UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 12-62140-Civ-Scola

SEMINOLE TRIBE OF FLORIDA,
a Federally recognized Indian Tribe,

Plaintiff,

v.

STATE OF FLORIDA, DEPARTMENT
OF REVENUE, and MARSHALL STRANBURG,
AS INTERIM EXECUTIVE DIRECTOR AND
DEPUTY EXECUTIVE DIRECTOR,

Defendants.
_____/

DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR ENTRY OF FINAL JUDGMENT IN ACCORDANCE WITH THE OPINION OF THE ELEVENTH CIRCUIT COURT OF APPEALS

Plaintiff responds to Defendants' Motion by elevating a comment in a footnote in the Eleventh Circuit's opinion in this case over an explicit holding in order to escape the consequences of its decisions about how to plead and argue this case. The opinion in this case *holds*:

> **we must determine whether federal law preempts imposition of the Utility Tax on non-Indian utility companies operating on-reservation. After careful consideration, we hold that the Utility Tax does not violate federal law.**

Seminole Tribe of Florida v. Stranburg, 799 F.3d 1324, 1352 (11th Cir. 2015).

As set forth in our motion, the Tribe chose to plead the *Bracker* analysis in this case with respect to three uses: the provision of essential government services, gaming and leasing of land. In its Motion for Summary Judgment, opposition to the Defendants' Motion for Summary Judgment, and brief to the Eleventh Circuit, the same three uses were referenced. Now, as

evidenced by the laundry list of uses in its response to our motion, after losing this appeal, the Tribe seeks to expand this case to involve *Bracker* analyses of a myriad of uses never before pled or even mentioned in this litigation. It would appear that the Tribe intends to argue that all of these uses, which as a whole appear to encompass anything the Tribe does, are exempt from the tax; an outcome clearly inconsistent with the express holding of the Eleventh Circuit.

If Plaintiff intended to assert that all of the uses listed in its response were preempted, then they should have been pled in the complaint and argued when the Court was evaluating cross-motions for summary judgment. It is well established that when parties move for summary judgment, they must, "at the very least, rais[e] in their opposition papers any and all arguments or defenses that they fe[el] preclude[] judgment." *Case v. Eslinger*, 555 F.3d 1317, 1329 (11th Cir. 2009) (quotation marks omitted). Failure to fully develop an argument constitutes waiver, as this Court so forcefully pointed out with respect to the Defendants' argument that the situs of the transaction was off the reservation:

> Generally, a "litigant who fails to press a point by supporting it with pertinent authority, or by showing why it is sound despite a lack of supporting authority or in the face of contrary authority, forfeits the point. The court will not do his research for him." *Phillips v. Hillcrest Medical Center*, 244 F.3d 790, 800 n. 10 (10th Cir.2001) (internal quotation omitted); *McPherson v. Kelsey*, 125 F.3d 989, 995–96 (6th Cir.1997) ("Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to put flesh on its bones." (internal quotation omitted)).

Seminole Tribe of Florida v. Florida, 49 F. Supp. 3d 1095, 1107 (S.D. Fla. 2014). Seems that sauce for the goose should also be sauce for the gander.

The Eleventh Circuit ***held*** that the tax challenged by the Tribe was not preempted by federal law – a clear reference to the careful consideration of the issue under *Bracker*. The footnote upon which the Tribe relies can only be read to limit the breadth of the opinion to cover

only those uses argued by the Tribe "in this case," leaving open the possibility that there might be theories that could be successful in another case, "if properly framed." *See Seminole Tribe*, 799 F.3d at 1352 & n. 21. Thus, while the footnote leaves open the possibility of future challenges in future cases, it was certainly not an invitation for the Tribe to disregard the Federal Rules of Civil Procedure and expand the reach of this case substantially beyond anything set forth in any of the previous pleadings or motions.

The Tribe chose how to plead and argue this case. It is not entitled to another try; any arguments not made in the Tribe's Motion for Summary judgment have been waived and the arguments it did make have been ruled upon by the Eleventh Circuit. Defendants are entitled to judgment in their favor.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Jonathan A. Glogau
Jonathan A. Glogau (371823)
Attorney General Office
The Capitol PL-01
Tallahassee, FL 32399-1050
850-414-3300, ext. 4817
850-414-9650 (fax)
jon.glogau@myfloridalegal.com

Attorney for Defendants, State of Florida, Department of Revenue, and Leon Biegalski, as Executive Director

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2016, the foregoing document was filed with the Clerk of Court via the CM/ECF system, causing it to be served on all counsel of record.

/s/ Jonathan A. Glogau
Attorney