or other (similar) arrangement" contemplated by Montana's first exception.

This Court was then concerned (given the thin record of the tribal court proceedings) with the question whether the consensual relationships here involved—between Dolgen and the Tribe's YOP program and Dolgen and tribal member John Doe—involved a sufficient *quid pro quo* respecting benefits to Dolgen from the YOP placements to satisfy the consensual relationship exception (Doc. 36, p.14):

> It is clear that John Doe was not a paid employee of the Dollar General store, but was instead an intern or apprentice of some sort. It is also undisputed that a purpose of his placement at the Dollar General store was so that he could receive job training of some sort, or perhaps at least be exposed to a work environment. The more pertinent issue for jurisdictional purposes, however, is 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.

Despite these concerns this Court denied Dolgen's Motion for Preliminary Injunction. That ruling was based on the thin record of the tribal court proceedings and Dolgen's failure to prove it was likely to prevail on its attack on the tribe's jurisdiction, as follows (Doc. 36, p. 16):

> 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.

The Court did grant Dolgen's requested injunction as to the tribal court claims filed against store manager Dale Townsend (Doc. 36, pp. 17-18).

Later, after the Court's denial of Dolgen's preliminary injunction request as to Doe's claims against Dolgen itself, Dolgen sought to pursue discovery in this action. In seeking that discovery it argued that "Answering the question whether jurisdiction exists revolves on the nature of Dolgen's and Doe's participation in the Choctaw Youth Opportunity Program." [Doc. 43, p.2]. On that basis Dolgen sought "discovery on that limited issue here." *Id.*

This Court—mindful of its original concerns based on the spare tribal court record in the earlier proceedings—then allowed limited discovery (over the Tribal Defendants' objections, Doc. 37) for the sole purpose of eliciting evidence "…relating to the particulars of the Tribe's and John Doe's relationship(s) with Dolgen as a result of John Doe's placement with Dolgen pursuant to the tribal Youth Opportunity Program…" to elucidate "the specific nature of John

Doe's placement with Dolgen or [whether] such placement gave rise to a 'consensual relationship' such as would support tribal jurisdiction." (Doc. 46, p.3).

It is plain from the additional evidence elicited in that discovery that the answer to this Court's original concern (Doc. 36, page 13) is that Dolgen did receive a commercial benefit[2] from the work of John Doe (and other YOP participants) while assigned at its store on the reservation.

The undisputed facts respecting "the particulars of the Tribe's and John Doe's relationship(s) with Dolgen as a result of John Doe's placement with Dolgen pursuant to the Tribal Youth Opportunity Program" clearly show the existence of an "other arrangement" which satisfies the Tribe's burden to show (and bolsters this Court's prior ruling) that there existed a "consensual relationship" which supports the exercise of tribal court jurisdiction over John Doe's lawsuit "to the extent the Does charge that [Dolgen] was itself negligent in the hiring, training and supervision of Townsend. (Doc. 36, p. 16). Those claims arise directly from Dolgen's consensual relationship with the Tribe and John Doe. Indeed, Dolgen's own employee handbook

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[2] We note in this regard, that a legal premise underlying this question and the parties' submissions bearing upon it, and this Court's ruling in the prior proceedings, is faulty. That legal premise is the proposition that the only "other arrangements" which can satisfy the first *Montana* test are "other arrangements…of a commercial nature" (emphasis added), as argued by Dolgen (Doc.19, p.1), *citing* as the sole authority for this proposition *Boxx v. Long Warrior,* 265 F.3d 771, 776 (9th Cir. 2001). This court previously accepted Dolgen's argument on this point (Doc. 36, p. 13, fn.4 ("The 'other arrangement' to which the exception refers must also be of a commercial nature. See, Boxx v. Long Warrior, 265 F.3d 771, 776 (9th Cir. 2001)."). However, none of the parties alerted the Court that the Ninth Circuit in *Smith v. Salish Kootenai Community College,* 434 F.3d 1127, 1137, n.4 (9th Cir. 2006) (*en banc*) had already repudiated that ruling of *Boxx v. Long Warrior*. Thus, it ultimately doesn't mater (in applying the *Montana* test) whether the consensual relationships here at issue are properly characterized as commercial or noncommercial in nature. The U.S. Supreme Court has never adopted such a limiting rule. Krakoff, "Tribal Civil Jurisdiction over nonmembers: A Practical Guide for Judges, " 81 University of Colorado Law Review, 1187, 1226 (2010); *Nevada v. Hicks, supra* at 359, n. 3, noting only that a qualifying consensual relationship must be a "*private consensual relationship*."

in 2003 (Exhibit 3) recognized that being sexually or otherwise assaulted by supervisors or co-employees was a foreseeable risk of employment in its stores.

Doe's allegations are that this is precisely what happened to him during working hours on the store premises.

Doe claims that Dolgen's own negligence in connection with its hiring, training and supervising its store manager, renders Dolgen liable both directly and vicariously for the store manager's tortious conduct in the store which occurred while both Townsend and Doe were on duty there, and while Doe was working under the store manager's supervision (and ultimately under Dolgen's supervision). Such claims clearly have a logical relationship (nexus) to the consensual relationships Dolgen had with the Tribe and John Doe via Dolgen's participation in the YOP, and break no new ground as to the basis on which Doe seeks to impose liability on Dolgen. *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 as 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); *Gulledge v. Shaw*, 880 So.2d 288 (Miss. 2004) ("The doctrine of respondent 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."); *Ferrell v. Shell Oil Co.,* 1996 WL 75586 (E.D.La. 1996) ("The focus of the vicarious liability inquiry cannot be on the tortious act itself. If it were, employers

could evade liability in most cases, since employers obviously do not include violating company policy or harming one's co-workers among their employees' job duties."); *Attorney's Process & Investigation Services, Inc. v. Sac & Fox Tribe of the Mississippi,* 609 F.3d 927 (8th Cir. 2010) ("If the Tribe retains power under *Montana* to regulate such conduct, we fail to see how it makes any difference whether it does so through precisely tailored regulations or through tort claims such as those at issue here"); *MacArthur v. San Juan County,* 457 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.. . . Consequently, Montana's consensual relationship exception applies to a nonmember who enters into an employment relationship with a member of the tribe. (Citations omitted).

Thus, the Tribal Defendants have shown all that is required to affirm tribal court jurisdiction under *Montana*. This Court should on that basis now reaffirm its prior ruling on that issue (Doc. 36, p. 16) and deny Dolgen's Motion for Summary Judgment and request for a permanent injunction. This Court should on the same basis grant summary judgment for the Tribal Defendants on their Cross-Motion, rule that Dolgen is entitled to no relief and bring these district court proceedings to a close.

III. TRIBES ARE NOT REQUIRED TO PROVE A SPECIAL HARM TO THE RIGHTS OF SELF-GOVERNMENT TO SUSTAIN TRIBAL JURISDICTION UNDER *MONTANA'S* CONSENSUAL RELATIONSHIP EXCEPTION

Perhaps not surprisingly, in view of what emerged in discovery, Dolgen now wants to changes horses—arguing in contrast to its position when seeking discovery (Doc. 43, p.2) that "[t]he critical issue, then, is not whether Dolgen received an economic benefit from its participation in the Choctaw Youth Opportunity Program." (Doc. 56, p. 9).

This explains why Dolgen's main argument on this motion is that even if its store manager's verbal agreement to have Dolgen participate—and its actual participation—in the YOP program constituted "consensual relationships" with Doe and/or the Tribe under the first exception of the *Montana* rule, and even if the tribal court claims pled by Doe have a logical nexus to that consensual relationship (as previously found by this Court, Doc. 36, p. 16), that the Tribe still has to prove more to sustain the exercise of tribal court jurisdiction over those claims. This is simply a reprise of the same argument Dolgen made (and which this Court properly rejected) during the preliminary injunction proceedings. (Doc. 3, pp. 12-13; Doc. 34, p. 4).

Specifically, Dolgen argues that *Plains Commerce Bank* imposes a new duty on the Tribe to make some special showing that depriving the Tribe of authority to regulate consensual relationships which would otherwise invoke *Montana's* first exception (and adjudication of claims arising from such relationships) would cause some particular harm to the Tribe's right of self-governance or its internal relationships. (DG Memo, p. 12). Dolgen cites no authority for this proposition other than a vague reference to *dicta* in *Plains Commerce Bank*—which ultimately held that the *Montana's* consensual relationship exception was not applicable in that case because the facts as found by the Court involved a tribal effort to regulate the sale of nonmember owned land to another nonmember. *Plains Commerce Bank, supra* at 332, 334. Notably, the lender in *Plains Commerce Bank* did not appeal the judgment entered against it on the Longs' breach of contract claim. *Id.* at 324. It only appealed the judgment entered against it on the discrimination claim—a claim the court reconfigured as being about a tribal effort to stop a nonmember (the Bank) from selling nonmember-owned fee land to another nonmember. *Id.*

Thus, nothing in *Plains Commerce Bank* altered the basic *Montana* framework. Krakoff, "Tribal Civil Jurisdiction over Nonmembers: A Practical Guide for Judges," 81 University of Colorado Law Review, 1187, 1223 (2010):

> Rather, the Court stated, *Montana's* exceptions allow the tribe to regulate "nonmember *conduct* inside the reservation that implicates the tribe's sovereign interests."
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> *Plains Commerce* left *Strate's* doctrinal approach intact, but carved out one particular category of nonmember action—ownership of non-Indian land—from qualifying for the *Montana* exceptions. Activity or conduct by nonmembers on non-Indian lands may have sufficient effects on the tribe or its members to trigger tribal authority, but tribal sovereign interests do not extend to ownership of non-Indian lands. (Emphasis added).

To like effect is Furnish, "Sorting out Civil Jurisdiction in Indian Country After *Plains Commerce Bank*: State Courts and the Judicial Sovereignty of the Navajo Nation," 33 American Indian Law Rev. 385, 408-410 (2008-2009):

> One must read *Plains Commerce Bank* as a child of its peculiar pleading. The appellant bank attacked the tribal jurisdiction over only the discrimination claim, although the jury found for the plaintiffs on their claims of bad faith, breach of contract, and discrimination and awarded a "general verdict" for $750,000. The curious self-limitation by the successful appellant leaves open not only the question of precisely what it has won, if anything, but what precedent its case may have set.
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> The bare majority may have granted certiorari in the expectation that it could use the *Plains Commerce Bank* as an agenda case to derogate or emasculate the first exception in *Montana.*
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> But for whatever reason, the five justices missed the opportunity. The majority could have agreed with the four dissenters (and all of the lower court judges that considered the case) that the discrimination claim grew out of a consensual relationship. Then the majority could have ruled that even where the facts qualified the case for *Montana's* first exception, no tribal court jurisdiction obtained, either derogating the exception altogether or emasculating it by identifying mitigating factors that made it inapplicable in the case. Such a decision could have left tribal courts with virtually no civil jurisdiction over nonmembers, regardless of their consensual relationships with tribes and tribal members.

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> Note carefully what the majority backed away from in *Plains Commerce Bank.* As the majority stated in the case, however much it may have twisted the facts to do so, *Plains Commerce Bank* deals with a transaction between two nonmembers, the same as in *Strate.* That formulation does not confront the first *Montana* exception, it avoids it.
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> As it stands, *Plains Commerce Bank* represents no disagreement over the *Strate-Montana* doctrine. The two exceptions continue untouched. The five-justice majority excluded the first *Montana* exception by finding that the case involved a sale of fee land between nonmembers. Four justices thought it was more and saw facts that would have triggered the first exception.
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> Lower courts should apply the *Strate-Montana* doctrine as before, mindful that the Supreme Court of the United States has passed on a chance to overrule that doctrine. (Emphasis added).

Significantly, no case before or since *Plains Commerce Bank* has held that tribal court jurisdiction based on the consensual relationship exception must also be bolstered by any kind of additional proof as argued by Dolgen where the nexus test is satisfied. Instead, cases involving disputes arising from such relationships are deemed to properly fall within tribal regulatory and adjudicatory jurisdiction because such cases inevitably impact the ability of tribal governments to "make their own laws and be ruled by them"—including the resolution of disputes involving nonmembers engaged in on-reservation activities involving such consensual relationships. This satisfies *Montana's* over-arching theme that tribal jurisdiction over nonmember activities on their reservation is appropriate because regulating such activities in the context of such consensual relationships is integral to protecting tribal rights of self-governance as enunciated in *Merrion v. Jicarilla Apache Tribe, supra; Williams v. Lee, supra; Buster v. Wright, supra; see,* argument and authorities cited in Tribal Defendants' "Introduction" *supra.*

Tellingly, Dolgen does not cite a single case applying the *Montana* test since *Plains Commerce Bank* which imposes any such additional burden of proof on a tribe. None of the post-*Plains Commerce Bank* cases addressing the *Montana* rule and exceptions have so held. *Graham*

v. Applied Geo Technologies, Inc., 593 F.Supp.2d 915 (S.D.Miss. 2008) (holding Choctaw tribal entity had shown the existence of colorable tribal jurisdiction under *Montana's* "consensual relationship" test sufficient to require exhaustion of tribal remedies without any extra proof of special harm to tribal self-government or internal relations beyond proof of an employment relationship between the tribal entity and the nonmember plaintiff, and a logical nexus between the claims pled and that relationship); *Phillip Morris USA, Inc. v. King Mountain Tobacco.,* 509 F.3d 932, 937 (9th Cir. 2009) (the tribal jurisdiction "teachings of three supreme court cases; *Montana, Strate,* and *Hicks*…are affirmed in important respects by the Court's most recent tribal jurisdiction decision in *Plains Commerce."*); *Attorney's Process & Investigation Services, Inc. v. Sac & Fox Tribe of the Mississippi in Iowa,* 609 F.3d 927, 936, 937-946 (8th Cir. 2010) (recognizing that *Plains Commerce Bank* left intact the basic *Montana* framework and its two exceptions, then ruling that the tribal court had jurisdiction over all the trespass and certain conversion claims under the second *Montana* exception, remanding to the district court the question whether tribal court jurisdiction existed over the tribe's claim for conversion of tribal funds based on the second exception); *Ford Motor Credit Corporation v. Poitra,* 2011 WL 799746 (D.N.D), at p. 3 (affirming tribal court jurisdiction over tribal member suit against lender grounded in the "consensual relationship" exception; rejecting lender's argument that after *Plains Commerce Bank* "tribal courts do not have jurisdiction over nonmember companies" even when a consensual relationship under *Montana* is shown); *Red Mesa Unified School District v. Yellowhair,* 2010 WL 3855183 (D.Ariz) (reaffirming pre-*Plains Commerce Bank* rules regarding consensual relationship test; holding that only private consensual relationships—not those stemming from inter-governmental relations—can satisfy *Montana's* first exception); *Crowe & Dunlevy, P.C. v. Stidham,* 609 F.Supp.2d 1211 (N.D.Okla.2009), where the Court applied the

Montana test as reaffirmed in *Plains Commerce Bank* to hold that Muscogee (Creek) tribal court did not have jurisdiction under *Montana* over a nonmember law firm (Crowe & Dunlevy) which represented a separate tribal government plaintiff ("Thlopthlocco Tribal Town"), since the Muscogee (Creek) Nation had no form of consensual relationship with Crowe & Dunlevy.

In *Phillip Morris, supra* at 940-942 the court applied the same *Montana* "consensual relationship" exception after *Plains Commerce Bank* as existed before, noting that the Indian entity plaintiff (King Mountain) had no consensual relationship with Phillip Morris and that the tribal court claims pled against Phillip Morris by King Mountain had no relationship to the consensual relationships Phillip Morris did have with various (other) tribal members. The case contains no suggestion that had a consensual relationship meeting the *Montana* requirements been shown, that King Mountain would also have had to show that adjudication of the dispute (or regulation of the conduct involved) was necessary to prevent some other or further intrusion upon the affected tribe's rights of self-governance or its internal relations.

> It is only when tribal jurisdiction is founded on *Montana's* second exception—invoking the political integrity, economic security, health and welfare test—that a showing of significant harm to the tribe's political existence or internal relations (e.g. to its right of self-governance) must be made. But that showing is not extra—its integral to the second *Montana* exception. *Plains Commerce Bank, supra,* 128 S.Ct. at 2726 (to invoke the second exception requires proof that the "nonmembers' conduct…'must imperil the subsistence of the tribal community'"); *Attorney's Process & Investigation Services, Inc., supra* at 939 (allegations that nonmember defendants were involved in effort to seize control of the tribal government and economy by force…[stated claims that] pled "direct attack on the heart of tribal sovereignty, the right of Indians 'to protect tribal self-government'" which invoked *Montana's* second exception).

As this Court and the Fifth Circuit have previously held on several occasions, once the existence of such a "consensual relationship" is found this is sufficient to trigger the first *Montana* exception for all claims which have a logical relationship (nexus) with that consensual relationship. (Doc. 36). *TTEA, supra; Bank One, supra; Martha Williams-Willis, supra; Graham,*

supra. While "but for" causation is not by itself enough to establish the existence of a "consensual relationship" under *Montana,* once (as here) such a relationship is shown, all claims which are logically connected to (derivative of) that relationship are subject to tribal court jurisdiction based on the first *Montana* exception. Doc. 36, p. 16. ("Montana's consensual relationship exception does not apply to a purely accidental encounter between two strangers but requires a nexus between a preexisting consensual relationship between the parties and the personal injury claim.").

Thus, Dolgen's argument that after *Plains Commerce Bank* tribal court jurisdiction can be sustained under *Montana's* first (consensual relationship) exception only when a special or additional showing of specific injury to the tribe's rights of self-governance or its internal relations is also shown should again be rejected by this Court.

IV. WHETHER DALE TOWNSEND HAD AUTHORITY TO AUTHORIZE DOLGEN'S PARTICIPATION IN THE YOP DOES NOT ALTER THE FACT THAT CONSENSUAL RELATIONSHIPS SUFFICIENT TO INVOKE *MONTANA'S* FIRST EXCEPTION EXISTED AND HAVE BEEN RATIFIED BY DOLGEN

Dolgen next argues (DG Memo, p.13) that "[t]here is no evidence that anyone other than [store manager, Dale Townsend] himself agreed to participate in the YOP." However, Exhibit 3 shows that at least two other supervisory personnel for Dolgen were aware that Dolgen was participating in the YOP at Dollar General's Choctaw Reservation store in 2003 and signed off on timesheets respecting other YOP workers (Jeremy Wesley and Neal Cotton) assigned to that store, to-wit: Amanda Martise [Sp?] and Debbie McChee.

In any event, Mr. Townsend—as the store manager—clearly had apparent authority to authorize Dolgen's participation in the YOP, as is evidenced by the lack of objection from the other store supervisors to the presence of the YOP participants working in the store. *See, Mladineo v. Schmidt,* 52 So.3d 1154 (Miss. 2011):

> "Apparent authority exists when a reasonably prudent person, having knowledge of the nature and usages of the business involved, would be justified in supposing, based on the character of the duties entrusted to the agent, that the agent has the power he is assumed to have." …To recover under the theory of apparent authority, the following three factors must be present: (1) acts or conduct on the part of the principal indicating the agent's authority, (2) reasonable reliance on those acts, and (3) a detrimental change in position as a result of such reliance. *Id.* (Citations omitted).

See also, Atkins v. Golden Triangle Planning & Development District, Inc., 34 So.3d 575 (Miss. 2010); *Bailey v. Worton,* 752 So.2d 470 (Miss.App. 2000). The questions whether Dale Townsend had actual or apparent authority to authorize participation in the Choctaw YOP program are in any event questions for trial, not for the kind of preliminary jurisdictional determination here at issue. *See, TTEA, supra* at 682-684, where the Court distinguished the question whether the underlying tribal-nonmember contract there at issue was legally valid or enforceable against either party (an issue which the Court held was properly addressed in the tribal court), from the issue whether that contract and the "consensual relationship" it reflected was sufficient to invoke *Montana's* first exception (a question the Court answered in the affirmative), and which the Court said did not depend upon whether the contract was legally valid.

Dolgen also argues (DG Memo, p. 13) that if tribal court jurisdiction over John Doe's claims against Dolgen is sustained, this would result from the unauthorized conduct of the same individual whose actions are at issue in the underlying claim. What Dolgen has not explained is why that should matter. Dolgen has not identified any case in which a tribe had to prove that contracts signed by agents or employees of a principal and then executed on their reservation were legally authorized in order to invoke *Montana's* consensual relationship exception to sustain tribal court jurisdiction nor has Dolgen identified any case holding that a tribe has to first prove the employee's authorization before exhaustion of tribal remedies is required. For the

reasons set out above, imposing any such proof requirement—especially where none of these issues were raised before the Tribal Courts—would be irreconcilable with *National Farmers Union* and *Iowa Mutual.* In any event, Dolgen's store manager had apparent authority to authorize Dolgen's participation in the YOP program (by virtue of his appointment to that position).

Moreover, whatever the answer as to store manger Dale Townsend's actual or apparent authority to approve Dolgen's participation in the Choctaw YOP, those questions are now moot because Dolgen has ratified his authority by its subsequent actions in retaining the financial benefits it received from participation in that program. Whatever happened before Dolgen higher-ups learned of Townsend's decision to approve the store's participation in that program, Dolgen has now known for several years that Townsend in fact authorized Dolgen's participation and that Dolgen in fact participated in that program. Yet, even with full knowledge of Townsend's actions and of the work performed by the Choctaw YOP workers at the Choctaw Reservation store, Dolgen has nonetheless opted to retain the full financial benefits it received from their work. Dolgen cannot have it both ways. If it intended to repudiate Townsend's approval for Dolgen to participate in that program, it should long ago have tendered back to the Tribe what it cost the YOP to place its workers at Dollar General's reservation store, or what it would have cost Dolgen to hire comparable workers to perform their work there in 2003. Instead, it has retained those benefits while attacking Townsend's authority to authorize the participation which generated them. By these actions and decisions Dolgen has ratified Townsend's approval for Dolgen to enter into the resulting consensual relationships with the Tribe and John Doe.

A principal who—with full knowledge of the circumstances—elects to retain the benefits of a contract executed on his behalf by an agent who had no authority to bind the principal

thereto, will be deemed to have ratified the contract and will be bound by it. *3A's Towing Company v. P&A Well Services, Inc.,* 642 F.2d 756, 758 (5th Cir. 1981) (held "unauthorized act of one purporting to bind a corporation may be implicitly ratified by the corporate principal through the knowing acquiescence of those having authority…such ratification" has retroactive effect and is equivalent to prior authority…the acceptance of benefits may evidence ratification); *see, Bunge Corporation v. Biglane,* 418 F.Supp. 1159 (S.D.Miss. 1976) (principal may be deemed bound by unauthorized contract when "principals not only had full knowledge of the act of the agent but also accepted the benefits thereof."); *see, Fortune Furniture Manufacturing Company, Inc. v. Mid-South Plastic Fabric Company, Inc.,* 310 So.2d 725, 727 (Miss. 1975) ("The general rule is that a contract made by promoters with a view towards incorporation will be binding on the corporation if it accepts benefits of the contract with full knowledge of the terms of the contract.").

V. STORE MANAGER CONDUCT IN VIOLATION OF THE DOLGEN POLICY DOES NOT RELIEVE DOLGEN OF LIABILITY

Dolgen then argues (DG Memo, p.13) that "Mr. Townsend's allowing these youth to work in the store violated Dolgen's policies and was grounds for immediate termination," referencing a page from a 2003 Dollar General Employee Handbook (Exhibit B). That page recites *inter alia:*

> The following are some examples of violations (NOT all-inclusive) for which even the first offense may lead to progressive counseling and/or termination from the Company:
>
> * * * *
>
> 9. Allowing a minor to perform work for the Company.

Putting aside that neither the Tribe nor John Doe had access to that Handbook in 2003 , agreeing to allow students to work in the store via a job training arrangement such as YOP, does not clearly violate the policy against "allowing a minor to perform work for the company." The

meaning of that phrase depends on what is meant by performing "work." The policy might very well have barred employing a minor to perform work as a regular paid employee of Dolgen, yet still permit Dolgen's store managers to authorize participation in YOP type arrangements, as authorized by Mr. Townsend. In this regard, neither federal law nor Mississippi law in 2003 barred the employment of minors age 14 and above in retail establishments even as regular employees. 29 C.F.R. Parts 570.33-570.34 (2004 Ed.) (Exhibit 5). Section 71-1-17—Children Under 14 Not to Work in Mills or Factories. (Exhibit 6).

Moreover, an employer cannot escape either vicarious liability or liability for its own direct negligence solely by evidence that its employee's tortious conduct violated a store policy or store rule. *Williams v. U.S.,* 352 F.2d 477, 480 (5th Cir. 1965) ("In Georgia, as in most jurisdictions, the mere fact that a servant's negligent act is expressly forbidden by the master does not absolve the master of vicarious liability."); *Buchanan v. Stanhips, Inc*., 744 F.2d 1070, 1075, iv.4 (5th Cir. 1984) ("Nor will the promulgation of a company rule or policy forbidding an activity excuse the employer's inaction when he knows or should know that his employees are engaging in that activity. 'That an employee's conduct violates the employer's express rules is not conclusive of the issue of scope of employment.'" quoting *Normand v. City of New Orleans,* 363 Do. 2d 1220, 1222 (La.App. 4th Cir. 1978)); *Gulledge v. Shaw, supra* ("The focus of the vicarious liability inquiry cannot be on the tortious act itself. If it were, employers could evade liability in most cases, since employers obviously do not include violating company policy or harming one's co-workers among their employees' job duties."); *Ferrell v. Shell Oil Co., supra* ("The doctrine of respondent 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.”).

VI. THE STORE MANAGER’S CONDUCT WAS FORESEEABLE AND HAD A CLEAR NEXUS TO THE UNDERLYING CONSENSUAL RELATIONSHIPS

Likewise, Dolgen’s argument (DG Memo, p. 13) that what occurred here was not foreseeable and that this somehow undermines the nexus between Dolgen’s consensual relationships with John Doe and the Tribe—on the theory that it was not foreseeable that a store manager would violate store rules in allowing minors to work on the premises or in sexually assaulting him—is untenable both in fact and in law. Dolgen’s own employee handbook shows that Dale Townsend’s conduct as occurred here was clearly foreseeable, and the foregoing case law makes clear that Dolgen cannot escape liability for the consequences of its own negligence by pointing out that Townsend’s own conduct was in violation of store rules.

Further, an employer can be held vicariously liable for injury caused by an employee’s tortious conduct which could have been prevented or mitigated if the employer itself had not been negligent in regard to its own hiring, training or supervision functions. *Gulledge v. Shaw, supra.*

VII. DOLGEN HAS NOT EXHUASTED TRIBAL REMEDIES AS TO ITSNEW AUTHORITY, CAUSATION, LIABILITY OR DAMAGES’ ARGUMENTS

Ultimately, Dolgen’s arguments addressed at Points IV, V and VI implicate questions bearing on authority, causation, liability and damages to be sorted out at trial, not on jurisdiction. These are all merits issues on which Dolgen could have sought discovery or rulings in the Choctaw Courts by summary judgment or at trial. Dolgen instead sought dismissal on jurisdictional grounds based solely on the pleadings. Under its duty to exhaust tribal remedies, Dolgen is not permitted to make these kind of tactical choices in the tribal court proceedings—

choices which avoided raising any of those issues there—and then seek to litigate those issues here—whether involving apparent authority, causation, liability or damages. Again, allowing that kind of end around the tribal court would defeat the whole point of requiring exhaustion of tribal remedies. *See,* Tribal Defendants' previous arguments on this issue. Doc. 37.

Dolgen has not exhausted its tribal remedies as to any of these liability, damages, causation or authority issues and is not permitted to have this Court now rule on them without first seeking rulings on them in the Choctaw Courts. This is clear from the Court's ruling in *National Farmer Union, supra* at 856:

> Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed. (Emphasis added).

See also, Iowa Mutual, supra at6 15-16 ("Promotion of tribal self-government and self-determination required that the Tribal Court have 'the first opportunity to evaluate the factual and legal bases for the challenge' to its jurisdiction." *Id.,* at 856, 105 S.Ct., at 2454.); *Attorney's Process & Investigation Services, Inc. v. Sac & Fox Tribe of the Mississippi in Iowa,* 609 F.3d 927, 936, 937-946 (8th Cir. 2010). In *Attorney's Process, supra* at 934 and 937, the Court ruled:

> The extent of tribal court subject matter jurisdiction over nonmembers of the Tribe is a question of federal law which we review de novo…in deciding the jurisdictional issue we review findings of fact by the tribal courts for clear error and defer to their interpretation of tribal law. (Citations omitted).
>
> * * * *
>
> In analyzing the jurisdictional issue we rely on the record developed in the tribal courts and the allegation in the Tribe's complaint. Questions of subject matter jurisdiction often require resolution of factual issues before the court may proceed…, and that is particularly true of inquiries into tribal jurisdiction. It is therefore both necessary and appropriate for the parties and the tribal court to ensure that "a full record [is] developed in the tribal court. …Here the parties were afforded discovery in the tribal trial court. (Citations omitted).

Dolgen is now asking this Court to ignore this mandate in a way even more egregious than occurred in its request for discovery for the reasons set out here and in the Tribal Defendants' Motion for Protective Order (Doc. 37) based on *National Farmers* and *Iowa Mutual.* What Dolgen is seeking would also convert federal court jurisdictional inquiries based on the *Montana* rule and its exceptions into full-blown evidentiary proceedings addressing legal arguments and factual issues which were never raised in the Choctaw Courts.

Thus, Dolgen's request (DG Memo, p. 14) that this Court further narrow the scope of John Doe's claims which can be heard in the Choctaw Courts—allowing Doe to pursue damages caused by Dolgen's own negligence but not for damages caused by its store manager's own tortious conduct which could have been mitigated or prevented had Dolgen not been negligent—should be denied.

VIII. DOLGEN IS NOT ENTITLED TO INJUNCTIVE RELIEF AND SUMMARY JUDGMENT SHOULD BE ENTERED FOR THE TRIBAL DEFENDANTS

The Tribal Defendants do not dispute that if the Choctaw Courts did not have jurisdiction to adjudicate John Doe's claims against Dolgen under *Montana,* that Dolgen would be able to satisfy the other elements required to secure the issuance of a permanent injunction barring the Choctaw Courts from adjudicating those claims, as argued by Dolgen, and as shown by the case law there cited. DG Memo (Doc. 56), pp. 14-16. Likewise, if the Choctaw Courts had no such jurisdiction, Tribal Defendants' Cross-Motion should be denied.

However, since the Choctaw courts do have jurisdiction to adjudicate those claims, Dolgen cannot satisfy any of those criteria and its summary judgment motion and request for permanent injunction should be denied. Likewise, Tribal Defendants' Cross-Motion should be granted.

Specifically, as regards Dolgen's request for injunctive relief, the balance of interest clearly weighs in favor of allowing John Doe to exercise his right to choose from the lawfully available forums to decide his claims; and, since the Choctaw Courts may properly exercise jurisdiction over John Doe's claims, requiring Dolgen to submit to adjudication of those claims there causes no cognizable injury to Dolgen, much less irreparable harm. On the other hand, barring the Choctaw Courts from exercising jurisdiction which tribal and federal law and policy here recognize to be appropriate, will cause injury to the Mississippi Band of Choctaw Indians' right under federal and tribal law to make their own laws and be ruled by them, including the adjudication of civil claims involving nonmembers where (as here) the first *Montana* exception is satisfied.

Likewise, the public interest would be injured by depriving John Doe of his choice of forum and by barring the tribal court from lawfully exercising jurisdiction which federal and tribal law and policy says those courts may properly exercise.

As regards the Tribal Defendants' Cross-Motion and their request that the Court rule Dolgen is entitled to no relief in this case, all these same factors mitigate in favor of entry of summary judgment for the Tribal Defendants and against Dolgen, thus bringing these District Court proceedings to a close.

Respectfully submitted,

s/Donald L. Kilgore
Donald L. Kilgore, Esq.
Attorney for the Tribal Defendants
MS Bar: 3758
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 5th day of May, 2011, 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

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

And I certify that I have on the 5th day of May, 2011, mailed via United States Postal Service the document to the following:

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

s/C. Bryant Rogers