IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

CASE NO.: 3D16-2826
L.T. Case No. 16-21856 (CA 40)

MICCOSUKEE TRIBE OF INDIANS
OF FLORIDA,

Appellant,

vs.

LEWIS TEIN, P.L., GUY LEWIS,
and MICHAEL TEIN,

Appellees.
_____/

ANSWER BRIEF OF APPELLEES LEWIS TEIN, P.L., GUY LEWIS, AND MICHAEL TEIN

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STATEMENT OF THE CASE

This lawsuit seeks relief for the Miccosukee Tribe's campaign to destroy the reputations and careers of Guy Lewis, Michael Tein and their law firm Lewis Tein, P.L. (collectively "Lewis Tein"). The Complaint in this case contains much more than mere allegations leveled at the inception of an ordinary civil dispute. Rather, Miami-Dade Circuit Judge John W. Thornton, Jr. and U.S. District Court Judge Marcia G. Cooke have already made extensive findings that the Miccosukee Tribe repeatedly abused the Florida and federal court systems in their "unrelenting legal crusade" (as Judge Cooke called it) to destroy Lewis Tein. And, this Court already affirmed Judge Thornton's detailed summary judgment order finding that the Tribe's state court lawsuit was entirely unsupported by any evidence. *See Miccosukee Tribe v. Lewis*, 165 So.3d 9, 12 (Fla. 3d DCA 2015) (observing that the Tribe filed no conflicting evidence to oppose summary judgment and that "the Tribe's expert was unable to identify a single invoice by [Lewis Tein] that he believed was fraudulent, illegal or excessive").

Prosecuting not just one, but four wildly unsupported proceedings, involving over two thousand filings, over one hundred judicial hearings and countless public denouncements of Lewis Tein, makes this case truly exceptional and truly extraordinary. But beyond prosecuting these bad-faith claims, the Miccosukee Tribe hid evidence, falsified evidence, destroyed evidence, committed perjury,

suborned perjury, retaliated against witnesses, flouted state and federal court orders, and obstructed a police investigation. The Miccosukee Tribe's defense now rests on the notion that it can wreak mayhem by committing repeated criminal acts in Florida's courts and then retreat into its own sovereignty with impunity.

As discussed below, in a case that the Miccosukee Tribe failed even to mention in its motion to dismiss before the lower court, this Court has already held that the core misconduct directed at Lewis Tein by the Tribe constituted an "express waiver" of sovereign immunity. *Miccosukee Tribe v. Bermudez*, 92 So.3d 232 (3d DCA 2012), *rev. denied*, 114 So.3d 935 (Fla. 2013). Far from being "unprecedented" (Initial Brief at p. 7), the trial court's Order properly followed this Court's *Bermudez* decision and denied the Miccosukee Tribe's motion to dismiss the Complaint based on sovereign immunity.

COUNTER-STATEMENT OF FACTS

Lewis Tein provides this counter-statement of facts to address certain of the misstatements of the record contained in the Tribe's Initial Brief. Throughout the Initial Brief, the Tribe seeks to minimize its role in the underlying misconduct and bad faith lawsuits and to shift the blame to its former Tribal Counsel (Bernardo Roman). The Tribe also glosses over the egregiousness of its conduct as well as the state and federal courts' findings regarding that conduct.

The *Bermudez* Collection Action. The Tribe seeks to obscure its own participation in the conduct that underpins this action by blaming its lawyer, four times. *See* Initial Brief at pp. 2-3 (stating that "Mr. Roman sought to induce" false allegations against Lewis Tein), 24 ("Mr. Roman disclosed checks to plaintiff's counsel"), 24 ("Mr. Roman took multiple steps" to influence the litigation), and 25 (discussing "acts of Mr. Roman . . . in 2011") (emphasis added). This Court, however, expressly observed that Mr. Roman delivered the checks "[w]ith the Tribe's blessing" by "an act approved by the Tribe." *Bermudez*, 92 So.3d at 233, 235 (emphasis added).

To this same end, the Tribe misleadingly quotes this Court, two times, as holding that "Mr. Roman 'purposefully sought to participate in or influence a state court proceeding' . . . ." Initial Brief at pp. 3, 24 (quoting *Bermudez*, 92 So.3d at 235; emphasis added). The complete quote is: "Mr. Roman, in an act approved by the Tribe, admittedly, has purposefully sought to participate in or influence a state court proceeding." *Id.* at 235 (emphasis added). The Tribe also mischaracterizes this Court's holding, six times, as finding only a "limited" waiver. *See* Initial Brief at pp. 3 ("this Court affirmed the limited waiver"), 8 ("this Court's holding . . . found only a limited waiver"), 24 (section titled "The Limited Waiver . . . Found by this Court . . . ."), 24 (describing "this Court's finding of a limited waiver"), 25 ("The limited waiver of sovereign immunity found in *Bermudez* has long since

been resolved."), and 26 ("the limited waiver of sovereign immunity this Court found in *Bermudez*"). There is nothing in this Court's ruling about the waiver being "limited." That is language the Tribe is simply seeking to write into the opinion after the fact.

The First State Court Action. In reciting the history of its lawsuits against Lewis Tein, the Tribe again attempts to minimize its own participation, writing three times that they were filed by "Roman, on behalf of the Tribe." Initial Brief at pp. 3 (¶1), 4 (¶3), and 4 (¶4). To be clear, in May 2011, the Tribe's full General Council, by a 42-3-9 vote, passed written resolution No. MGC-02-12 expressly authorizing Roman to "file all necessary legal actions" against Lewis Tein. *See Miccosukee Tribe v. Guy Lewis et al.*, Case No. 12-12816-CA-40 (First State Court Action), Bernardo Roman, Esq.'s Witness and Exhibit List, at Ex. 10 (filed Nov. 18, 2015) (Miccosukee Gen. Council Resolution No. MGC-02-12, dated May 3, 2011).

The Tribe then incorrectly states that the trial court (Judge John W. Thornton, Jr.) simply "dismissed the complaint for lack of jurisdiction and failure to state a claim." Initial Brief at p. 4. In fact, the trial court granted summary judgment after sixteen months of discovery had taken place. Among other things, the court found that "[t]he thousands of pages of record evidence adduced in this matter, ranging from affidavits to deposition transcripts, to Special Magistrate

Report and Recommendations and Orders thereon, all disclose that no false statements or evidence of fictitious or improperly created or fraudulent legal fees or expenses have been perpetrated by Lewis Tein upon the Tribe." A-311. Further, the court found that "[t]he Tribe has failed to identify one fictitious time entry, invoice or legal matter attributable to Lewis Tein." *Id.* The court held that there was no evidence that "Lewis Tein acted with any bad intent, made intentional misrepresentations to the Tribe, or otherwise intended to harm the Tribe." *Id*. In short, the court ruled: "There is no evidence in the record of any fraud or overbilling." *Id*.

Judge Thornton's Order was subsequently affirmed by this Court. *See Miccosukee Tribe of Indians of Florida v. Lewis*, 165 So.3d 9 (Fla. 3d DCA 2015). In finding that Judge Thornton "properly granted summary judgment" for Lewis Tein and against the Tribe, this Court found that the Tribe failed to come forward with any evidence, or sworn statement, supporting its claims against Lewis Tein. This Court specifically pointed out that, indeed, "the Tribe's expert was unable to identify a single invoice by [Lewis Tein] that he believed was fraudulent, illegal or excessive." *Id*. at 11.

The trial court subsequently entered a sanctions order against the Tribe as well. In that order, Judge Thornton excoriated the Tribe for filing the lawsuit against Lewis Tein. Judge Thornton expressly found, among other things, the

following: "[T]he Tribe and its counsel commenced and continued to litigate this matter in the face of overwhelming evidence demonstrating the claims against Lewis Tein were unfounded and frivolous." A-90. Further, the court found that "Mr. Roman, his firm, and the Tribe necessarily had access at all times to the facts and evidence, which conclusively refuted the claims alleged against Lewis Tein, but they nevertheless pursued them in lengthy and costly litigation." A-91-92. The court summed up the Tribe's "bad faith" as follows:

> [The State Court Action] was completely lacking in merit and utterly frivolous. The Tribe and its lawyer, Bernardo Roman, III, knew that there was no basis in fact or law to file these allegations against Guy Lewis, Michael Tein and Lewis Tein, P.L. The Tribe and Roman filed this lawsuit in bad faith.

A-99 (emphasis added).

The Federal Court Action. The Tribe neglects to mention not only that the U.S. District Court entered a sanction award of over $1 million against the Tribe, but also that it harshly reprimanded the Tribe and its Tribal Council for their conduct. U.S. District Judge Marcia G. Cooke conducted a nine-day evidentiary hearing on whether the Tribe had a good faith basis to file its lawsuits against Lewis Tein. On January 16, 2015, Judge Cooke entered an Omnibus Order Granting Defendants' Motions for Sanctions. *See Miccosukee Tribe of Indians v.*

Cypress, 2015 WL 235433 (S.D. Fla. Jan. 16, 2015). The federal court sanctioned the Tribe in excess of $1 million.[1]

In unsparing language, the federal court found that "there was no evidence, or patently frivolous evidence, to support the factual contentions set forth [in the Second Amended Complaint], which form the basis of [the Tribe's] claims against Defendants Lewis Tein . . . ." 2015 WL 235433 at *4. Specifically, the court observed that "there is no doubt that the loans to Tammy Gwen Billie, Jimmie and Louise Bert for legal fees in the *Bermudez* matter were valid because over the course of several years and continuing until today, the Berts have been repaying on the loans." *Id.* Further, the court concluded that the Tribal Attorney (Roman) knew or should have known this because relevant documents were found in his office and because Jodi Goldenberg, an accountant in the finance department for the Tribe for over 21 years, spoke to Roman about the loans and their validity. *See id.* Moreover, the Tribe's outside auditor reported the loans to tribal members and to the Tribe's former general counsel. *See id.* The court also found that the Tribal Attorney "had no evidence of a 'kickback scheme' involving Defendants Lewis Tein and former Chairman Cypress." *Id.*

[1] The federal court also referred Roman to The Florida Bar for "investigation and appropriate disciplinary action." 2015 WL 235433 at * 19. The Florida Bar later charged Roman for violating five separate Florida Bar rules in the Federal Action and the State Court Action in addition to Roman's ethics violations relating to his misconduct in the *Bermudez* Sanctions Proceeding.

The Second State Court Action. The Tribe again misrepresents the disposition of its lawsuit. The Tribe filed this case after Judge Cooke dismissed the Tribe's virtually identical federal lawsuit for lack of subject-matter jurisdiction. The Tribe states that this state-court case was likewise dismissed "for lack of subject-matter jurisdiction." Initial Brief at p. 4. In truth, Circuit Court Judge Jennifer Bailey dismissed this case "with prejudice" finding it "another attempt to make the same claims that two prior judges have determined are factually baseless . . . ." A -324. Judge Bailey expressly cited Judge Cooke's "subsequent post-dismissal work" which "adjudicated the lack of factual evidentiary support for the Tribe's claims." A-323.

The Tribal Counsel and the Tribe's Business Council. The Tribe also misrepresents the Complaint when it asserts that Lewis Tein alleges that "the Tribe's former attorney sought to 'exclude and did regularly exclude' the Tribe's leadership from the decision-making process." Initial Brief at p. 2. In fact, the Complaint alleges that "[Chairman] Colley Billie and Tribe 'Business Council' member Roy Cypress Jr. conspired to exclude and did in fact regularly exclude [two people, namely,] the Tribe's Lawmaker, William Osceola, and its Treasurer, Jerry Cypress, from certain meetings of the Tribe's Business Council in which they were otherwise entitled to participate." A-4 at ¶ 8. Importantly, the Complaint

does not say that Roman was the excluder; nor does it say that "the Tribe's leadership" (*i.e.*, the entire leadership) was excluded.

Finally, the Tribe even seeks to distort the attention given to its motion to dismiss by the trial court by suggesting the court merely held a "status conference at which it directed the parties to submit proposed orders regarding the Tribe's motion to dismiss." Initial Brief at p. 6. In fact, the Tribe extensively briefed its motion to dismiss (30 pages) (A-150-237), extensively argued it, and it was heard at a one-hour Case Management Conference as is the standard practice in the Eleventh Judicial Circuit's Complex Business Division.

SUMMARY OF ARGUMENT

The trial court's Order should be affirmed because (1) it expressly follows this Court's decision in *Bermudez*; (2) it is consistent with many other decisions confirming that litigation conduct by an Indian tribe can act as a waiver of sovereign immunity; and (3) The Tribe's policy arguments are greatly exaggerated unsupported by any evidence.

First, the trial court's Order falls squarely in line with this Court's decision in *Bermudez.* This Court's holding bears quoting at length:

> [T]here can be no mistake about what occurred in our case. Mr. Roman [the Tribal Attorney], in an act approved by the Tribe, admittedly, has purposefully sought to participate in or influence a state court proceeding. We can conceive of no motive for the Tribe or Mr. Roman to have done so. The only plausible legal conclusion that can be drawn from the actions of

> Mr. Roman and the Tribe in this case is the one made by the trial court – ***the Tribe's and Mr. Roman's conduct constituted a clear, explicit, and unmistakable waiver of the Tribe's claim to sovereign immunity***.

Bermudez, 92 So.3d at 235. Lewis Tein's claim is that, as this Court found, the Tribe waived immunity by injecting alleged evidence of a "fraudulent loan scheme" into the *Bermudez* case. Then, the Tribe elected not to comply with this Court's mandate in *Bermudez*. Instead of responding truthfully to discovery, which the mandate required, the Tribe flouted it and, as two courts have already found, pursued four years of frivolous and obstructive litigation on the same subject. Moreover, the Tribe prosecuted those cases by numerous acts of obstruction, including perjury, witness-tampering, evidence-tampering, violating clear discovery orders, and even filing a false police report.

Second, there is nothing "unprecedented" about the trial Court's Order. Initial Brief at p. 26; *see also id*. at 17 (claiming that the Circuit Court issued its Order "[w]ithout any supporting authority," despite its express reliance on and lengthy analysis of this Court's *Bermudez* decision). It is well-settled that a Tribe can waive its sovereign immunity through litigation conduct. As will be discussed below, multiple reasoned decisions from around the country fully support this Court's holding and reasoning in *Bermudez* and the trial court's Order below. Simply put, a tribe's litigation or other conduct can amount to an "express" waiver

of sovereign immunity without any formal pronouncement. As this Court already held, that is exactly what happened here.

Third, the policy arguments raised by the Tribe are overblown. This is a unique case, the likes of which – one would hope – will not be seen again in our court system. The issue on appeal concerns waiver only. It does not present any fundamental question about the doctrine of sovereign immunity. Affirming the trial court's Order should lead to nothing more than a fact-specific determination that sovereign immunity was waived in these extraordinary and egregious circumstances.

ARGUMENT

I. THIS COURT ALREADY DECIDED THAT THE MICCOSUKEE TRIBE WAIVED SOVEREIGN IMMUNITY BASED ON THE SAME CONDUCT THAT UNDERPINS THIS CASE.

The Miccosukee Tribe's argument that tribal sovereign immunity requires wholesale dismissal of the Complaint should be rejected. The Tribe's argument rests on a mischaracterization of the trial court's Order. In the Tribe's re-writing of the Order, the decision rested solely on the determination that "a tribe's bad faith conduct in prior lawsuits waives sovereign immunity for future lawsuits." Initial Brief at p. 14. The Tribe's argument ignores the foundations of the court's Order and seeks to gloss over the fact that, in *Bermudez*, this Court already decided that the Miccosukee Tribe waived sovereign immunity through the same conduct that

underpins this case.[2] As the trial court summed it up: "Accordingly, the holding in *Bermudez* binds this Court." A-297.

Likewise, in its Initial Brief, the Tribe grossly mischaracterizes the Complaint as alleging that the Tribe waived immunity merely by "filing a lawsuit." Initial Brief at pp. 7, 11, 12, 15, 16, 31, 32. Lewis Tein's claim is very different. The Complaint alleges that the Tribe injected itself into the *Bermudez* case, which it had not filed and to which it was not a party, with knowingly false allegations against Lewis Tein. Then, the Tribe elected to disregard this Court's mandate in *Bermudez*. Instead of responding truthfully to discovery, the Tribe flouted the mandate and, as two courts have already found, pursued four years of frivolous and obstructive litigation on the same subject. Moreover, the Tribe prosecuted those cases by numerous criminal acts. Most of these acts occurred during the *Bermudez* proceedings and were also designed to obstruct it. This course of conduct far transcends merely "filing a lawsuit."

A. The *Bermudez* Decision.

In *Bermudez*, this Court found that the Miccosukee Tribe had waived sovereign immunity by the very same acts that are the foundation of what Lewis

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[2] The *Amicus* Brief of United South and Eastern Tribes, Inc. (USET) fails even to mention the *Bermudez* decision and instead devotes most of its argument to a recitation of the origins and purpose of tribal sovereign immunity – a discussion that is largely irrelevant to the issue to be decided here.

Tein challenges here. In that case, the plaintiffs in a wrongful death case against individual Tribe members obtained a $3.2 million judgment against the individuals and were involved in post-judgment proceedings to execute on the judgment. The individual Tribe members were represented by Lewis Tein. The plaintiffs were seeking to collect against the Tribe even though the judgment was only against the individuals. During the post-judgment litigation, Lewis Tein made a statement to the court that its clients were responsible for and had been paying its fees. *See* 92 So.3d at 233 n. 1.

The Tribe, which was not a defendant in the wrongful death action, then took actions which this Court characterized as being "mystifying to us." 92 So.3d at 233. The Tribe provided the wrongful death plaintiffs' counsel with copies of checks purporting to show payments to Lewis Tein from the Tribe for the representation of the individual defendants. The Tribe took this action with the intent "to influence ongoing litigation in our state courts," including efforts to have Lewis Tein sanctioned by the court and disqualified from the case. *Id.* at 234.

Based on this action, the trial court set a hearing on whether Lewis Tein had committed perjury. The trial court allowed discovery on that issue. To disprove the Tribe's false allegation that Lewis Tein was involved in a "fraudulent loan scheme," Lewis Tein issued a deposition subpoena *duces tecum* to Tribal Counsel Bernardo Roman. The subpoena sought the Tribe's loan records and testimony

relating to the checks that the Tribe had injected into the *Bermudez* litigation and its claim that they evidenced Lewis Tein's "fraudulent loan scheme." The Tribe moved to quash the subpoena on the basis of sovereign immunity, and the trial court denied the motion. The Tribe then petitioned this Court for certiorari review.

This Court affirmed, finding that the Tribe had waived any sovereign immunity by the "duly authorized act of providing the checks to plaintiff's counsel" which was "intended to influence ongoing litigation in our state courts." 92 So.3d at 234. This Court announced its reasoning in the clearest of terms:

> ***An election to participate in litigation is not a one-way street***. Mr. Roman cannot seek to participate in or influence litigation in another sovereign entity, the State of Florida, then ***retreat into his own sovereign when it suits him***.

Id. (emphasis added). Acknowledging the rule that a waiver of sovereign immunity must be "clear, explicit and unmistakable," this Court found such a waiver by the Tribe on our precise facts:

> [T]here can be no mistake about what occurred in our case. ***Mr. Roman, in an act approved by the Tribe, admittedly, has purposefully sought to participate in or influence a state court proceeding***. We can conceive of no motive for the Tribe or Mr. Roman to have done so. The only plausible legal conclusion that can be drawn from the actions of Mr. Roman and the Tribe in this case is the one made by the trial court—***the Tribe's and Mr. Roman's conduct constituted a clear, explicit, and unmistakable waiver of the Tribe's claim to sovereign immunity***.

Id. at 235 (emphasis added). The Tribe unsuccessfully sought rehearing of this Court's ruling, including rehearing *en banc*, and even appealed it to Florida's Supreme Court, which denied review.[3] *Bermudez* is clear and should end the analysis. *Cf. Massachusetts v. Wampanoag Tribe of Gay Head*, 98 F. Supp.3d 55, 62-66 (D. Mass. 2015) (based on prior state court ruling that Tribe had waived its sovereign immunity with respect to use of certain tribe lands, tribe was barred by issue preclusion from raising sovereign immunity in subsequent state court lawsuit relating to gaming operations on those lands).

B. In Response to this Court's Mandate in *Bermudez*, the Tribe Obstructed Justice.

After this Court issued its mandate enforcing the subpoena over the Tribe's claim of sovereign immunity, the Tribal Counsel's deposition was convened and then recessed because, incredibly, the Tribe failed to produce the subpoenaed documents. The Tribe later objected to reconvening the deposition or producing documents relating to Tribal loans, arguing that it had recently filed its (first) lawsuit against Lewis Tein in the trial court alleging a "fraudulent loan scheme." The trial court rejected the Tribe's objections, ordering the Tribal Counsel to

[3] Remarkably, in its motion to dismiss based on sovereign immunity, the Tribe failed to even alert the lower court to the existence of this Court's *Bermudez* decision (which is even cited in the Complaint, A-15 at ¶ 42(a)).

produce the records. A-21 at ¶ 49(b) (describing Order Denying Reconsideration, Case No. 00-25711 (Dec. 10, 2012)).

In response, and with the express "approval of the Miccosukee Business Council," the Tribe filed an affidavit from its Tribal Counsel falsely swearing that the Tribe had "no books and/or records" that "reflect[] loans or advances made by the Miccosukee Tribe . . . for payment of . . . legal fees [to] Lewis Tein PL." A-15 at ¶ 43 (describing Notice of Filing Affidavit in Case No. 00-25711 (Dec. 20, 2012)).

The Tribe then pursued four more years of frivolous and obstructive litigation in support of the perjury in that affidavit and in support of their false claim of a "fraudulent loan scheme." The trial court eventually found that there was "no evidence" supporting the Tribe's position, granted summary judgment and ordered sanctions. A-310-311 ("It is further undisputed that the record evidence consisting of internal Tribe financial accounting documents reflect that many other law firms, including the Tribe's current lawyer, were paid in a virtually identical manner as Lewis Tein."); *see also Miccosukee Tribe v. Lewis,* 2015 WL8665975, *4 (Fla. Cir. Ct. Dec. 12, 2015) (Thornton, J.) (ordering sanctions and finding that the Tribe's "own financial documents" to which "Roman and the . . . Tribe had access to at all times" demonstrated the existence of many records of the loans, and listing them specifically).

C. To Cover Up Its False Testimony and to Hurt Lewis Tein, the Tribe Committed Numerous Criminal Acts.

As the Complaint details, the Tribe went to great lengths to cover up its perjury in the *Bermudez* affidavit, to hinder Lewis Tein's access to truthful testimony and evidence that would have exonerated them in the *Bermudez* case, and "to hurt" Lewis Tein. A-15 at ¶ 42(b) (THE COURT: "Because of bad blood, the Tribe did whatever it could to hurt Lewis and Tein. . . ."). For example, the Complaint describes how the Tribe disobeyed clear compulsion orders issued by both Judge Thornton and Judge Cooke to delay production of responsive loan documents – until after the final evidentiary hearing in *Bermudez* on the Tribe's perjury allegations against Lewis Tein. A-15 at ¶ 43; A-20-21 at ¶¶ 49-50. Many of the Tribe's criminal acts occurred during the lead-up to the *Bermudez* hearing and were designed to obstruct it, including:

- firing its Senior Accountant Jodi Goldenberg for refusing to commit perjury, A-42 at ¶ 91(b);
- retaliating against its Vice-Chairman Jasper Nelson for testifying truthfully, A-43 at ¶ 91(c);
- shredding loan documents in violation of two court orders, A-16 at ¶ 44;
- hiding loan documents in violation of two court orders, A-16-20 at ¶¶ 44-47, 49;
- suborning perjury from Jimmie Bert in and out of court, A-23 at ¶ 53; and

- making a false emergency 911 call, obstructing the subsequent police investigation and tampering with witnesses, A-41 at ¶ 91(a).

The Tribe's truculence offends justice. This Court squarely held that the Tribe waived sovereign immunity over compliance with a subpoena seeking documents concerning the Tribe's core allegations (the "fraudulent loan scheme") against Lewis Tein. Instead of the complete and truthful response required by a subpoena with which this Court ordered compliance, the Tribe obstructed the subpoena. It falsely claimed that no responsive documents existed and then orchestrated a criminal cover-up. Now, the Tribe literally claims it should be immune from the consequence of that obstruction. ***The logical consequence of the Tribe's argument is that the Tribe can waive immunity from a subpoena, feign compliance with this Court's mandate enforcing the waiver, affirmatively obstruct that mandate by repeated acts of perjury and evidence-tampering, and suffer zero consequences***.

The Tribe here argues that this Court's opinion applies only to the narrow act of responding to the *Bermudez* subpoena. This argument fails for multiple reasons. First, as discussed above, the Tribe did not simply respond to the subpoena after being ordered to do so; rather, it flouted that subpoena by numerous predicate criminal acts over an extended period of time. Second, as also discussed above, the Tribe prosecuted its malicious lawsuits and committed its criminal acts

against Lewis Tein contemporaneously and in concert with the Tribe's obstruction of the *Bermudez* subpoena. Indeed, the trial court observed that even when the Tribe first injected its checks and allegations into the *Bermudez* case, it was "obviously planning" to sue Lewis Tein. A-360. Third, this Court broadly found that the Tribe's "conduct" waived its immunity. This Court did not cabin the waiver. Indeed, there is simply no way to square the Tribe's argument with the clear command of this Court's holding. *See Bermudez*, 92 So.3d at 235 ("The only plausible legal conclusion that can be drawn from the actions of Mr. Roman and the Tribe in this case is the one made by the trial court—the Tribe's and Mr. Roman's conduct constituted a clear, explicit, and unmistakable waiver of the Tribe's claim to sovereign immunity.").

The Tribe's misplaced argument that Lewis Tein's reputations "remained constant" and their injuries are "unfounded" (Initial Brief at pp. 21-22) should be disregarded. It was not raised before the trial court; it relies on purported facts that are not in the record (*e.g.*, the content of the "Super Lawyers" website); and it is irrelevant to the issue of sovereign immunity. Indeed, the recovery of attorneys' fees already paid to defend these bad faith cases hardly leaves Lewis Tein's "hands . . . already filled." Initial Brief at p. 22.

Moreover, the argument simply ignores the damages alleged in the Complaint (which must be taken as true at the motion to dismiss stage), including

the catastrophic loss of clients and loss of referrals from lawyers and general counsels, the meteoric drop in income to the firm, the resignation of every single one of its many associates, the devastating toll on their home lives, not to mention the lasting damage to their professional reputations (a lawyer's most precious asset) caused by the Tribe's malicious and bad faith conduct. A-46-48 at ¶¶ 99-105.

Finally, it is also worth observing that the Tribe sued Lewis Tein for over $84 million and invoked the court's equitable powers, seeking pre-judgment injunctive relief including the appointment of a receiver, personal asset freezes and disgorgement remedies against the law firm. A-209. Had the Tribe been successful in overwhelming Lewis Tein and misleading state and federal trial and appellate judges, and thereby won its lawsuits or even just the pre-judgment injunctions, could the Tribe seriously contend it would be immune from the consequences?

II. THIS COURT'S *BERMUDEZ* DECISION AND THE TRIAL COURT'S ORDER ARE CONSISTENT WITH NUMEROUS SIMILAR DECISIONS.

Numerous courts in other jurisdictions have deemed a tribe's affirmative litigation conduct, such as filing lawsuits or even less, to constitute an "express" waiver of sovereign immunity.

A. It is Well-Settled that Tribes Can Waive Sovereign Immunity by Litigation Conduct.

A tribe can waive tribal sovereign immunity by conduct. There is no requirement that a tribe issue a formal statement, employ "talismanic phrases," "use magic words," or even use the words "sovereign immunity." *See C & L Enters. Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 420-21 (2001) (finding "clear" waiver because tribe agreed to arbitrate and quoting the "cogent observation" of the Seventh Circuit in *Sokaogon* that the words "sovereign immunity" need not even be used for a waiver to be clear); *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Associates, Inc*., 86 F.3d 656, 660 (7th Cir. 1996) (Posner, J.) (reasoning that "[n]o case has ever held" that for a waiver "to be deemed explicit" it "must use the words 'sovereign immunity'"); *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 25 (1st Cir. 2006) (finding waiver and allowing a state search warrant to be executed on tribal land, observing that: "An Indian tribe's sovereign immunity may be limited by either tribal conduct (*i.e.,* waiver or consent) or congressional enactment . . . . [T]here is no requirement that talismanic phrases be employed. Thus, an effective limitation on tribal sovereign immunity need not use magic words.").

In a case like this one involving a "history of abuses by the Tribe and its attorney," the U.S. Court of Appeals for the Eighth Circuit found that a tribe had waived its sovereign immunity by filing suit to resolve a property dispute. *See*

Rupp. v. Omaha Indian Tribe, 45 F.3d 1241, 1246 (8th Cir. 1995). As we argue here, that court reasoned that a contrary result "effectively encourages the Tribe's flagrant disrespect of the court's authority and orders." *Id*. at 1246. As the court put it:

> We confront here special circumstances striking at the core of the effective administration of justice. ***The history of abuses by the Tribe and its attorney leading to the dismissal of the Tribe's complaint is especially egregious.*** To hold, as the Tribe argues, that its consent to the counterclaims was conditioned upon the continuing vitality of its quiet title action ***effectively encourages the Tribe's flagrant disrespect of the court's authority and orders.*** The Tribe's original consent to the district court's jurisdiction to resolve all claims in the disputed lands is binding upon it. It cannot revoke its consent because it disagrees with decisions it authorized the district court to make by virtue of its filing suit. Additionally, allowing the Tribe to revoke its consent to suit allows them to disregard the district court order dismissing its suit as a discovery sanction.

Id. (emphasis added; citation omitted).

The Tribe attempts to distinguish *Rupp* by arguing that Lewis Tein relies on dicta from the opinion and that the decision dealt with counterclaims against the tribe involved. Initial Brief at pp. 14-15. As the quoted material from the decision above shows, however, it is not mere dicta. In addition, the district court in *Rupp* had dismissed the tribe's complaint as a sanction for its misconduct, so the case proceeded only on the non-tribe party's counterclaims. Lewis Tein's claims here are comparable to counterclaims and arise out of the very actions being taken by

the Tribe in the underlying lawsuits. Indeed, the trial court remarked that "[t]he Tribe conceded at oral argument that Lewis Tein could have filed counterclaims to the suits brought by the Tribe." A-297. Malicious prosecution is simply a cause of action that cannot be brought as a counterclaim because one of its essential elements requires a bona fide conclusion on the merits in favor of the wronged party before the claim can be brought. And as for its claim under the Florida Civil Remedies for Criminal Practices Act, Lewis Tein was not aware of the Tribe's criminal conduct until after the pleadings had closed in each of the cases.

As another example, the U.S. Court of Appeals for the Ninth Circuit found "express" waiver of a tribe's sovereign immunity by virtue of its having filed a claim in a bankruptcy case. *See In re White*, 139 F.3d 1268, 1272-1273 (9th Cir. 1998) (holding that tribe's filing a bankruptcy claim constituted an "express – not implied" waiver, reasoning that "[l]ike any creditor" the tribe "must abide by the consequences of choosing to assert a claim . . . and cannot reclaim immunity just because the case took a turn that was not to its liking") (citations omitted); *see also Elem Indian Colony of Pomo Indians v. Ceiba Legal, LLP*, 2017 WL 467839, at *2 (N.D. Cal. Feb. 2, 2017) ("Nor can [the Indian tribe] bring its claims to court for adjudication and then 'reclaim immunity just because the case took a turn that was not to its liking.'") (quoting *In re White*). And the California Court of Appeals

deemed a tribe's filing a lawsuit claiming funds held by the state gambling commission to be an "express" waiver of sovereign immunity:

> [T]he Tribe is the *plaintiff* that instituted this action, and it therefore affirmatively chose to submit to the jurisdiction of the superior court. By affirmatively choosing to make itself a plaintiff in a litigation, the Tribe expressly waived its immunity and consented to all of the normal obligations that go along with participating as a plaintiff in a litigation.

California Valley Miwok Tribe v. Calif. Gambling Control Comm., 2016 WL 3448362, at *4 (Cal. Ct. App. June 16, 2016) (unpublished) (emphasis in original).

Indeed, waivers of tribal sovereign immunity have been found for litigation conduct far more benign than the Miccosukee Tribe's multiple malicious prosecutions here. In *United States v. State of Oregon*, 657 F.2d 1009, 1015 (9th Cir. 1981), for example, the Ninth Circuit held that a tribe's intervening in an equity action to protect its fishing rights "assumed the risk" of adverse rulings in related equity proceedings and "that the Tribe itself would be bound by an order it deemed adverse." In another case, the Ninth Circuit also found that a tribe's voluntary disclosure of documents into ongoing litigation constituted an express waiver of tribal immunity. *See United States v. James*, 980 F.2d 1314, 1320 (9th Cir. 1992) ("The Quinault Indian Nation cannot selectively provide documents and then hide behind a claim of sovereign immunity when the defense requests different documents from the same agency.").

Similarly, one federal court recently found that a tribe expressly waived sovereign immunity to resist submitting to depositions merely by voluntarily submitting declarations to the court with its amicus brief. *See Knox v. U.S. Dept. of the Interior*, 2012 WL 465585, at *1 (D. Idaho Feb. 13, 2012). Another found an express waiver requiring compliance with a subpoena just by appearing in court through counsel as a non-party and making an affirmative argument. *See United States v. Snowden*, 879 F. Supp. 1054, 1056-67 (D. Or. 1995).

The Tribe repeatedly cites the U.S Supreme Court's decision in *Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe of Oklahoma*, 498 U.S. 505 (1991). Initial Brief at pp. 7, 12, 13, 15. The holding of that case, however, was far afield from what is at issue here: "We conclude that under the doctrine of tribal sovereign immunity, the State may not tax [sales of goods occurring on land held in trust for a federally recognized Indian tribe] to Indians, but remains free to collect taxes on sales to nonmembers of the tribe." *Id.* at 507. Moreover, the suit brought by the tribe in that case sought to enjoin the State from collecting the taxes. *See id.* at 507-08. The Supreme Court held that bringing such a lawsuit – which, in effect, sought to confirm the existence of the tribe's sovereign immunity from the levy of the taxes in the first place – did not constitute a waiver of the very sovereign immunity it sought to protect.

The tribe's lawsuit in *Oklahoma Tax Commission* thus bears little resemblance to the multiple bad faith lawsuits brought by the Miccosukee Tribe here, which sought not to defend their sovereign immunity but sought affirmatively to use the state and federal court system to destroy Lewis Tein through the imposition of ruinous damages and sought to achieve that end through multiple acts of misconduct. Indeed, the same can be said for all of the cases the Tribe cites at pages 16-17 of its Initial Brief, none of which involved intentional off-reservation torts.[4]

The Tribe also relies on a Connecticut case, *Beecher v. Mohegan Tribe*, 918 A.2d 880 (Conn. 2007), for the proposition that a malicious prosecution claim

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[4] *See Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 790 F.3d 1000 (10th Cir. 2015) (state could not prosecute tribal members for offenses that occurred on tribal lands); *Lewis v. Norton*, 424 F.3d 959 (9th Cir. 2005) (tribe had sovereign immunity on claim by rejected tribal applicants for membership in tribe); *McClendon v. United States*, 885 F.2d 627 (9th Cir. 1989) (claim for breach of lease agreement involving lease on tribal lands); *Navajo Nation v. Urban Outfitters, Inc.*, 2014 WL 11511718 (D. N.M. Sept. 19, 2014) (Lanham Act claim by tribe against retailers and counterclaim seeking to cancel tribe's trademark); *Quinault Indian Nation v. Comenout*, 2015 WL 1311438, at *1 (W.D. Wash. Mar. 23, 2015) (dispute between tribe and tribal member where member counterclaimed that tribe wrongfully denied him "of a right to have an interest in land he leased from a fellow tribal member"); *Mashantucket Pequot Gaming Enter. v. CCI, Inc.*, 12 Conn. L. Rptr. 69 (Conn. Super. Ct. 1994) (unpublished) (dispute between tribe and computer services vendor in connection with establishing payroll and other business account for tribe's casino); *Dacotah Properties-Richfield, Inc. v. Prairie Island Indian Community*, 520 N.W.2d 167 (Minn. Ct. App. 1994) (tribal employee's counterclaim for breach of employment agreement).

against a tribe is barred by sovereign immunity. That non-binding case has never subsequently been cited by any other court for this proposition. In fact, it has never been cited at all outside of Connecticut. In any event, *Beecher*'s holding relies on dictum from a footnote to a Tenth Circuit case, which on closer reading is taken out of context. *See Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 (10th Cir. 1982). Indeed, the very next sentence of that footnote suggested that a "malicious prosecution" claim might be "premature" until the merits of the tribe's suit had been determined. *Id*. at 1345 n. 15.

Beecher also specifically distinguished its facts from our circumstance, where "the vexatious litigation claim is akin to the enforcement of state criminal laws." *Id*. at 887. Further distinguishing its facts from ours, *Beecher* observed that the plaintiffs "offer no other grounds upon which to conclude that . . . the defendant waived . . . sovereign immunity." *Id*. at 886. Finally, *Beecher* addressed a malicious prosecution claim that was beyond frivolous. Previously, the Mohegan Tribe had sued Beecher, a former employee, to enjoin his threat to divulge the Tribe's confidential information on the eve of a valuable negotiation. Almost immediately, Beecher ***agreed to the injunction***. Then, ***after agreeing to the injunction***, Beecher sued the Tribe, claiming that the injunction claim was "malicious." Even if *Beecher* had any remaining relevance, the Miccosukee

Tribe's waiver here is beyond its reach. As this Court noted in *Bermudez,* "the application of Tribal sovereign is a fact-specific inquiry." 92 So.3d at 235.

B. The Tribe's Answer and the Eleventh Circuit's Opinion in this Case Also Support Waiver.

The Court need not look further than its prior ruling to affirm the trial court's order. The Tribe's subsequent litigation conduct, though, also supports waiver in several respects.

First, knowing that this Court had decided that the Tribe had waived sovereign immunity, the Tribe not only continued to prosecute its lawsuit in the trial court (the First State Court Action before Judge Thornton), but also filed its bad faith Federal Court Action (and amended its complaint twice) and filed another new lawsuit in the trial court (the Re-Filed State Court Action before Judge Bailey). That third lawsuit was filed even after this Court had affirmed summary judgment against the Tribe's first lawsuit (the First State-Court Action), expressly observing that its expert could not identify a single fraudulent or excessive invoice. *Miccosukee Tribe*, 165 So.3d at 12.

Second, the Tribe specifically elected not to invoke sovereign immunity in the Circuit Court. Lewis Tein asserted counterclaims (for unpaid legal bills) against the Tribe in its lawsuit the original State Court Action. Consistent with this Court's holding five months earlier that the Tribe had waived sovereign immunity

on these same facts, the Tribe asserted ten affirmative defenses to Lewis Tein's claims; none raised sovereign immunity. *See* A-372-379.

Third, the United States Court of Appeals for the Eleventh Circuit also observed that "the Tribe assert[ed] no claims of sovereign immunity" in prosecuting the Federal Court Action against Lewis Tein. *See Miccosukee Tribe v. Cypress*, 814 F.3d 1202, 1208–09 (11th Cir. 2015) ("First, tribes enjoy an affirmative defense of sovereign immunity as to many civil actions, subject to the limitation that Congress maintains plenary authority to restrict tribes' sovereign immunity. . . . And tribes, of course, may waive this immunity. . . . ***Here, the Tribe asserts no claims of sovereign immunity***; the Tribe seeks entry into federal court to press its RICO claims . . . .") (emphasis added).

In short, this Court's decision in *Bermudez* was correctly followed by the lower court. The fact that the Tribe, in the face of that holding, made the decision to engage purposefully in multi-jurisdictional litigation and declined to assert sovereign immunity as a defense in either state or federal court simply underscores the significance of this Court's ruling.

III. THE TRIBE'S POLICY-BASED ARGUMENTS ARE OVERBLOWN.

The Tribe also makes a series of policy-based arguments in an effort to paint a picture that affirming the trial court's Order will "severely erode" the doctrine of sovereign immunity and "open the floodgates" to lawsuits against tribes. Initial Brief at p. 27. These arguments are simply overblown.

First, the Tribe argues that if this Court affirms the trial court's Order, "the long-standing doctrine of tribal sovereign immunity will be weakened beyond recognition" and it will "forever alter[] the logic of litigation brought by or against Indian tribes." Initial Brief at pp. 9, 33. There is no reason, however, that this Court need do anything more than follow its own decision in *Bermudez* and limit its affirmance to the unique facts of this case. This is a waiver case only; contrary to the Tribe's argument (as well as the arguments in the Amicus Brief), Lewis Tein has not sought any sort of expansive statement on the doctrine of sovereign immunity.

Second, the Tribe argues that affirming the trial court's Order will inject a "fairness quotient" into the doctrine of sovereign immunity. Initial Brief at p. 30. The Tribe points to the enforcement of sovereign immunity even in cases where people are tragically injured on tribal property and left with no remedy. But this is not a situation where Lewis Tein intentionally ventured into the Tribe's sovereignty and met an ill fate (as in *Furry* and *Miller*, *see* Initial Brief at pp. 19-

21). Nor is it even a situation where the Tribe negligently injured someone in activity that was by necessity off-reservation. To the contrary, this is a situation where the Tribe, after deliberation, intentionally and repeatedly reached outside of its sovereignty, its borders and its own tribal courts, and manipulated Florida's state and federal court systems in order to inflict permanent harm on Lewis Tein.

Third, the Tribe argues without citation to any evidence that if the trial court's Order is affirmed, government relations "will suffer," economic intercourse with non-Indian society will be "potentially limit[ed]," and tribes "will be reluctant" to participate in the U.S. legal system. Initial Brief at p. 31. If the effect of the trial court's Order is to make Indian tribes reluctant to flout the mandate of an appellate court, initiate multiple bad-faith lawsuits, and commit repeated criminal acts in the state and federal court systems ranging from perjury to witness tampering to fabricating evidence, all with the intention of destroying the careers of respected professionals – then it is hard to suggest that is a negative.

Fourth, the Tribe argues that affirming the trial court's Order is a "slippery slope" that will allow later courts to "stretch the holding" to any pleading "simply by alleging past bad faith or egregious conduct." Initial Brief at p. 32. The facts and circumstances of this case, however, truly are unique. The Tribe's conduct here was no isolated incident. Here we have three lawsuits and a perjury proceeding, litigated in state and federal trial and appellate courts, including this

Court and the Florida Supreme Court, with thousands of filings and hundreds of hearings, spanning almost five years, all expressly pre-authorized by a Tribe-wide vote, and all pursued after and in the teeth of this Court's 2012 waiver ruling.

Nor are these mere allegations. The Tribe's bad faith (not just its counsel's) is not merely alleged; it has been determined as a fact in published sanctions decisions by state and federal judges after painstaking evidentiary hearings. It has likewise been determined by The Florida Bar, which found probable cause and filed charges of unethical conduct against counsel for Bermudez and the Tribe's two lead attorneys. A-25, 40, 45 at ¶¶ 56, 90, 94. And as for the Tribe itself (as distinguished from its counsel) the Circuit Court found that the "Tribe's representatives attended many hearings," that "[n]umerous Tribe elected officials . . . were deposed," and that its chairman testified in federal court as the person with the most knowledge of the facts. *Miccosukee Tribe of Indians v. Lewis*, 2015 WL 8665975 at *3 (Fla. Cir. Ct. Dec. 12, 2015). Thus, the court found that, apart from its counsel, "the Tribe . . . proceeded even though it knew or should have known the claims were not supported by the facts." *Id*. at *3.

Fifth, the Tribe argues that affirming the holding will "perversely incentivize" litigants against tribes to move for sanctions or allege bad faith in order to preserve future remedies against the tribe. Initial Brief at p. 32. That argument, however, ignores the fact that lawyers are bound by a variety of rules

(*e.g.*, Fed. R. Civ. P. 11, Fla. Stat. § 57.105), not to mention the courts' own supervision, before they can move for sanctions or allege bad faith conduct. To suggest that lawyers will simply disregard these rules as well as their professional ethics when an Indian tribe is an adversary paints a dim picture of our profession.

Finally, the doomsday prophesizing employed by the Tribe works both ways. Lewis Tein could equally argue that failing to affirm the trial court's Order could lead to a parade of horribles. It could lead Indian tribes to act with utter impunity in the state and federal court systems, allowing them to flout the rules that govern every other litigant. It could lead to a "slippery slope" of incentivizing vindictive and malicious lawsuits by tribes. But, frankly, those scenarios are no more realistic than those imagined by the Tribe.

The fundamental point remains that, as this Court has observed, "the application of Tribal sovereignty is a fact-specific inquiry." *Bermudez*, 92 So.3d at 235. This case truly is – one hopes – unique. Affirming the trial court's Order should lead to nothing more than a fact-specific determination that sovereign immunity, otherwise alive and well, was waived by this deliberate, orchestrated, prolonged and multi-faceted course of extraordinary and egregious conduct.

CONCLUSION

In clear language, this Court has already held that the Tribe waived sovereign immunity by the very conduct that underpins this case. What is more, faced with this Court's ruling, the Tribe flagrantly violated it, continued to prosecute the perjury proceeding, continued to prosecute two of its bad faith lawsuits against Lewis Tein, filed a third, and committed numerous criminal acts designed to obstruct each one of those proceedings. The lower court properly followed this Court's decision in *Bermudez*. Accordingly, the trial court's Order denying the Tribe's motion to dismiss based on tribal sovereign immunity should be affirmed.

Respectfully submitted,

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CERTIFICATE OF TYPE SIZE AND STYLE

Appellees certify that this Answer Brief complies with the type size and font requirements and the font is in Times New Roman 14-point typeface, in compliance with Rule 9.210(a)(2).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on February 17, 2017, I electronically filed the foregoing document with the Clerk of Court. I also certify that the foregoing document is being served this day by electronic mail on the following:

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