No. 21-55217

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE ENGASSER, an individual,
Plaintiff,

v.

TETRA TECH, INC., a Delaware corporation,
Defendant-Third-Party-Plaintiff-Appellant,

v.

MECHOOPDA CULTURAL RESOURCE PRESERVATION ENTERPRISE,
Third-Party-Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California
No. 2:19-cv-07973-ODW-PLA
Hon. Otis D. Wright, II

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The contract at issue in this appeal plainly states that it may be enforced by "any court with competent jurisdiction." Those words have clear import: *both* parties to the contract may enforce its terms in any court with jurisdiction over the dispute. The fact that one of the parties to a contract containing that term is a sovereign means that party has consented to be sued. For that reason, the district court's decision must be reversed and the case must be remanded for trial.

Mechoopda Cultural Resource Preservation Enterprise's ("MCRPE") argument in support of affirmance hinges on a general reservation of sovereign immunity, which, according to MCRPE means that it did not "unequivocally express[]" its waiver. Under MCRPE's dogmatic view, a tribal entity can only waive its sovereign immunity if it states, in essence, "we waive our sovereign immunity." But the controlling authorities do not elevate form over function; it is enough to clearly express consent to suit. MCRPE did just that. Nothing more—no choice of law provisions, references to arbitration rules, or magic formulas—was necessary for the MCRPE to waive its sovereign immunity.

The district court's error—which MCRPE endorses—is that it elevates a generalized reservation of sovereign immunity over a specific agreement to judicial enforcement in a manner that entirely strikes the latter from the contract. The district court's obligation was to interpret the contract in a manner that gives effect to all of its terms, and it abdicated that responsibility. While MCRPE complains that Tetra Tech "creatively highlight[s]" the Dispute Resolution Provision ("DRP") in the parties' agreement, that is the mechanism the parties agreed to follow to resolve their disputes. That provision could not have greater relevance than it does here, where the parties have a concrete, unresolved dispute over the contract.

MCRPE tries to minimize the DRP precisely *because* it can be reconciled with the general reservation of sovereign immunity in a way that gives both effect. In short, while the Tribe reserved its sovereign immunity against all other claims and all other interested parties, by agreeing to the DRP, the Tribe consented to claims asserted by Tetra Tech for disputes arising from this particular contract. Having tied its argument to the district court's rationale, however, MCRPE does not

even attempt to explain away how this reading is unreasonable or inconsistent with federal law.

MCRPE negotiated and signed a valid and enforceable waiver of its sovereign immunity and should now face the consequences of refusing to honor its promises. This Court should vacate the District Court's order and remand for judgment on Tetra Tech's third-party claims.

II. ARGUMENT

A. The MCRPE's Interpretation of C & L Enterprise Grossly Misstates the Supreme Court's Holding and Rationale and Federal Precedent.

A sovereign need only state a clear consent to be sued to effectively waive its sovereign immunity. *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 422 (2001); *Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 660 (7th Cir. 1996); see also *Rosebud Sioux Tribe v. Val-U Const. Co. of S. Dakota, Inc.*, 50 F.3d 560, 563 (8th Cir. 1995). No magic words or incantations are necessary. If the plain text of an agreement shows an agreement to submit disputes for judicial resolution, the Court need not ask any other questions to find waiver.

MCRPE did just that when it agreed to a contractual provision that unambiguously creates an express right of action in court. *C & L Enterprises*, 532 U.S. at 422. "[W]hen states or the federal government waive sovereign immunity . . . they do not say they are waiving 'sovereign immunity'; **they create a right to sue**." *Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 660 (7th Cir. 1996) (emphasis added). By entering the PSA, MCRPE created a right to sue and must live up to it.

MCRPE's view is a stark departure from the controlling authorities that guide the Court's decision here. In its view, a tribe can only waive its immunity if it does so in a contract containing: (1) an arbitration clause; (2) observance of tribal laws and regulations; and (3) a forum selection clause. No authority—in MCRPE's brief or anywhere else—supports this position. This dogmatic approach, in which nothing less than an express waiver containing certain specified features effectively waives immunity, grossly misstates the standard.

1. *Arbitration is Not a Condition Precedent to a Waiver of Sovereign Immunity.*

MCRPE contends that the DRP is not an effective waiver of sovereign immunity because it does not contain an arbitration

agreement. It cites several cases in support, *C & L Enterprises*, *Sokaogon*, and *Rosebud*, but none supports its argument.

In *C & L*, the Supreme Court held that the tribe waived its sovereign immunity by committing to the contract's "dispute resolution regime"—a "regime with a ***real world objective***." *Id.* at 422 (emphasis added). While the contract in *C & L* included an arbitration clause, the Supreme Court *did not* limit its holding to contracts including arbitration provisions. In fact, the Court's rationale was far broader: once a tribe agrees to any sort of a dispute resolution regime—with or without arbitration—it agrees to participate, and face the consequences, of that process. "That regime has a real world objective; it is not designed for regulation of a game lacking practical consequences." *Id.*

In *Sokaogon*, Tushie-Montgomery Associates, Inc. ("TMI"), the Seventh Circuit held that "[w]hen states or the federal government waive sovereign immunity . . . they create a right to sue." *Sokaogon*, 86 F.3d at 660. "[T]he right to sue is conferred in so many words, **rather than by incorporation through a reference to the rules of the arbitration association**." *Id.* at 661 (emphasis added). Thus, an arbitration agreement that expressly permits the parties to enforce

their agreement in court waives the tribe's immunity through its consent to suit provision. *Id.*

In *Rosebud*, the Eighth Circuit likewise held that the Supreme Court "has never required the invocation of 'magic words' stating that the tribe hereby waives its sovereign immunity." 50 F.3d 560, 563. As long as the parties clearly manifest their intent to resolve disputes by participation in a dispute resolution regime, a tribe's waiver of immunity is effective. *Id.* at 563. The "simplicity" of the waiver language does not undermine its clarity or explicitness. *Id.*

The fact that the DRP does not contemplate arbitration is a distinction without a difference. The point in these decisions is not that arbitration waives immunity (although it does); the point is that the Tribe agreed to a dispute resolution process that expressly authorizes judicial intervention. This is precisely the scenario that the *C & L* Court recognized as a clear and unequivocal consent to suit. And, as *C & L* explains, the DRP is "not designed for regulation of a game lacking practical consequences." *C & L*, 532 U.S. at 422. Rather, the DRP gets its teeth from permitting suit when direct negotiations fail.

Taken together, *C & L*, *Sokaogon*, and *Rosebud* all make clear what MCRPE refuses to acknowledge in this case: a tribe waives its sovereign immunity simply by consenting to suit. Such a waiver is effective with or without an arbitration agreement. The MCRPE consented to suit if the dispute resolution process was unsuccessful, a clear waiver of immunity.

2. *The MCRPE Can Waive its Sovereign Immunity Without Following its Ordinance or the Tribe's Constitution.*

MCRPE further contends that the DRP does not qualify as a waiver because it was not granted in accordance with its enabling ordinance or the Mechoopda Tribe's Constitution. This argument is misleading, however, because waivers of tribal immunity are governed by federal, not tribal, law. The DRP plainly qualifies as a waiver under federal law.

"When a person has authority to sign an agreement on behalf of a state, it is assumed that the authority extends to a waiver of immunity contained in the agreement." Restat. 3d of the Foreign Relations Law of the United States, § 456, com. b. "[T]ribal immunity is a matter of federal law." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies,*

Inc. (1998) 523 U.S. 751, 759; C & L Enterprises, 532 U.S. at 421, fn. 3 ("Instructive here is the law governing waivers of immunity by foreign sovereigns.")

The case of *Smith v. Hopland Band of Pomo Indians* is instructive. 95 Cal. App. 4th 1, 10 (2002). In *Smith*, plaintiff entered into two contracts with the Pomo Indians for various architectural services. *Id.* at 3. The contracts, which were executed by the plaintiff and the tribal chairperson, contained an agreement to arbitrate pursuant to the Construction Industry Arbitration Rules of the American Arbitration Association, enforceable "in any court having jurisdiction thereof." *Id.* at 3-4. After a dispute arose over performance and payment, plaintiff sued the tribe for unpaid fees in California Superior Court. *Id.* The tribe filed a motion to quash service contending, among other things, that its tribal ordinance prohibited waivers of sovereign immunity without a separate resolution or other tribal ordinance that explicitly waived the tribe's sovereign immunity from suit. *Id.* at 4.

The Court of Appeal rejected the tribe's argument, relying heavily on the Supreme Court's holding in *C & L*. *Id.* at 10. The court found

that, "where . . . the person negotiating and signing the contract is authorized to do so, and the tribal council approves the contract, the question whether that act constitutes a waiver is one of federal law." *Id.* at 10. Under federal law, any person authorized to sign an agreement on behalf of a state is assumed to have authority to waive its immunity. *Id.* (citing Restat. 3d of the Foreign Relations Law of the United States, § 456, com. b; *C & L Enterprise*, 532 U.S. at 421, fn. 3). Since the Pomo tribal chairperson had actual authority to agree to the contracts, the tribal council was bound by the contract's terms and therefore waived its sovereign immunity. *Id.* at 10-12; *see also Warburton/Buttner v. Superior Court*, 103 Cal. App. 4th 1170, 1188-89 (citing *Smith v. Superior Court*, 95 Cal. App. 4th 1).

Here, MCRPE executed the PSA through Robyn Forristel, who MCRPE concedes had *actual* authority to execute the PSA on behalf of MCRPE. *See* Declaration of Robyn Forristel (ECF No. 34-4) (ER No. 317-351). Ms. Forristel, who is a member of the Tribal Council and was a Board Member of the MCRPE, had authority to negotiate and execute the PSA, and thus also had authority to waive MCRPE's sovereign immunity. Restat. 3d of the Foreign Relations Law of the United

States, § 456, com. b. Accordingly, by consenting to suit, the MCRPE waived its sovereign immunity under federal law.

In support of its position, MCRPE argues that *Memphis Biofuels, LLC v. Chicksaw Nation*, 585 F.3d 917, 922 (6th Cir. 2009)—a decision that bears no resemblance to this case—requires any waiver of tribal immunity to comply with the affected tribe's constitution and charter. (MCRPE's Answering Brief at p. 18). *Memphis* is inapposite. In that case, a biodiesel refining company contracted with an Indian tribe to have the tribe deliver diesel fuel and soybean oil to a company facility. *Id.* at 918. The company insisted on a contractual provision expressly waiving sovereign immunity and a "representation and warranty" that the tribe's waiver was valid, enforceable, and effective. *Id.* Importantly, the waiver did not include a right of action against the tribe. *Memphis Biofuels LLC v. Chickasaw Nation Industries, Inc.* 2008 WL 11318298, at *2 (W.D. Tenn. Aug. 13, 2008). Nor did it specify any of the type of claims that the company could pursue against the tribe in court. *Id.* Unlike this case, in contract negotiations, the tribe's counsel made clear that the tribe's board needed to approve any waivers of tribal immunity. 585 F.3d at 918-19. Ultimately, a representative of

the tribe signed the agreement, but without the board's approval of the waiver. *Id.* at 919. The Sixth Circuit held that the waiver did not qualify as an effective waiver of tribal immunity because the tribal member who signed the agreement did not obtain board approval. *Id.* at 922.

By contrast, in this case, the PSA includes an *express* consent to suit provision that allowed Tetra Tech to sue MCRPE in court. Under well-settled Supreme Court precedent, a tribe can waive its immunity by consenting to suit in court, with or without a governing board's separate approval or resolution. *See also* Restat. 3d of the Foreign Relations Law of the United States, § 456, com. b. ("When a person has authority to sign an agreement on behalf of a state, it is assumed that the authority extends to a waiver of immunity contained in the agreement."). The contract in *Memphis* contained no such provision; instead, it contained only a recital referencing an intent to waive immunity. *Memphis Biofuels LLC v. Chickasaw Nation Industries, Inc.* 2008 WL 11318298, at *2. The DRP is not a recital; it is a binding covenant between the parties for a dispute resolution procedure that includes judicial enforcement. Second, unlike the tribe in *Memphis*, the

MCRPE was represented by an MCRPE board member with *actual* authority to negotiate for, and bind, the MCRPE. There are no abstractions in the PSA and no issue whether the signatory had authority to bind the MCRPE to the waiver of immunity.

Federal law, not the MCRPE's regulations and ordinance, governs whether the MCRPE has waived its tribal immunity. Under the governing law, the DRP plainly qualifies as a valid waiver of sovereign immunity.

3. *A Waiver of Sovereign Immunity Need Not Identify a Particular Court with Competent Jurisdiction to be Valid.*

The MCRPE claims that the DRP's waiver of tribal immunity is ineffective for an additional reason: the agreement lacks a forum selection provision. But like its other arguments, the MCRPE does not support this contention with any relevant authority.

As noted in Tetra Tech's opening brief, the Seventh and Eighth Circuits hold that a tribe does not need to identify a specific court with jurisdiction over the relevant claims to waive its sovereign immunity. In *Sokaogon Gaming*, the Seventh Circuit found an agreement that required all "claims, disputes or other matters" arising out of the

contract to be "decided by arbitration in accordance with the [rules] . . . of the American Arbitration Association" a valid waiver of immunity, even though the agreement did not contain a forum selection provision. *Sokaogon*, 86 F.3d 656, 659. Similar to the DRP, the contract provided that the arbitration agreement was "enforceable in accordance with *applicable law* in *any court having jurisdiction*." *Id.* The court concluded that the tribe waived its immunity and found that "[t]here [was] nothing ambiguous about this language." *Id.*

In *Rosebud*, the Eighth Circuit found a waiver of sovereign immunity on a contract without a forum selection clause. The contract required "[a]ll questions of dispute under [the] Agreement . . . [to] be decided by arbitration" and deemed the parties "to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof." *Id.* Despite the parties' failure to specify the "federal or state court having jurisdiction thereof," the Eighth Circuit found that this agreement unequivocally waived the tribe's sovereign immunity.

Both *Sokaogon* and *Rosebud* were favorably cited by the Supreme Court in *C & L*. *C & L Enterprises*, 532 U.S. 411, 417 (citing *Val/Del,*

Inc. v. Superior Court, 703 P.2d 502, 565 ("[A]fter agreeing that any dispute would be arbitrated and the result entered as a judgment in a court of competent jurisdiction, we find that there was an express waiver of the tribe's sovereign immunity."); *id.* at 420, (citing *Sokaogon*, 86 F.3d at 659-60); *id.* at 422 (quoting *Rosebud*, 50 F.3d at 562).

The cases are clear: Tetra Tech and MCRPE did not need to negotiate a separate forum selection provision to waive MCRPE's sovereign immunity. The Tribe consented to be sued simply by agreeing in the DRP to create a right of action against MCRPE in a "court with competent jurisdiction." Nothing further was necessary.

4. *The DRP Qualifies as a Waiver of Sovereign Immunity Under C & L Enterprises*

In an attempt to further distinguish *C & L*, MCRPE contends that the facts of this case are more akin to those of *Miller v. Wright* and *Demontiney v. U.S. ex rel. Dep't of Interior*, two cases cited by the trial court below. Again, however, MCRPE merely repeats the same conclusions made by the trial court and fails to engage any of Tetra Tech's arguments. As stated in Tetra Tech's Opening Brief, both cases are readily distinguishable.

In *Demontiney*, the tribe entered into a contract for engineering services that expressly granted jurisdiction over contractual disputes to a tribal court, but also retained the tribe's general immunity. 255 F.3d at 803, 812. Unlike the DRP, the contract provided that the decision of the *tribe's governing body* would be final absent a determination from a "court of competent jurisdiction" of fraud, arbitrariness, capriciousness, or gross error. *Id.* And *unlike MCRPE*, the tribe in *Demontiney* did not agree to be sued in court. Instead, the contract only allowed suit before a tribal forum. The Ninth Circuit held that those contractual provisions could be construed to establish a waiver of sovereign immunity but limited to proceeding in tribal court. *Id.* at 812-13. Here, unlike the *Demontiney* agreement, there is no remedy in tribal court and the DRP provides an express right of action against MCRPE in court, effectively waiving the tribe's sovereign immunity.

MCRPE does not provide any new analysis in its discussion of *Miller* either. The contract in *Miller* included a dispute resolution provision that required any disputes between the State of Washington and the tribe to be resolved by non-binding mediation. 705 F.3d at 925. Unlike the mediation agreement in *Miller*, the DRP required resolution

of all disputes related to the PSA in a "court with competent jurisdiction." This judicial enforcement mechanism was not optional—it is binding upon the parties. Thus, *Miller's* holding regarding non-binding mediation provisions cannot possibly apply here.

MCRPE's contentions fall far short of providing this Court with any reasons—factual or legal—for finding that *C & L* is not relevant to this appeal. The DRP plainly qualifies as a waiver of MCRPE's sovereign immunity.

B. The DRP Contains an Express Waiver of Tribal Immunity that Must be Reconciled with Section IV.D. of the PSA.

A cardinal rule of contract interpretation is that a document should be read to give effect to *all* of its provisions and render them consistent with each other. *Mastrobuono v. Shearson Lehman Hutton, Inc.* 514 U.S. 52, 63 (1995). The district court, however, failed to adhere to this precept by effectively negating Tetra Tech's bargained-for right to judicial enforcement in the DRP.

In MCRPE's view, the analysis ends at Section IV.D.'s generalized reservation of sovereign immunity; but this approach entirely nullifies the DRP. The district court erred in its interpretation because these

provisions can be read in a manner to give effect to both because the two provisions are not actually in conflict.[1] Because the Tribe had the power to define the scope of its consent to be sued, it did so by agreeing to a contract enforcement provision that provided for judicial enforcement alongside a provision reserving its sovereign immunity for all other claims.

MCRPE implicitly recognizes this problem with the district court's analysis because it proposes its own reading of the PSA to resolve this conflict. It contends that the DRP only provided the "timing and procedures" for the parties to meet and confer on any dispute related to the PSA, while simultaneously providing it—*but not Tetra Tech*—the

[1] The MCRPE asserts, for the first time on appeal, that its sovereign immunity was also preserved by a different provision of the PSA—Exhibit A to the PSA, which states that, "nothing herein shall be construed as a waiver of . . the Tribe's . . . sovereign rights as a federally recognized Indian Tribe." (MCRPE's Answering Brief, at p. 20). This belated attempt to expand the scope of this appeal is procedurally improper and should be disregarded. Indeed, in its order, the trial court *expressly* declined to consider the impact of this provision on the MCRPE's argument because it was never properly raised in connection with the motion to dismiss. Order Granting Third-Party Defendant's Motion to Dismiss, fn. 4 [1-ER-4-14]. Accordingly, the issue is not properly before this Court. *Singleton v. Wulff*, 428 U.S. 106, 120 ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.").

option to consent to litigation to a particular suit related to the PSA at a future time. Answering Brief, at pp. 24-25, 31-32. This interpretation is contrary to the plain language of the PSA and the parties' intent, and should be rejected.

Like the trial court's interpretation, MCRPE's proposal completely nullifies the judicial enforcement mechanism of the DRP. By its plain terms, the DRP granted Tetra Tech the right to sue MCRPE for any claims and disputes related to the PSA in a court with competent jurisdiction. Thus, the DRP provided far more than just the "timing and procedures" for an informal meet and confer process—it created an avenue for both parties to resolve their contractual disputes.

MCRPE's interpretation of the DRP would fundamentally alter the enforcement mechanism created by the PSA. By executing the PSA, both Tetra Tech and MCRPE agreed to engage in a pre-litigation meet and confer process as a condition precedent to litigation. The consent to suit provision of the DRP encourages both parties to fully participate in good faith to address any disputes related to the PSA and ultimately avoid legal costs. But if MCRPE is correct, and only the Tribe is allowed to initiate this meet and confer process, MCRPE will have

complete freedom to ignore the PSA entirely, with no repercussions. On the other hand, Tetra Tech would need to continue to comply with all of the PSA's provisions—without any mechanism in place to enforce and protect its rights.

In support of its proposed interpretation, MCRPE relies on *Ute Indian Tribe v. Utah*, 790 F.3d 1000, 1009 (10th Cir. 2015), in which an Indian tribe brought an action against state and local governments in Utah for unlawfully trying to displace tribal authority on tribal lands. *Ute*, 790 F.3d at 1003. The state and local governments filed counterclaims against the tribe for infringing their own sovereignty. *Id.* at 1005. As part of an earlier settlement, the parties had entered into a Mutual Assistance Agreement providing that "[o]riginal jurisdiction to hear and decide any disputes or litigation arising pursuant to or as a result of [the] Agreement shall be in the United States District Court for the District of Utah." *Id.* at 1009-1010. Another provision of the agreement entitled "No Waiver of Sovereignty or Jurisdiction Intended" stated, "no acquiescence in or waiver of claim of rights, sovereignty, authority, boundaries, jurisdiction, or other beneficial interests is intended by this Agreement." *Id.* at 1009.

The Tenth Circuit held that this agreement did not result in a waiver of tribal immunity. *Id.* at 1010. Among other things, the court found that the contract only provided a choice of law clause that designated the District of Utah as the venue for any disputes *should immunity ever be overcome*. *Id.* This arrangement provided the tribe with the freedom to consent to a particular suit arising under the agreement and proceed in the designated forum "even as the [t]ribe chooses to stand on its claim of immunity." *Id.*

The DRP is readily distinguishable from the Mutual Assistance Agreement in *Ute Indian* because it expressly allows Tetra Tech to submit any claims that are unresolved after a conference between the parties to a "court with competent jurisdiction." Far from being a forum selection clause, the DRP specifically identifies the type of claims that are covered by its judicial enforcement mechanism (all claims, disputes, and other matters in controversy arising from the PSA) *and* specifies that those claims can the pursued in a "court with competent jurisdiction." Unlike the Mutual Assistance Agreement, the DRP does not discuss judicial enforcement as an abstraction, or require tribal immunity to "be overcome" first in order to become effective. In fact,

the DRP expressly permits Tetra Tech to sue MCRPE in a "court with competent jurisdiction" as soon as it finalizes the pre-litigation meet and confer process. Thus, it specifically forecloses the possibility of the tribe "stand[ing] on its claim of immunity" while consenting to a particular suit under the PSA.

Instead of rewriting the PSA in this manner, the trial court should have harmonized both the PSA and Section IV.D. under a far more reasonable interpretation: the DRP constitutes a limited consent to suit for disputes arising from the PSA, but Section IV.D. preserves the Tribe's sovereign immunity in all other respects. This approach would have given effect to *all* terms of the PSA, honored the parties' intentions, and, most importantly, nullified nothing. The trial court committed reversible error by dismissing this proposal.

C. If the District Court is not a "Court with Competent Jurisdiction," the DRP is Meaningless Surplusage and Without Real World Consequence.

For the DRP to have *any* meaning, it must be enforceable in a "court with competent jurisdiction." Rather than addressing this argument directly, MCRPE repeats the same arguments it made to the trial court below: there are no federal, state, or tribal courts anywhere

in the world with jurisdiction over Tetra Tech's claims. MCRPE further contends that "[t]he existence of a tribal court is irrelevant to whether the language in the PSA gives rise to an express waiver of sovereign immunity." Answering Brief, at p. 34. MCRPE's argument misses the mark completely.

Whether MCRPE has commissioned a tribal court for disputes relevant to the PSA was relevant to its intent in executing the DRP. When courts harmonize the provisions of a contract, they do so consistent with the *general intent of the parties*. *Airadigm*, 616 F.3d at 657 (citing *First Am. Title Ins. Co. v. Dahlmann*, 715 N.W.2d 609, 616-17 (2006)). In discerning the intention of the contracting parties, a court must give effect to every word or term employed by the parties and reject none as meaningless or surplusage. *United States v. Hathaway*, 242 F.2d 897, 900 (9th Cir. 1957). MCRPE's reading completely disregards the parties' intent in executing the PSA.

By executing the DRP, the parties agreed to create an avenue for either party to enforce contractual compliance in court. Because the MCRPE's parent tribe never had a tribal court, its agreement with Tetra Tech had to be enforceable in *some* other court of competent

jurisdiction. This is not an argument based on "principles of equity," but one premised on well-settled and accepted canons of contract interpretation. The DRP could not have been any clearer: a court with "competent jurisdiction"—here, the trial court below—has the proper jurisdiction to resolve Tetra Tech's third-party claims against MCRPE. MCRPE should not be permitted to hide behind a general assertion of sovereign immunity to avoid that reality.

III. CONCLUSION

The contract between the parties provided Tetra Tech with a right to sue in any court of competent jurisdiction. Standing alone, there can be no doubt that the contract provision constitutes a waiver of sovereign immunity under established law. To the extent that the separate retention of immunity is relevant to the waiver, the provisions must be reconciled rather than construing the DRP to be meaningless. Finally, the MCRPE's invitation to graft additional waiver requirements onto current law are not supported by authority. Tetra Tech respectfully requests that the judgment be reversed.

Dated: April 11, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 11, 2022 the foregoing motion was filed electronically using the Court's CM/ECF system, which will cause service to be made on all counsel of record.

/s/ Damien P. DeLaney