UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
Fort Myers Division

Case No. 2:20-cv-00978-JLB-MRM

EVANS ENERGY PARTNERS, LLC,

Plaintiff/Petitioner,

v.

SEMINOLE TRIBE OF FLORIDA, INC.,

Defendant/Respondent.
_____/

DEFENDANT SEMINOLE TRIBE OF FLORIDA, INC.'S REPLY IN FURTHER SUPPORT OF ITS RULE 12(b)(1) AND 12(b)(6) MOTION TO DISMISS THE COMPLAINT

Peter W. Homer, Esq.
Howard S. Goldfarb, Esq.
Attorneys for Defendant
Seminole Tribe of Florida, Inc.
1200 Four Seasons Tower
1441 Brickell Avenue
Miami Florida 33131
Phone: (305) 350-5163
Fax: (305) 372 2738

Pursuant to Court's April 28, 2021 Order [D.E. 24], Seminole Tribe of Florida, Inc. ("STOFI") hereby replies in further support of its Rule 12(b)(1) and 12(b)(6) motion to dismiss (the "Motion") [D.E. 12] the Complaint.

I. MEMORANDUM OF LAW.

A. Dismissal for lack of subject matter jurisdiction is warranted.

1. EEP has not satisfied its burden to excuse tribal exhaustion, which requires dismissal of EEP's claim for declaratory relief.

Evans Energy Partners, LLC ("EEP") does not dispute in its Response [D.E. 25], and thus concedes, that its refusal to appear before the Tribal Court was intentional. Notwithstanding its gamesmanship, EEP claims it can supposedly avoid its obligation to exhaust tribal remedies because it is supposedly "plain that no federal grant provides for tribal governance over nonmember EEP" and it is supposedly "otherwise clear that the Tribal Court lacks subject matter jurisdiction." Compl., ¶ 21. EEP's argument is meritless.[1]

[1] EEP first "urges" that it be excused from tribal exhaustion because "there is no pending tribal court action" and cites for this proposition *Garcia v. Akwesasne Housing Authority*, 268 F. 3d 76 (2d. Cir. 2001). As a threshold matter, *Garcia* is factually inapposite because, unlike here, there was *never* a tribal court action. *See Garcia*, 268 F.3d at 80. Nonetheless, the wealth of authority, including from courts in the Eleventh Circuit, explicitly obligates EEP to exhaust tribal remedies whether or not a tribal court proceeding is pending. *See Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 921 (9th Cir. 2008) ("the absence of any ongoing litigation over the same matter in tribal courts does not defeat the tribal exhaustion requirement.") (internal quotations and modifications omitted); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 31 (1st Cir. 2000) ("this prudential doctrine has force whether or not an action actually is pending in a tribal court."); *United States v. Tsosie*, 92 F.3d 1037, 1041 (10th Cir. 1996) ("[T]he exhaustion rule does not require an action to be pending in tribal court."); *Allman v. Creek Casino Wetumpka*, No. 2:11CV24-WKW, 2011 WL 2313706, at *4 (M.D. Ala. May 23, 2011), *report and recommendation adopted*, No. 2:11-CV-24-WKW, 2011 WL 2313701 (M.D. Ala. June 13, 2011) ("The exhaustion rule is applicable regardless of whether an action is currently pending in tribal court.").

Homer Bonner Jacobs Ortiz, P.A.
1200 Four Seasons Tower | 1441 Brickell Avenue | Miami Florida 33131
305 350 5100 | www homerbonner.com

Courts have "taken a strict view of the tribal exhaustion rule," and thus the exceptions are "applied narrowly." *Norton v. Ute Indian Tribe of the Uintah & Ouray Rsrv.*, 862 F.3d 1236, 1243 (10th Cir. 2017). EEP also bears the burden of making a "substantial showing" of eligibility under its touted exceptions. *See Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1238 (10th Cir. 2014) (applying "substantial showing" standard concerning "plainly lacking" exception); *Sprint Commc'ns Co. L.P. v. Wynne*, 121 F. Supp. 3d 893, 902 (D.S.D. 2015).

As a threshold matter, it is dubious that EEP's touted "plainly lacking" exception has any applicability here, as courts that have applied this exception (and to STOFI's knowledge, no court in the Eleventh Circuit has done so) have done so where tribal court jurisdiction is predicated on *Montana*'s "main rule." *See Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1200 (9th Cir. 2013) (finding exception applicable where "it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule"); *State of Mont. Dep't of Transp. v. King*, 191 F.3d 1108, 1112-13 (9th Cir. 1999) ("*Montana*'s main rule is that absent a treaty or a federal law, a tribe has no civil regulatory authority over non-tribal members for activities on reservation land alienated to non-Indians"). However, as discussed in STOFI's Motion, tribal court jurisdiction exists over EEP under the *exceptions* to *Montana*, not its "main rule." Thus, EEP's touted exception is facially inapplicable. *See Grand Canyon Skywalk Dev., LLC*, 715 F.3d at 1203-04 ("The tribal court does not plainly lack jurisdiction because *Montana*'s main rule is unlikely

Homer Bonner Jacobs Ortiz, P.A.
1200 Four Seasons Tower | 1441 Brickell Avenue | Miami Florida 33131
305 350 5100 | www homerbonner.com

to apply to the facts of this case … Even if the tribal court were to apply *Montana*'s main rule, GCSD's consensual relationship with SNW or the financial implications of the agreement likely place it squarely within one of *Montana*'s exceptions and allow for tribal jurisdiction.").[2]

Nonetheless, even *assuming* arguendo that the "plainly lacking" exception is applicable here (it is not), EEP fails to satisfy is burden to avoid tribal exhaustion. "[T]he 'plainly lacking' exception to the exhaustion requirement does not apply when jurisdiction is 'colorable' or 'plausible.'" *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 898 (9th Cir. 2017), *as amended* (Aug. 3, 2017) (internal quotations omitted). Here, Tribal Court jurisdiction is unquestionably proper under both exceptions to *Montana*, exceeding the mere "colorable" or "plausible" standard.

The first *Montana* exception provides that "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers *who enter consensual relationships* with the tribe or its members*, through commercial dealing, contracts, leases or other arrangements*." *Montana v. United States*, 450 U.S. 544, 565 (1981) (citations omitted; emphasis added). This authority to regulate includes adjudicatory authority

[2] This limitation makes sense for two reasons. First, where jurisdiction is based on *Montana*'s "main rule" (i.e., under a treaty or specific federal law), the court should be able to quickly determine whether a specific federal grant of jurisdiction exists. *See Strate v. A-1 Contractors*, 520 U.S. 438, 459 n.14 (1997) ("When … it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana* 's main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct."). And second, to find otherwise would absurdly require the Court to first conduct a merits analysis of tribal court jurisdiction under the *Montana* exceptions to only then determine whether tribal exhaustion is necessary, which would "essentially eviscerate the comity doctrine and the reasoning behind it." *See Dish Network Corp. v. Tewa*, No. CV 12-8077-PCT-JAT, 2012 WL 5381437, at *9 n.12 (D. Ariz. Nov. 1, 2012).

Homer Bonner Jacobs Ortiz, P.A.
1200 Four Seasons Tower | 1441 Brickell Avenue | Miami Florida 33131
305 350 5100 | www homerbonner.com

over those same activities. *See Strate*, 520 U.S. at 453. Here, the underlying subject of the Tribal Judgment is that EEP entered into and breached its duties and obligations owed to STOFI under the Management Agreement and the Loan Agreement. These agreements, which each contain express dispute resolution provisions requiring disputes to be brought before the Tribal Court, constitute "consensual relationships" that satisfy the first *Montana* exception.

In the second *Montana* exception, STOFI retains inherent power to exercise civil authority over the conduct of non-Indians when that conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. Here, EEP's conduct concerning its breaches of its contractual and other duties owed to STOFI certainly satisfies this exception, particularly given STOFI's critical role in the Seminole Tribe. *MMMG, LLC v. Seminole Tribe of Fla., Inc.*, 196 So. 3d 438, 440 (Fla. 4th DCA 2016) ("STOFI's purpose is to engage in commercial enterprises for the economic betterment of its tribal members.").

EEP argues that "mere monetary interest" is not sufficient to confer jurisdiction under the second *Montana* exception, but this mischaracterizes STOFI's interest and role in the Seminole Tribe. STOFI and each of its members (constituting the entire Seminole Tribe) have a significant ongoing economic and political interest in the regulation of all of STOFI's business ventures and dealings, including the petroleum business at issue. Further, STOFI and each of its members has a significant interest in EEP's attempt to seek substantial assets from STOFI, to which EEP is not entitled, and which STOFI and the Seminole Tribe require for their health, welfare, and

Homer Bonner Jacobs Ortiz, P.A.
1200 Four Seasons Tower | 1441 Brickell Avenue | Miami Florida 33131
305 350 5100 | www homerbonner.com

economic security and independence. These interests unquestionably satisfy the second *Montana* exception. *See, e.g., Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 817 (9th Cir. 2011) (finding satisfaction of the second Montana exception where the "business venture itself constituted a significant economic interest for the tribe"). Accordingly, Tribal Court jurisdiction over EEP is indisputably "colorable" or "plausible" under both *Montana* exceptions.

EEP also erroneously argues the Management Agreement is supposedly an insufficient hook for Tribal Court jurisdiction because "[n]one of the activity to be done pursuant to the Management Agreement was to occur within Tribal land nor was the business to be carried out on Tribal property." Response, ¶ 32. As a threshold matter, the applicability of the *Montana* exceptions is not limited to activity occurring on tribal lands. The exceptions set forth by the Supreme Court nowhere contain such limiting language. *See Montana*, 450 U.S. at 565. In addition, where the parties (as they have here) voluntarily entered into arms-length contracts requiring the parties to bring disputes before the Tribal Court, the analysis of EEP's conduct is not confined to its physical location, even if off-reservation. *See F.T.C. v. Payday Fin., LLC*, 935 F. Supp. 2d 926, 939–40 (D.S.D. 2013) ("[I]n cases involving a contract formed on the reservation in which the parties agree to tribal jurisdiction, treating the nonmember's physical presence as determinative ignores the realities of our modern world that a defendant, through the internet or phone, can conduct business on the reservation and can affect the Tribe and tribal members without physically entering the reservation.").

Homer Bonner Jacobs Ortiz, P.A.
1200 Four Seasons Tower | 1441 Brickell Avenue | Miami Florida 33131
305 350 5100 | www homerbonner.com

Nonetheless, EEP's depiction of the pertinent jurisdictional "activities" concerning the Management Agreement as occurring off-reservation is false and contradicted by the Agreement's plain terms. The Management Agreement does not limit operations to off-reservation activity, and instead expressly discusses the operation of and tax savings to be obtained from "retail fuel stations on [the] reservation." *See* Management Agreement [Ex. A to Compl.], § 1.3. The tax savings discussed were to be generated from sales made through tribal trading posts, sales made to tribal members, and sales made for tribal vehicles all located on the reservation. The Management Agreement also provided for other operational activities to be conducted on the reservation, including approving budgets (§§ 3.2, 3.9), that the business would use STOFI-owned bank accounts, which are located on the reservation (§ 3.3), that credit facilities would be maintained (§ 4.7), and that capital and loans would be contributed as needed (§ 3.9.6). All of this activity is connected to the reservation. Similarly, the Management Agreement was negotiated and signed on tribal land by STOFI's President, and the actions supposedly giving rise to EEP's desired arbitration (i.e., the termination of the Management Agreement by STOFI's General Counsel) occurred on tribal lands, as did other aspects of the dispute before the Tribal Court, including EEP's other torts and breaches.

EEP's false depiction of the pertinent jurisdictional activities as being off-reservation is also contradicted by EEP's own pleadings. Specifically, EEP acknowledges the anticipated tax savings from reservation operations as a reason why EEP allegedly entered into the transaction. *See* Compl., ¶ 16 (alleging that the "joint

Homer Bonner Jacobs Ortiz, P.A.
1200 Four Seasons Tower | 1441 Brickell Avenue | Miami Florida 33131
305 350 5100 | www homerbonner.com

venture would provide significant capital and tax advantages that would not be otherwise available to EEP's operations."); ¶ 19(c) ("STOFI would not be required to pay certain fuel taxes that would provide it with an economic advantage over other whole fuel distributors"). Similarly, EEP alleges that "[s]overeign immunity status [would exist] that would shield the company from liabilities," *Id.*, ¶ 19(a), and such immunity is naturally derived from STOFI's reservation activities.

EEP in its Response also conveniently ignores that the Tribal Judgment concerns *other claims* beyond whether STOFI supposedly owed a fee under the Management Agreement, and that these other claims serve as independent grounds for Tribal Court jurisdiction. These other claims include EEP's failure to pay monies owed under the Loan Agreement, which includes a dispute resolution provision requiring disputes to be resolved by the Tribal Court, was negotiated and signed on the reservation, and the proceeds of which were disbursed by STOFI (and were to be paid back to STOFI) on the reservation. The Loan Agreement is also expressly intertwined with the terms of the Management Agreement, which allows the deduction of delinquent loan payments from monies otherwise owed to EEP. *See* Loan Agreement [Ex. B to Petition for Declaratory Relief and Damages, at Ex. B to Compl.], § 5. The Tribal Judgment also concerns STOFI's claim against EEP for submitting false expense reports, which EEP submitted for payment to STOFI on the reservation, which were paid by STOFI on the reservation.

Thus, whether the jurisdictional analysis concerns the operation of the petroleum business, EEP's specific wrongdoing, EEP's general dealings with STOFI,

Homer Bonner Jacobs Ortiz, P.A.
1200 Four Seasons Tower | 1441 Brickell Avenue | Miami Florida 33131
305 350 5100 | www homerbonner.com

or any combination thereof, the Tribal Court's exercise of jurisdiction over EEP is unquestionably "colorable" or "plausible." EEP was therefore required to first exhaust its tribal remedies before filing suit. *See Marceau*, 540 F.3d at 920 ("Exhaustion of tribal remedies is 'mandatory' … [A] district court has no discretion to relieve a litigant from the duty to exhaust tribal remedies prior to proceeding in federal court.") (internal citations omitted).

Accordingly, for all these reasons and those set forth in the Motion, the Court should dismiss Count I for failure to exhaust tribal remedies.

2. The Court lacks independent federal jurisdiction over EEP's alleged claim under § 4 of the FAA, which should be dismissed.

As discussed in the Motion, the FAA is non-jurisdictional and therefore under the "look through" analysis required by *Vaden v. Discover Bank*, 556 U.S. 49 (2009), the Court must first assess "*the substantive dispute* between the parties, not the arbitrability issue actually to be decided by the district court." *Cmty. State Bank v. Strong*, 651 F.3d 1241, 1255 (11th Cir. 2011) (italics in original; underscore added). Here, such analysis reveals EEP's alleged claim under § 4 of the FAA (Count II) to be grounded entirely in an alleged state law breach of contract claim. Accordingly, the Court lacks subject matter jurisdiction over EEP's alleged § 4 claim because the underlying substantive dispute lacks sufficient connection to federal law.

EEP argues that notwithstanding these facts it should nevertheless be allowed to assert its alleged § 4 claim because it supposedly "arise[s] under federal law" under the "complete preemption" doctrine and because the claim "implicate[s] significant

Homer Bonner Jacobs Ortiz, P.A.
1200 Four Seasons Tower | 1441 Brickell Avenue | Miami Florida 33131
305 350 5100 | www homerbonner.com

federal issues" pertaining to "tribal jurisdiction and enforceability of the arbitration clause." Response, ¶¶ 39, 44. EEP's arguments are baseless.

"Complete preemption" occurs when "the pre-emptive force of a [federal] statute is so 'extraordinary' that it converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987). "The Supreme Court has admonished that federal law should be found to completely preempt state law only in statutes with 'extraordinary' preemptive force." *Dunlap v. G&L Holding Grp., Inc.*, 381 F.3d 1285, 1291 (11th Cir. 2004) (internal quotations omitted); *Gulf-to-Bay Anesthesiology Associates, LLC v. United Healthcare of Florida, Inc.*, No. 8:20-CV-2964-CEH-SPF, 2021 WL 1718808, at *3 (M.D. Fla. Apr. 30, 2021) ("the Supreme Court has identified only three statutes that completely preempt related state-law claims"). This doctrine is inapplicable here, because EEP does not (and cannot) point to any federal statute that preempts EEP's underlying breach of contract claim.

EEP's additional argument that its breach of contract claim "implicate[s] significant federal issues" is also baseless. *Vaden* instructs that the Court may only entertain EEP's alleged § 4 claim if the underlying dispute could be litigated in federal court "save for the [arbitration] agreement." 556 U.S. at 66. Thus, EEP's touted issue concerning the "enforceability of the arbitration clause" is facially insufficient to confer federal jurisdiction. *See Cmty. State Bank*, 651 F.3d at 1255 (Court should not assess "the arbitrability issue actually to be decided by the district court").

Homer Bonner Jacobs Ortiz, P.A.
1200 Four Seasons Tower | 1441 Brickell Avenue | Miami Florida 33131
305 350 5100 | www homerbonner.com

Moreover, to the extent EEP's touted federal issue of "tribal jurisdiction" has any relationship to EEP's alleged § 4 claim, it is at best an *anticipated defense* by STOFI to that claim. However, EEP cannot rely on a defense to confer federal jurisdiction, including tribal immunity. *See Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 841 (1989) ("The possible existence of a tribal immunity defense … did not convert [the] claims into federal questions, and there was no independent basis for original federal jurisdiction") (internal citations omitted); *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 808 (1986) ("A defense that raises a federal question is inadequate to confer federal jurisdiction."); *Mobil Oil Corp. v. Coastal Petroleum Co.*, 671 F.2d 419, 422 (11th Cir. 1982) ("In order to determine whether the claim arises under the Constitution or laws of the United States, we look to the complaint unaided by anticipated defenses and with due regard to the real nature of the claim.").

Accordingly, for all these reasons and those set forth in the Motion, the Court should dismiss Count II for lack of subject matter jurisdiction.

3. EEP's argument for supplemental jurisdiction is unavailing.

EEP claims purported entitlement to supplemental jurisdiction over Count II because both of its alleged claims supposedly "form part of the same nucleus of facts" and "arise from the [Management] Agreement and involve the same facts, occurrences, witnesses and evidence." Response, ¶ 49. EEP is wrong. EEP's alleged claim for declaratory relief (Count I) raises legal and factual issues pertaining to the Tribal Court's jurisdiction over EEP and the underlying Tribal Court proceedings that resulted in entry of the Tribal Judgment. On the other hand, EEP's alleged claim under

Homer Bonner Jacobs Ortiz, P.A.
1200 Four Seasons Tower | 1441 Brickell Avenue | Miami Florida 33131
305 350 5100 | www homerbonner.com

§ 4 of the FAA (Count II) raises issues concerning the enforceability and scope of the Management Agreement's arbitration provision.

Thus, EEP's alleged § 4 claim does not sufficiently "derive" from the facts underlying its purported federal claim for declaratory relief. *See United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725, 86 S. Ct. 1130, 1138, 16 L. Ed. 2d 218 (1966) ("The state and federal claims must derive from a common nucleus of operative fact."). Moreover, even assuming *arguendo* that two the claims sufficiently derive from the same facts (they do not), EEP does not (and cannot) address that its request for supplemental jurisdiction contravenes *Vaden* by attempting to use a non-arbitrable federal question claim as a supposed jurisdictional hook to compel to arbitration a breach of contract claim that could not otherwise be properly maintained in federal court. EEP also does not (because it cannot) address the fact that the material differences and deficiencies in its alleged claims render supplemental jurisdiction inappropriate so that the Court should decline jurisdiction under the "exceptional circumstances" and "other compelling reasons" prongs of 28 U.S.C. § 1367(c)(4).

Accordingly, for all these reasons and those set forth in the Motion, the Court does not have, nor should it exercise, supplemental jurisdiction.

B. STOFI is immune from this proceeding under tribal sovereign immunity, which has not been waived.

In its Response, EEP does not (and cannot) meaningfully rebut STOFI's cited authority providing that STOFI cannot waive tribal immunity unless by express waiver that fully complies with STOFI's Charter and Bylaws and pledges specific property as

Homer Bonner Jacobs Ortiz, P.A.
1200 Four Seasons Tower | 1441 Brickell Avenue | Miami Florida 33131
305 350 5100 | www homerbonner.com

the limit of any liability. Nor does (or can) EEP meaningfully rebut that its touted waiver language contained in the Management Agreement fails to comply with STOFI's Charter and Bylaws. Indeed, EEP ignores entirely STOFI's cited authority and instead pins its waiver hopes on an erroneous interpretation of *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001). STOFI largely anticipated EEP's arguments and cited in its Motion a wealth of authority finding *C&L Enterprises* inapplicable where (like here) the alleged waiver is inconsistent with tribal governing documents, where the scope of the arbitration provision is narrow and does not concern "all disputes," and where the parties did not otherwise agree through choice of law to confer independent jurisdiction over any arbitral award.

EEP's attacks on STOFI's cited authority are unavailing.[3] EEP also erroneously attempts to minimize the importance of the Oklahoma choice of law provision central to *C&L Enterprises* by claiming here that the "FAA clearly governs this dispute" and that § 9 of the FAA ostensibly serves the same purpose. *See* Response, ¶ 70. This is not correct. Even assuming *arguendo* that the FAA "governs this dispute," the FAA does

[3] EEP argues *Churchill Fin. Mgmt. Corp. v. ClearNexus, Inc.*, 341 Ga. App. 798 (2017), supposedly contains "no analysis," but the court found "persuasive" the analysis in *Memphis Biofuels, LLC*, 585 F.3d 917 (6th Cir. 2009) that immunity waivers must be consistent with tribal governing documents. EEP then complains that *Lobo Gaming, Inc. v. Pit River Tribe of California*, No. C037661, 2002 WL 922136 (Cal. Ct. App. May 7, 2002) is "unpublished," but this Court is not bound by California publication restrictions and "federal courts may consider unpublished California opinions as persuasive authority" where binding authority is lacking. *See Am. Zurich Ins. Co. v. Country Villa Serv. Corp.*, No. 2:14-CV-03779-RSWL, 2015 WL 4163008, at *12 n.24 (C.D. Cal. July 9, 2015). And contrary to EEP's mischaracterization of *First Am. Casino Corp. v. E. Pequot Nation*, No. 541674, 2001 WL 950243, at *5 (Conn. Super. Ct. July 16, 2001), the court there did contrast the inapplicability of *C&L Enterprises* when an arbitration provision is narrow in scope instead of covering "all disputes," and further discussed the interplay that occurred in *C&L Enterprises* between the agreement concerning arbitral rules *and* application of the Oklahoma Uniform Arbitration Act ("OUAA"), which in combination rendered the tribe there to have consented to enforcement of arbitral awards.

not provide an independent basis for federal jurisdiction to allow enforcement of any arbitral award. For this reason, "the Eleventh Circuit has held that 'actions brought in federal court to confirm arbitration awards pursuant to section 9 of the FAA must demonstrate independent grounds of federal subject matter jurisdiction." *Sawgrass Mut. Ins. Co. v. Endurance Specialty Ins. Ltd.*, No. 4:16CV449-MW/CAS, 2017 WL 5992041, at *3 (N.D. Fla. Mar. 15, 2017) (quoting *Baltin v. Alaron Trading Corp.*, 128 F.3d 1466, 1470 (11th Cir. 1997)). Unlike here, the parties in *C&L Enterprises* agreed that Oklahoma law (and in turn the OUAA) would govern their arbitration provision, which in turn served as consent to the enforcement of any arbitral award and waiver of tribal immunity. This interplay, which does not exist in the instant action, renders *C&L Enterprises* inapplicable here.[4] EEP also relies in its Response on a number of inapposite and unhelpful authorities that do not support waiver of tribal immunity.[5]

Accordingly, for all these reasons and those set forth in the Motion, the Court should dismiss the Complaint in its entirety on grounds of tribal sovereign immunity.

[4] EEP's baseless criticism of *Equitas Disability Advocates, LLC v. Daley, Debofsky & Bryant, P.C.*, 177 F. Supp. 3d 197 (D.D.C.); *Muhammad v. Comanche Nation Casino*, No. CIV-09-968-D, 2010 WL 4365568 (W.D. Okla. Oct. 27, 2010); and *Housh v. Dinovo Investments, Inc.*, No. CIV.A. 02-2562-KHV, 2003 WL 1119526 (D. Kan. Mar. 7, 2013) is also premised on EPP's misunderstanding of the importance of the choice of law provision in *C&L Enterprises*.

[5] Unlike here, *Oglala Sioux Tribe v. C&W Enterprises, Inc.*, 542 F. 3d 224, 231 (8th Cir. 2008) "perceive[d] no ambiguity in the contract" and the tribe ostensibly waived immunity by appearing in arbitral proceedings, declining to object, and asserting counterclaims. The arbitration provision in *Big Valley Band of Pomo Indians v. Superior Court*, 133 Cal. App. 4th 1185 (2005) broadly covered "all disputes" and the tribe "concede[d]" that the provision "necessarily permits state court actions to compel compliance with the agreement to arbitrate." *Bank One, N.A. v. Shumake*, 281 F.3d 507, 515-16 (5th Cir. 2002), dismissed the complaint for failure to exhaust tribal remedies despite the presence of an arbitration agreement. *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006) did not involve an arbitration provision at all nor did it find waiver of tribal immunity.

Homer Bonner Jacobs Ortiz, P.A.
1200 Four Seasons Tower | 1441 Brickell Avenue | Miami Florida 33131
305 350 5100 | www homerbonner.com

C. The Court should dismiss Count II for failure to state a claim.

Under the plain terms of EEP's touted arbitration provision, STOFI is itself not subject to any arbitration,[6] and EEP's desired arbitration exceeds the extremely narrow scope of the arbitration provision.[7] Nevertheless, EEP inconsistently seeks here to compel STOFI to arbitrate the payment of an alleged fee under the long-since terminated Management Agreement. EEP nonsensically argues the term "and" in the phrase "terminating the Management Agreement *and* compelling the payment of the Termination Fee" should be construed to mean "or," and further claims "[t]here is nothing in the Agreement to suggest that the use of the word "and" … was meant to be used in the joint sense, as opposed to the several sense." Response, ¶ 85.

EEP's argument is baseless and conveniently ignores *the immediately preceding phrase* that gives the provision necessary context and provides that EEP may only initiate an arbitration "*for [the] sole and exclusive purpose* of terminating the Management Agreement *and* compelling payment of the Termination Fee …" (emphasis added). This "sole and exclusive" modifier makes clear the arbitration has "one and only"[8]

---

[6] The Management Agreement provides that "*in no event* shall the *Seminole Tribe of Florida, Inc.* or any of its other affiliated entities be named a party in *any arbitration* or court proceeding." Management Agreement, ¶ 7.13 (emphasis added). Instead, EEP is restricted to compelling a *different* entity, Seminole Energy, to participate in a limited arbitration proceeding: "Evans Energy's rights under this Section 7.13 shall be restricted to compelling *Seminole Energy* to participate in an arbitration proceeding for the express purpose set forth herein." *Id.* (emphasis added).

[7] The Management Agreement only allows for "Evans Energy to initiate binding arbitration … for [the] *sole and exclusive purpose* of terminating the Management Agreement *and* compelling payment of the Termination Fee …" *Id.* ¶ 7.13 (emphasis added). Thus, EEP must seek in arbitration to *both* terminate the Management Agreement *and* compel payment of any termination fee.

[8] "Sole" means "the one and only" and "exclusive" means "with no exceptions." *See* Bryan A. Garner, *A Dictionary of Modern Legal Usage*, 816 (2d ed. 1995) ("**sole** (= the one and only, single)";

HomeR BonneR JacobS OrtiZ, P.A.
1200 Four Seasons Tower | 1441 Brickell Avenue | Miami Florida 33131
305 350 5100 | www homerbonner.com

purpose, although EEP's erroneous interpretation obliterates this meaning. And while EEP brazenly argues that STOFI's plain language reading creates a supposed "absurd result," it is EEP's wild interpretation that absurdly allows EEP to seek a supposed multimillion dollar fee for an already terminated Management Agreement despite EEP having engaged in the myriad breaches, fraud, and other misconduct that is the subject of the Tribal Judgment.

Finally, EEP's reliance for this interpretation on *Chacon v. Philip Morris USA, Inc.*, 254 So. 3d 1172 (Fla. 3d DCA 2018) is misplaced. *Chacon* interpreted an earlier issued Third DCA opinion using a "series-qualifier" canon of statutory construction, which is inapplicable to interpreting plain language in an arm's length contract (like the one here). *Compare Chacon*, 254 So. 3d at 1176 with *Gold Crown Resort Mktg. Inc. v. Phillpotts*, 272 So. 3d 789, 792 (Fla. 5th DCA 2019), *reh'g denied* (June 5, 2019) ("The canons of construction cannot be used when the contract is unambiguous as there is no need for judicial construction"). Interpreting "and" to mean "or" does violence to the provision's plain language, which the Court should reject.[9]

Accordingly, the Court under Rule 12(b)(6) should dismiss Count II.

II. CONCLUSION.

As set forth herein and in the Motion, the Court should dismiss the Complaint.

"**sole and exclusive** is a legalistic REDUNDANCY."); *Id.* at 335 ("**exclusive** means 'with no exceptions' and should be used carefully.").

[9] *See MacDonald v. Pan Am. World Airways, Inc.*, 859 F.2d 742, 746 (9th Cir. 1988) (Kozinski, J., dissenting) ("As a linguistic matter, 'and' and 'or' are not synonyms; indeed, they are more nearly antonyms … when they stand alone, they have substantially different meanings with dramatically different effects. We give our language, and our language-dependent legal system, a body blow when we hold that it is reasonable to read 'or' for 'and.'") (emphasis in original).

Homer Bonner Jacobs Ortiz, P.A.
1200 Four Seasons Tower | 1441 Brickell Avenue | Miami Florida 33131
305 350 5100 | www homerbonner.com

Dated: May 12, 2021.

Respectfully submitted:

HOMER BONNER

1200 Four Seasons Tower
1441 Brickell Avenue
Miami Florida 33131
Phone: (305) 350-5163
Fax: (305) 372 2738

By: *s/Peter W. Homer*

Peter W. Homer, Esq.
Email: phomer@homerbonner.com
Florida Bar No.: 291250
Howard S. Goldfarb, Esq.
Email: hgoldfarb@homerbonner.com
Florida Bar No: 0016568

Counsel for Defendant
Seminole Tribe of Florida, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 12, 2021, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the below Service List via transmission of Notices of Electronic Filing generated by CM/ECF.

By: *s/Peter W. Homer*
Peter W. Homer

SERVICE LIST

Evans Energy Partners, LLC v.
Seminole Tribe of Florida, Inc.
Case No.: 2:20-cv-00978-JLB-MRM
United States District Court for the Middle District of Florida
Naples Division

Donald G. Peterson, Esq.
Yarnell & Peterson, P.A.
3431 Pine Ridge Road, Suite 101
Naples, FL 34018
Email: donpeterson@naples.law.com

Attorneys for Plaintiff/Petitioner Evans Energy Partners, LLC