No. _____

In the Supreme Court of the United States

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS D/B/A SAULT STE. MARIE TRIBE ECONOMIC DEVELOPMENT COMMISSION,

Petitioner,

v.

ERNEST I. YOUNG,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner, the Sault Ste. Marie Tribe of Chippewa Indians d/b/a the Sault Ste. Marie Tribe Economic Development Commission (the "Tribe") entered into a Joint Venture Master Agreement ("JVMA") with Respondent Ernest Young ("Young") which contemplated the creation of a separate legal entity, Special Plastics Products, L.L.C. ("SPPLLC") that would enter into an employment agreement ("Employment Agreement") with Young, and would operate a plastic injection molding business. *The Tribe was never a party to the Employment Agreement.* The JVMA included an express waiver of the Tribe's sovereign immunity that permitted enforcement of an arbitration award in state court, but did not expressly permit application of any state law doctrines for extending liability to non-contractual parties, or for imposition of statutory judgment interest.

The specific questions presented to this Court arising from these circumstances are:

I. Did the Tribe waive its sovereign immunity such that it can be held liable for an alleged breach of the Employment Agreement—even though it was never a party to the Employment Agreement—based on state law doctrines extending liability to non-contractual parties?

II. Did the Tribe waive its sovereign immunity for the purpose of subjecting itself to Michigan's judgment interest statute even though it never expressly agreed to subject itself to the interest statute?

The larger question is:

In actions against sovereign Indian tribes, can state courts vitiate the federal law governing waivers of sovereign immunity, which requires such waivers to be express and unequivocal, by applying state law doctrines or statutes?

PARTIES TO THE PROCEEDING

Petitioner

Petitioner, the Sault Ste. Marie Tribe of Chippewa Indians d/b/a the Sault Ste. Marie Tribe Economic Development Commission, is a federally-recognized, sovereign Indian tribe.

Respondent

Respondent, Ernest I. Young, is a natural person.

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Petitioner respectfully petitions for a Writ of Certiorari to review the judgment of the Michigan Court of Appeals, as well as the decision of the Michigan Supreme Court not to 1) grant leave to appeal and 2) reverse that judgment.

CITATION TO OPINIONS AND ORDERS

The decision of the Michigan Supreme Court from which this appeal is taken (App. to Pet. for Cert. p. 1a) is reported at 641 N.W.2d 857, 2002 Mich. LEXIS 244.

The Michigan Court of Appeals decision which the Michigan Supreme Court refused to consider is an unpublished decision in case number 214136 decided on May 11, 2002. (App. to Pet. for Cert. p. 3a)

BASIS FOR SUPREME COURT JURISDICTION

The judgment of the Michigan Supreme Court was entered on March 4, 2002. (App. to Pet. For Cert. p. 1a)

This Court has jurisdiction to review the judgment in question on a writ of certiorari pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND MICHIGAN STATUTES INVOLVED IN THE CASE

1. U.S. Const., art. I, § 8, cl. 3, that states in relevant part:

> The Congress shall have Power to...regulate Commerce with foreign Nations, and among

the several States, and with the Indian Tribes....

2. U.S. Const. art. VI, cl. 2, that states in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

3. Relevant excerpts from Michigan Compiled Laws ("MCL") 600.6013. (App. to Pet. for Cert. p. 34a)

STATEMENT OF THE CASE

I. The Relationship Of The Parties.

In 1994, Young approached the Tribe with the idea of forming a joint venture to take over the operation of his business, Special Plastic Products, Inc. ("SPP, Inc." or the "Corporation"), which manufactured plastic injection molded parts for the automotive industry. The plan proposed that the joint venture take the form of three limited liability companies to operate the business and hold the assets. Special Plastic Products, L.L.C. (SPPLLC), the only company formed pursuant to the plan which is pertinent to this Petition, was formed on December 15, 1994, when Young and the Corporation entered into the JVMA (*See*, App. to Pet. for Cert. pp. 67a-68a) with the Tribe. The JVMA provided that the Tribe would be a member of SPPLLC with a 50% ownership interest while the Corporation would also be a

member of SPPLLC with ownership of 50%. It also contemplated that Young would be hired by SPPLLC as its CEO, and in fact Young *and SPPLLC* did execute the Employment Agreement (App. To Pet. for Cert. p. 52a) as required by the JVMA. *However, Young was never employed in any manner by the Tribe.*

II. The Failure Of The Business

Under the guidance of Young, the business of the joint venturers sustained major losses, precipitating a financial crisis in the company. In early 1996, these major losses prompted a closer look at Young's performance as CEO. Given this and other relevant facts, the board of SPPLLC concluded that Young had been grossly negligent or reckless in the performance of his duties. Based on the overwhelming evidence, it was decided that Young's employment by SPPLLC should be terminated on September 5, 1996.

III. The Arbitration.

Young demanded arbitration of both an alleged breach of the JVMA (Young essentially alleged mismanagement of SPPLLC by the Tribe) and an alleged breach of his Employment Agreement. A hearing was held on January 21, 22, 23 and on February 4, 1998. On April 10, 1998, the arbitrators issued their award. (App. to Pet. for Cert. p. 31a) Young received a no-cause of action on his contention that the Tribe was somehow responsible for SPPLLC's demise. He was awarded the sum of $546,351.33, but only on his claim that his Employment Agreement had been breached. Not only was this award entered against Young's employer, SPPLLC, it was also entered jointly against the Tribe, even though the Tribe never employed Young for any purpose.

IV. Trial Court Proceedings.

The Tribe filed an action in Oakland County (Michigan) Circuit Court to vacate and/or modify the award, and also moved for summary disposition. Young brought a motion to confirm the award. The trial judge refused to dismiss the action and, over the objection of the Tribe, confirmed the arbitration award. *See*, Judgment dated August 12, 1998. (App. to Pet. for Cert. p. 15a) The trial court rejected Young's request for statutory judgment interest.

V. Court Of Appeals Proceedings.

The Tribe appealed the judgment confirming the arbitration award to the Michigan Court of Appeals. Young appealed the trial court's refusal to award statutory judgment interest. Without seriously addressing the issue of sovereign immunity, the appeals court held that the Tribe was liable for a breach of the Employment Agreement. The court further held that statutory judgment interest should be imposed pursuant to MCL 600.6013.

VI. The Michigan Supreme Court Declined To Accept The Appeal.

The Tribe filed a timely application for leave to appeal to the Michigan Supreme Court. The application sought leave to appeal the entire decision of the appeals court. Indicating that it was "not persuaded that the question presented should be reviewed by this Court," the Michigan Supreme Court denied leave to appeal on March 4, 2002. (*See*, App. to Pet. for Cert. p. 2a)

VII. The Tribe Preserved The Issue Of Non-Waiver Of Sovereign Immunity.

A. Non-Waiver As It Relates To The Employment Agreement.

The Tribe argued to the arbitrators, the trial court, the Michigan Court of Appeals, and the Michigan Supreme Court that it could not be held liable for a breach of the Employment Agreement, because, *inter alia*, it was not a party to the Employment Agreement and did not waive its sovereign immunity for any actions arising from that agreement. See:

1. Excerpt from the Tribe's Arbitration Brief (App. to Pet. for Cert. p. 35a);

2. Excerpt from the Tribe's Brief in Support of Motion to Vacate or Modify Arbitration Award (Oakland County Circuit Court) (App. to Pet. for Cert. p. 39a);

3. Excerpt from the Tribe's Brief on Appeal to the Michigan Court of Appeals (App. to Pet. for Cert. p. 42a); and

4. Excerpt from the Tribe's Application for Leave to Appeal to the Michigan Supreme Court. (App. to Pet. for Cert. p. 47a)

The Arbitrators did not expressly address the issue, but effectively rejected the Tribe's argument in their award. (*See*, App. to Pet. for Cert. p. 31a) The trial court also rejected the argument. (*See*, App. to Pet. for Cert. p. 15a), as did the appeals court. (*See*, App. to Pet. for Cert. p. 3a) The Michigan Supreme Court denied leave to appeal,

effectively rejecting the argument of the Tribe. (*See*, App. to Pet. for Cert. p. 1a)

B. Non-Waiver As It Relates To The Imposition Of State Law Statutory Judgment Interest.

The Tribe argued to the Michigan Supreme Court that it was not subject to statutory judgment interest because, *inter alia*, it did not waive its sovereign immunity for any actions seeking the imposition of statutory interest. (*See*, Excerpt from the Tribe's Application for Leave to Appeal to the Michigan Supreme Court, App. to Pet. for Cert. p. 51a)

In response to the Tribe's arguments on the issue of judgment interest, the trial court did not award any interest on the judgment. As the Tribe prevailed on the interest issue in the trial court, it did not raise it in the appeals court, although it did assert sovereign immunity in response to Young's arguments that interest should be awarded despite the decision of the trial court. The issue was first determined adversely to the Tribe by the appeals court. (*See*, App. to Pet. for Cert. p. 11a) The Michigan Supreme Court denied leave to appeal, effectively rejecting the argument of the Tribe. (*See*, App. to Pet. for Cert. p. 1a)

ARGUMENTS IN SUPPORT OF PETITION

I. The Lower Courts' Decision To Allow Judgment To Be Entered Against The Tribe For Breach Of The Employment Agreement To Which It Was Not A Party Conflicts With Clear Precedent From This Court And Other Federal Courts Requiring Waivers Of Sovereign Immunity To Be Unequivocally Expressed, And, If Not Overturned, Will Permit State Courts, Relying On Purely State Law Doctrines, To Vitiate The Federal Law Requirement Of An Express and Unequivocal Waiver.

A. Overview Of Tribal Sovereign Immunity.

The Tribe is a federally-recognized, sovereign Indian tribe. Indian tribes were self-governing before the coming of the Europeans, and today Indian tribes still possess the basic attributes of sovereignty. *United States v. Wheeler*, 435 U.S. 313, 323 (1978). This Court has explained that the sovereignty Indian tribes retain:

> ...is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

Id. (citations omitted). In *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*, 498 U.S. 505 (1991) this Court held:

> A doctrine of Indian tribal sovereign immunity was originally enunciated by this Court, and has been reaffirmed in a number of cases. Congress has always been at liberty to dispense with such tribal immunity or to limit it. Although Congress has occasionally authorized limited classes of suits against Indian tribes . . . Congress has consistently reiterated its approval of the immunity doctrine.

Id. at 510 (citations omitted). This doctrine has been reinforced time and again throughout American jurisprudence. *See also, Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978); *Puyallup Tribe Inc. v. Dep't of Game*, 433 U.S. 165, 172, (1977); *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 512 (1940); *see generally*, *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985); *Pan Am Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416 (9th Cir. 1989); *United States v. James*, 980 F.2d 1314 (9th Cir. 1992), *cert. denied*, 510 U.S. 838 (1993), *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998) (a recent reaffirmation of immunity for commercial off-reservation ventures.).

1. Only Congress And The Tribe May Waive The Tribe's Sovereign Immunity From Suit, And Any Waiver Must Be Explicit.

Under the United States Constitution, U.S. Const. art. I, § 8, cl. 3 (Indian commerce clause), and U.S. Const. art. VI, cl. 2 (supremacy clause), only Congress and the Tribe itself have the power to waive the Tribe's sovereign immunity. *Martinez*, 436 U.S. at 58; *Wheeler*, 435 U.S. at 323; *Potawatomi Indian Tribe*, 498 U.S. at 510. "It is settled that a waiver of [an Indian tribe's] sovereign immunity" "cannot be implied but must be unequivocally expressed." *Martinez*, 436 U.S. at 58; *accord, In re Greene*, 980 F.2d 590, 592 (9th Cir. 1992), *cert. denied, sub nom Richardson v. Mount Adams Furniture*, 510 U.S. 1039 (1994) (a waiver of sovereign immunity must be unequivocally expressed); *Sisseton-Wahpeton Sioux Tribe v. United States*, 895 F.2d 588, 594 (9th Cir.), *cert. denied*, 498 U.S. 824 (1990). Simply stated, waivers of immunity will *not* be implied. *Martinez, supra.* The waiver of immunity to allow enforcement of an action through arbitration is not a waiver for other matters. *Rosebud Sioux Tribe v. Val-U Constr. Co. of S.D., Inc.*, 50 F.3d 560 (8th Cir. 1995); *Tamiami Partners, Ltd. ex rel. Tamiami Dev. Corp. v. Miccosukee Tribe of Indians of Fla.*, 177 F.3d 1212 (11th Cir. 1999).

2. The Tribe Did Not Waive Its Immunity From Suit For Any Claims Arising Under the Employment Agreement[1]

When the joint venture was formed, three agreements were executed — the JVMA, the Operating Agreement (not at issue here) and the Employment Agreement. The Tribe expressly waived its sovereign immunity for purposes of arbitration in both the JVMA and the Operating Agreement

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[1] In the case at bar, there is no issue regarding whether Congress itself has waived the Tribe's sovereign immunity. It has not.

for claims arising out of those agreements. The Tribe did not, however, waive immunity in the Employment Agreement. Indeed, the Tribe was not even a party to the Employment Agreement and, therefore, is in no way subject to its provisions.

The express waiver of sovereign immunity in the JVMA unequivocally states:

> The [Tribe] EDC hereby waives immunity from suit to enforce the provisions of this Agreement, and all Agreements executed and delivered at the Closing and/or pursuant to this Agreement, and consents to the jurisdiction over such suit by any court which may have jurisdiction over the subject matter, *subject to the following conditions and limitations*:
>
> A. The waiver is granted solely to the parties, their representatives, agents, trustees, successors and assigns, and does not extend to third parties.
>
> B. The governing law shall be the law of the State of Michigan.
>
> C. The waiver shall extend only to the enforcement of the obligations of the EDC *under this Agreement* (including the agreement to arbitration), or to damages for breach of this Agreement by the EDC.

> D. This waiver shall expire six years after the termination of the Company or successor entities.
>
> E. The waiver shall be enforceable solely against the assets of the EDC, as provided in Sault Ste. Marie Tribal Code § 40.108(1). (Emphasis added.)

Young asserted and the lower courts found that the Employment Agreement was one of the agreements "delivered at Closing" and was therefore covered by the waiver of sovereign immunity.[2] However, even if the Employment Agreement was delivered at closing, there is still no basis for finding that the *Tribe* was a party to it and had any obligations under it that could be enforced.[3] To get around this obvious problem, the appeals court relied on a novel and somewhat perverted application of a state law doctrine which allows a court to *construe* contracts together. As explained by the appeals court:

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[2] The Tribe contends that the "delivered at Closing" language is not material as it is subject to paragraph C. of the waiver that limits the waiver to the enforcement of the obligations of the Tribe set forth in the JVMA only.

[3] There are any number of agreements that may be "delivered" at a closing that would impose no enforceable obligations on the Tribe, e.g., title insurance commitments or policies, insurance policies, brokerage agreements, to name a few. Just because such agreements were delivered at closing does not mean that the Tribe waived sovereign immunity with respect to those agreements. Obviously, the intent of the waiver was to waive immunity with regard to those agreements *to which the Tribe was a party* and consequently had obligations.

Where one writing refers to another, the two shall be construed together. *Culver v. Castro*, 126 Mich. App. 824, 826, 338 N.W.2d 232, 234 (1983), *citing Whittlesey v. Herbrand Co.*, 217 Mich. 625, 628, 187 N.W. 279, 280 (1922); *see also Jenkins v. U.S.A. Goods, Inc.*, 912 F. Supp. 969, 971-972 (E.D. Mich. 1996) (where a promissory note was subject to the terms and conditions of a stock purchase agreement, and the stock purchase agreement included references to the promissory note and ancillary agreements, the stock purchase agreement, note, and ancillary documents "must be considered one agreement").

Under the plain language of the JVMA, that agreement is subject to the terms of the EA [Employment Agreement].

* * *

Further, § 13.5 of the EA states that "[t]his Agreement is one of the documents executed at the Closing as part of the transaction governed by the Joint Venture Master Agreement." Finally, as noted above, the immunity waiver in the JVMA specifically states that the Tribe EDC "waives its immunity from suit to enforce the provisions of [the JVMA], and all Agreements executed and delivered at Closing and/or pursuant to [the JVMA]...". The plain language of the JVMA thus demonstrates that the parties intended that the JVMA and other documents "executed and delivered at Closing," including the EA, be construed as one agreement. Accordingly, *a breach of the*

> *EA constitutes a breach of the JVMA*, the claim of breach was subject to arbitration under the terms of the JVMA, and the Tribe EDC could be held liable for the breach.

(App. to Pet. for Cert. pp. 7a-9a) (emphasis added).

The last sentence of this quote reveals the heart of the error promulgated by the appeals court. It is one thing, when divining the intention of the parties, to "construe" two contracts together where they reference each other. This doctrine merely aids in the interpretation of the contract language used by the parties. It absolutely does not follow, however, from this tenet of contract interpretation, that the *breach* of one contract is a *breach* of the other. This is a leap of logic of Olympic proportions. There is something seriously wrong with the law if it requires a party to one contract to arbitrate a claim arising under another contract *to which it is not a party*, merely because the contracts refer to each other.[4,5] The appeals court's decision is especially

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[4] The appeals court does not even correctly apply Michigan law in this regard. The cases relied on by the appeals court do not stand for the proposition that a breach of one agreement referenced in another is a breach of that agreement, too, particularly where the two agreements are between different parties. *Whittlesey v. Herbrand Co.*, 217 Mich. 625, 187 N.W. 279, 280 (1922), the seminal case for this line of reasoning, is a good example. There, the plaintiff was employed by the defendant manufacturer as a salesman. The plaintiff entered into a contract with the defendant to receive a commission on certain parts which had been ordered by a third party. There was a dispute regarding how many parts were actually ordered by the third party, and the court permitted reference to the contract between defendant and the third party *to*

establish the intention of plaintiff and defendant when they entered into the commission contract. The court held that the two contracts must be construed together for the purpose of interpreting their meaning. It never said anything about the breach of one amounting to a breach of the other, and for good reason. Just as in the case at hand, the parties to the two agreements were not the same. The commission agreement was between the plaintiff and the defendant, while the contract providing for the sale of the parts was between the defendant and the third party purchaser. Under the appeals court's rationale in the case at hand, if the third party in *Whittlesey* had breached its agreement to buy the parts, the defendant, who was a party to both agreements, *would have had the right to sue the plaintiff for the breach*, even though the plaintiff was never a party to the contract with the third party. The absurdity of such a result is obvious in this context.

Another example makes this clear. In §12.6 of the JVMA, SPP, Inc. agreed to provide insurance coverage for all of the assets it was contributing to the joint venture. Assume SPP, Inc. did in fact obtain such insurance as it agreed. If there had been a subsequent fire that destroyed some or all of these assets and the insurance company refused in violation of its contract to reimburse SPPLLC for the losses, would the Tribe be able to make a claim against SPP, Inc. that it was responsible for the insurance company's breach? And more importantly, would any reasonable person contend that SPPLLC had agreed to arbitrate a claim that the insurance policy had been *breached by the insurance company*? Of course not. Yet this is precisely analogous to the claims made in the arbitration against the Tribe. Merely because it was recognized in the JVMA that SPPLLC and Young would enter into an agreement (just as it was recognized that SPP, Inc. and an insurance company would enter into an insurance contract) does not entitle a party to one of these contracts to look to a party to the JVMA for

satisfaction of a claim of breach of such contract.

What the lower courts and the arbitrators did was essentially make the Tribe the *guarantor* of SPPLLC's obligations under the Employment Agreement. Had this been the parties' intention, it would have been a simple matter to have the Tribe execute the Employment Agreement along with SPPLLC. Young never requested such a guaranty, and such a claim was never raised in the arbitration.

Moreover, there are no facts in the record which could possibly support the novel idea that the Tribe would somehow be responsible for the employment of Young by SPPLLC. The appeals court's conclusion that the agreements be treated as one is strained and is belied by the fact that there are separate agreements, with separate obligations and with separate parties. It completely re-created the relationship of the parties. The Loan Agreement, also referenced in § 9 of the JVMA, expressly stated that the Tribe would provide a loan. SPPLLC was a party to the Operating Agreement and the Employment Agreement, and the Tribe was not a party to the Employment Agreement. Why did the Loan Agreement and JVMA speak to the Tribe, but the Employment Agreement spoke to SPPLLC as the employer? Each player had differing obligations. Construing the agreements together takes this into account; treating them as "one agreement," such that everyone is responsible for everyone else's breaches, is purely a fiction.

[5] The trial court held:

> The Arbitration provision of the Master Agreement clearly provides that any controversy or claim arising out of or relating to this Agreement, or the breach of this Agreement, shall be resolved by arbitration. The Employment Agreement not only

egregious where the result of misapplying these rules is to vitiate clear and long-standing federal law requiring that the immunity possessed by sovereign Indian tribes can be waived only by an express and unequivocal act of the Tribe.

3. The Federal Law Of Sovereign Immunity Has Been Vitiated.

There are two problems with the decision of the appeals court: First, the court misconstrues state common-law contract interpretation principles to reach the absurd result that the Tribe breached the Employment Agreement to which it was not a party. More important, however, is the dangerous precedent set by this opinion which allows a state court to apply state law principles to circumvent the federal law of tribal sovereign immunity.

It is clear that the question of whether a tribe has waived sovereign immunity is a question of federal, not state, law. *Kiowa, supra*, 523 U.S. at 754, 756, 759 ("*As a matter of federal law*, an Indian tribe is subject to suit only where

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arises out of the Master Agreement, but is included as paragraph 9B of the Master Agreement. Therefore, pursuant to the terms of the Master Agreement, the Defendants agreed to arbitrate the Employment Agreement.

This rationale was not adopted by the Court of Appeals. The fallacy of the trial court's reasoning is obvious. Whether or not there was an agreement to arbitrate disputes under the Employment Agreement, the Tribe would have had to be a party to that agreement and have waived immunity before it could be required to arbitrate an alleged breach of its provisions.

Congress has authorized the suit or the tribe has waived its immunity...*It is a matter of federal law* and is not subject to diminution by the States...Like foreign sovereign immunity, tribal immunity *is a matter of federal law*.")(emphasis added). The practical effect of the Michigan courts' decisions below—which rely on state law doctrines not founded in the policy underlying the federal law of tribal sovereign immunity—is to vitiate the federal law requirement that waivers of sovereign immunity be express and unequivocal. That doctrine is rooted in the federal law concept that tribes should be self-governing, and that states cannot act in a way that effectively interferes with the tribe's right and ability to determine its own laws. *See, Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986) ("[B]oth the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes...our cases establish that 'absent governing Acts of Congress,' a State may not act in a manner that 'infringe[s] on the right of reservation Indians to make their own laws and be ruled by them'... The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance.").

The Michigan appeals court, besides clearly misapplying state law, never considered whether its decision to apply a waiver from one agreement to an alleged breach of an agreement to which the Tribe was not a party, would improperly infringe the Tribe's federally-mandated sovereign immunity. It cited not one federal decision or statute which suggests that a waiver can be extended to a breach of a contract to which a tribe is not a party. It relied only on a state law doctrine which it claimed permitted extension of the

waiver to the Employment Agreement.[6] Unlike the question of whether a contract has been breached, which a state court can decide based on state law doctrines even if a tribe which has unequivocally waived its immunity is involved, the question of whether there was a waiver of sovereign immunity cannot be determined on the basis of state law, but must be founded in uniform federal law principles.[7]

The Tribe is unaware of any federal decision where such an extension of a waiver to an agreement to which a tribe is not a party has been permitted. At the very least, the Michigan courts did not even purport to rely on federal Indian law principles, and it is therefore clear that these lower court decisions must be reversed. If not, they offer the potential of state courts across the nation subverting the doctrine of sovereign immunity entirely through application of state law doctrines, which are entirely within the control of the state's courts and legislatures.[8] Moreover, allowing states to decide

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[6] As noted above, the Tribe contends that the appeals court incorrectly applied this state law doctrine.

[7] One such principle that the state courts here did not apply is that federal laws applicable to Indians should be construed in favor of the Indians. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) ("...statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit...") Although this doctrine has arisen in the context of federal statutes, as well as treaty interpretations, the Tribe is unaware of any reason why it should not apply to the federal law governing waivers of sovereign immunity. Implying a waiver of sovereign immunity where none existed clearly frustrates this policy.

[8] Given the ability of state courts to create their own common law, or misconstrue such law as the Michigan courts did here, there

when and where a tribe has waived its immunity presents the possibility that a different law will pertain in each state. Given the clear supremacy of federal law in this area, any potential trend of state courts diluting the doctrine of sovereign immunity based on state law doctrines should be "nipped in the bud" immediately. Granting Petitioner's petition would provide the Court the opportunity to give direction to the states before the trend has advanced beyond its infancy in Michigan.[9]

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is no practical limit on the mischief state courts could cause Indian tribes if such courts are not required to adhere to federal principles governing waivers of sovereign immunity.

[9] Another example of a state law doctrine which could be used to frustrate federal policy governing waivers of sovereign immunity was relied on by Young below. Although he did not raise the issue in his arbitration claim, on the first day of the arbitration, Young contended that the "corporate veil" should be "pierced" so that the Tribe could be found liable for the alleged breach of the Employment Agreement. It seems (though not expressed in the arbitrators' decision) that this was the basis for the arbitrators' award against the Tribe. Neither the trial court nor the appeals court adopted this argument. (*See*, App. to Pet. for Cert. pp. 15a and 3a) The Tribe consistently argued that the state law doctrine of piercing the corporate veil could not be used to skirt federal law requirements that a waiver of sovereign immunity must be express and unequivocal. The arguments applied in this Petition to the appeals courts' analysis are equally applicable to the contention that the Tribe should be liable for breaches of the Employment Agreement based on the state law doctrine of piercing the corporate veil.

II. The Lower Courts' Decision To Allow Judgment Interest To Be Imposed Against The Tribe When The Tribe Did Not Waive Its Sovereign Immunity, Conflicts With Clear Precedent From This Court And Other Federal Courts.

Young contended that he is entitled to interest pursuant to the provisions of MCL 600.6013, which allows imposition of interest on certain judgments. (App. to Pet. for Cert. p. 34a.) However, as noted above, the Tribe is a sovereign Indian nation which is protected from legal actions, unless it has expressly and unequivocally agreed to them through an explicit waiver of its sovereign immunity. As previously set forth, although the Tribe expressly waived its sovereign immunity to permit enforcement of the terms of certain arbitration awards rendered in accordance with the JVMA, it did not waive its immunity from any action to enforce the interest provisions of MCL 600.6013 and cannot be subject to this statute. The Tribe advanced this argument before the Michigan Court of Appeals. Without citing a single federal precedent, the appeals court made the insupportable holding that a waiver to "enforce" the JVMA somehow meant statutory interest could be imposed on the Employment Agreement award. This reasoning deviates one hundred eighty degrees from the requirement that a waiver be explicit, clear and unequivocal. *Martinez*, 436 U.S. at 58.

Federal case law makes it clear that a waiver of immunity for purposes of arbitration, including suits to enforce arbitration, does *not* constitute a waiver for any other purpose. *See*, *Rosebud Sioux, supra; Tamiami Partners, supra*. As with the question of whether a state court can apply state common law principles to expand a waiver of sovereign immunity, a state court decision permitting interest to be imposed on a judgment confirming an arbitration award

sets a precedent that state legislatures and courts can vitiate the federal law requirement that waivers of sovereign immunity be express and unequivocal. The breadth of the waiver allowing enforcement of an arbitration award is an issue of great significance and should be addressed in this context by this Court.

In a directly analogous situation, this Court has ruled that interest of any kind cannot be added to a judgment against the United States, unless it has expressly waived its sovereign immunity from an award of such interest. In *Library of Congress v. Shaw*, 478 U.S. 310 (1986), the lower court awarded interest and attorney's fees to a plaintiff who had prevailed on a suit brought under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 USC § 2000e *et seq.* (the "CRA"). The U.S. Court of Appeals believed that interest could be awarded because the CRA provided that the United States would be liable "for costs the same as a private person." *Id.* at 313. This Court determined, however, that the CRA did not constitute a waiver of sovereign immunity such that a claim for interest on the judgment would be permitted. This Court noted:

> In analyzing whether Congress has waived the immunity of the United States, we must construe waivers strictly in favor of the sovereign, *see McMahon v. United States*, 342 U.S. 25, 27 (1951), and not enlarge the waiver "'beyond what the language requires,'" *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-686, (1983), quoting *Eastern Transp. Co. v. United States*, 272 U.S. 675, 686 (1927). The no-interest rule provides an added gloss of strictness upon these usual rules.

"[T]here can be no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute or contract to permit the recovery of interest suffice where the intent is not translated into affirmative statutory or contractual terms. The consent necessary to waive the traditional immunity must be express, and it must be strictly construed." *United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654 at 659.

A

When Congress has intended to waive the United States' immunity with respect to interest, it has done so expressly; (footnote omitted) thus, waivers of sovereign immunity to suit must be read against the backdrop of the no-interest rule. Yet respondent contends that by equating the United States' liability to that of a private party, Congress waived the Government's immunity from interest. We do not agree. *See ,Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 49 (1928).

[6] Title VII's provision making the United States liable "the same as a private person" waives the Government's immunity from attorney's fees, but not interest. The statute, as well as its legislative history, contains no reference to interest. This congressional silence does not permit us to

> read the provision as the requisite waiver of the Government's immunity with respect to interest.

Shaw, supra, at 318-319.

Likewise, in the case at hand, the Tribe cannot be subject to judgment interest absent an express and unequivocal waiver for such interest. The cases have uniformly treated tribal sovereign immunity just like the immunity of the United States, *see, Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 773 (D.C. Cir. 1986) ("An Indian tribe's immunity is co-extensive with the United States' immunity..."); *Florida Paraplegic, Ass'n, Inc. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1131 (11th Cir. 1999) ("[T]he same standard applies in determining whether Congress has abolished federal and state governments' protection from suit."), and have required express and unequivocal waivers before permitting lawsuits against such tribes. There is no legitimate reason why the "no-interest" rule, which is based solely on the United States' sovereign immunity, should not also apply to Native American Tribes, who enjoy the same immunity.

Here, the Tribe has not expressly and unequivocally waived its right to be free from claims for judgment interest. The Michigan Court of Appeals believed that language in the JVMA that extended the waiver of sovereign immunity to the enforcement of the Tribe's obligations under that agreement was sufficient to effect a waiver. However, there is no mention in this waiver of any intention to permit claims for judgment interest. The waiver only extends "to the enforcement of the obligations of the EDC under" the JVMA or to "damages". Such enforcement could mean many things, depending on the obligation that was sought to be enforced,

but it does not mean that statutory judgment interest is to be awarded a plaintiff, quite simply, because such interest is never mentioned in the waiver. If the Tribe had wanted to waive its immunity from such interest claims, it could have done so, just as it is clear that the United States can do so if it expressly mentions judgment interest in the applicable statute. *Shaw, supra,* at 318 n. 6.[10] What the Michigan Court of Appeals has done here is *imply* from the use of the word "enforce" that the Tribe waived its immunity to interest claims. However, as noted in *Shaw*, such waivers cannot be made by implication, and any language suggesting a waiver must be strictly construed.[11] *Shaw* goes so far as to hold that even if there was an *intention* to waive, unless it is unequivocally expressed in the language, even the intention cannot be honored. When this very strict standard is applied to the case at hand, it is readily apparent that the lower courts have committed a clear error of law.

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[10] Subsequent to the decision in *Shaw*, Congress amended the CRA to expressly permit the addition of interest to judgments entered against the United States. *See*, 42 U.S.C. 2000e-16.

[11] In *Shaw*, this Court refused to imply a waiver for interest even though the CRA permitted an award against the United States "for costs the same as a private person." *Shaw* at 318. If permitting the imposition of costs is insufficient to express a waiver that permits the imposition of interest, certainly merely permitting "enforcement" of an arbitration award in court is likewise insufficient to accomplish a waiver such that interest may be awarded, especially where the waiver of sovereign immunity only permits enforcement of an arbitration award for "damages," not judgment interest.

A. The State Courts' Application Of Statutory Interest Where There Has Been No Express Waiver For Such Interest, Dilutes And Compromises Federal Law Principles Governing Waivers Of Sovereign Immunity For Tribes And Other Governments.

Just as with the state courts' indifference to federal law principles governing waivers of sovereign immunity relevant to the issue of the breach of the Employment Agreement, the imposition of statutory judgment interest by those courts has wider implications, both for Indian tribes and for other governments entitled to sovereign immunity. Statutory judgment interest is a creature entirely of state law, and can be imposed or modified at the whim of the state courts and legislatures. Allowing such a creature to impact a sovereign unless it is clear that the sovereign was expressly agreeable to being subject to the state law, could lead to other and more onerous laws being passed by states, possibly even laws targeted specifically at sovereigns. *See, e.g., Wold Eng'g, supra*. The Michigan courts' error should be addressed (and corrected) by this Court as it is significant to federal jurisprudence, just as the question of waiver under the CRA was sufficiently significant that this Court granted leave in *Shaw* to correct the errors of the lower courts.

CONCLUSION

As set forth above, there are several issues presented in this application which are of critical importance to federal law, both Indian law and the general law of sovereign immunity. The Tribe therefore respectfully requests that this Court grant its Petition and, thereupon, reverse the lower courts and vacate the arbitration decision to the extent it awarded damages to Young against the Tribe. In the

alternative, Petitioner requests that this case be remanded to the Michigan Supreme Court with direction to consider the issues raised in Petitioner's Application for Leave to Appeal to that court.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF MICHIGAN

No. 119364

[Filed March 4, 2002]

ERNEST I. YOUNG and SPP, INC.,
Plaintiffs-Appellees,

v.

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS d/b/a SAULT STE. MARIE TRIBE ECONOMIC DEVELOPMENT COMMISSION, SPECIAL PLASTIC PRODUCTS, L.L.C., SPECIAL PRODUCTS ENGINEERING, L.L.C. and NAB GROUP, L.L.C.,
Defendants-Appellants.

On Appeal From
State of Michigan Court of Appeals
No. 214136
Before Collins, P.J., and Jansen and Whitbeck, JJ.

OPINION

On order of the Court, the application for leave to appeal from the May 11, 2001 decision of the Court of