NO. 21-13493-F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

EVANS ENERGY PARTNERS, LLC,
a Delaware limited liability company,

Plaintiff -Appellant,

v.

SEMINOLE TRIBE OF FLORIDA, INC.
a federal corporation,

Defendant - Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
Dist. Case No.: 2:20-cv-978-FtM-66MRM

INITIAL BRIEF OF APPELLANT EVANS ENERGY PARTNERS, LLC

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NO. 21-13493-F
EVANS ENERGY PARTNERS, LLC. v.
SEMINOLE TRIBE OF FLORIDA, INC.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, Fed. R. App. P., and 11th Cir. R. 26.1-1, the following listed attorneys, associations of persons, firms, partnerships or corporations may have an interest in the outcome of this appeal:

1. Judge L. Badalamenti, U.S. District Judge.
2. Seminole Tribe of Florida, Inc.
3. Seminole Tribe of Florida.
4. Evans Energy Partners, LLC.
5. Kousay "Casey" Askar (member of Evans Energy Partners, LLC).
6. Bassam "Sam" Askar (member of Evans Energy Partners, LLC).
7. Homer Bonner Jacobs Ortiz, P.A. (counsel to Seminole Tribe of Florida, Inc.).
8. Peter W. Homer (counsel to Seminole Tribe of Florida, Inc.).
9. Howard S. Goldfarb (counsel to Seminole Tribe of Florida, Inc.).
10. Allan Lerner (general counsel to Seminole Tribe of Florida, Inc.).
11. Yarnell & Peterson, P.A. (counsel to Evans Energy Partners, LLC).
12. Donald G. Peterson (counsel to Evans Energy Partners, LLC).

13. Jonathan M. Weirich (counsel to Evans Energy Partners, LLC).

14. Yasser Lakhlifi (counsel to Evans Energy Partners, LLC).

CORPORATE DISCLOSURE STATEMENT

Appellant, Evans Energy Partners, LLC, is a Delaware limited liability company that is authorized to do business in Florida. Evans Energy Partners, LLC is not publicly traded, it has no parent corporation, and is not owned in full, or in part, by any publicly traded company.

STATEMENT REGARDING ORAL ARGUMENT

Appellant Evans Energy Partners, LLC does not desire oral argument.

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JURISDICTIONAL STATEMENT

Appellant, EVANS ENERGY PARTNERS, LLC ("EEP"), seeks review of the district court's Order ("Order") [Appx 32-46 V2][1] dismissing EEP's Complaint for Declaratory Judgment and Petition to Compel Arbitration Pursuant to Section 4 of the Federal Arbitration Act ("Complaint") [Appx 8-94 V1]. The Order was entered pursuant to Appellee's, SEMINOLE TRIBE OF FLORIDA, INC. ("STOFI"), Rule 12(b)(1) and 12(b)(6) Motion to Dismiss the Complaint [Appx 95-202 V1]. EEP also seeks review of the lower court's Judgment in a Civil Case ("Judgment") [Appx 47-48 V2], which dismissed EEP's case without prejudice.

The lower court had subject-matter jurisdiction over the Complaint as the issue presented therein, whether a Tribal Court exceeded the lawful limits of its jurisdiction, is a federal question under 28 U.S.C. § 1331 [Appx 9 V1].

"Pursuant to § 1331, district courts have original jurisdiction over 'all civil actions arising under the Constitution, laws, or treaties of the United States.' 28 U.S.C. § 1331." *Miccosukee Tribe of Indians v. Kraus-Anderson Const. Co*., 607 F. 3d 1268, 1273 (11th Cir. 2010). "[C]laims founded upon federal common law as well as those of a statutory origin may give rise to federal question jurisdiction." *Id.*

[1] This Initial Brief uses the following citation format in referring to the pages of the Appendix to Initial Brief – Volume 1 and Volume 2, respectively: "[Appx. # V1]" and "[Appx # V2]."

at 1274 (quotation omitted). To that end, a question of "[w]hether a tribal court has adjudicative authority over nonmembers presents a federal question based on federal common law." *Id.*

As such, "[t]he question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court had to be answered by reference to federal law and is a federal question under § 1331. [A] federal court may determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction." *Id.* at 1275 (citations and quotations omitted).

Accordingly, the lower court had subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 as Count I of the Complaint presented the issue of whether the Tribal Court exceeded the lawful limits of its jurisdiction.

Moreover, the district court had subject-matter jurisdiction as to Count II of the Complaint [Appx 18-19 V1], which sought compulsion of arbitration, as the issues presented therein arise under federal law. *See Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 9 (1983) ("We have often held that a case 'arose under' federal law where the vindication of a right under state law necessarily turned on some construction of federal law[.]").

In *Bloomberg*, this Court highlighted the "commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience,

solicitude, and hope of uniformity that a federal forum offers on federal issues." *Adventure Outdoors, Inc. v. Bloomberg*, 552 F. 3d 1290, 1295 (11th Cir. 2008).

For example, in *Bay Mills*, the court found that although none of a plaintiff's claims were "based on a federal statute, the claims 'arise under' federal law because they 'implicate significant federal issues.'" *Michigan v. Bay Mills Indian Community*, 695 F. 3d 406, 413 (6th Cir. 2012). "Specifically, each claim on its face presents a question of federal law (whether the Vanderbilt casino is located on Indian lands) that is disputed by the parties. That question could have a substantial impact on both the present litigation and on federal Indian-gaming law more generally. And there is no reason to think Congress would prefer this question to be resolved by state courts." *Id.* (citations omitted).

In this case, the district court had subject-matter jurisdiction of Count II as it implicates significant federal issues arising under federal law. Although EPP sought to compel arbitration of STOFI's breach of the Agreement, the issues of tribal jurisdiction, tribal sovereign immunity, waiver of tribal sovereign immunity, and enforceability of the arbitration clause, as considered in *C&L Enterprises, Inc. v. Citizen Bank Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001), are substantial federal issues that could have a considerable impact on federal jurisprudence and are important to the federal system as a whole. *See Contour Spa*

v. Seminole Tribe of Florida, 692 F. 3d 1200, 1207 (11th Cir. 2012) ("tribal immunity is a matter of purely federal law.").

Alternatively, the district court also had supplemental jurisdiction over Count II, pursuant to 28 U.S. Code § 1367(a), as the issues presented therein form part of the same case or controversy as Count I.

"The constitutional 'case or controversy' standard confers supplemental jurisdiction over all state claims which arise out of a common nucleus of operative fact with a substantial federal claim." *Parker v. Scrap Metal Processors, Inc*., 468 F. 3d 733, 743 (11th Cir. 2006). *See also Palmer v. Hospital Authority of Randolph County*, 22 F. 3d 1559, 1566 (11th Cir. 1994) (applying supplemental jurisdiction even if claims are "quite different, [where] each claim involves the same facts, occurrences, witnesses, and evidence.").

In this case, the district court had supplemental jurisdiction over Count II as Counts I and II form part of the same nucleus of facts. Namely, that EEP and STOFI entered into an agreement and that STOFI breached the agreement when it failed to pay EEP a termination fee. Although Count I sought a declaration regarding the Tribal Court Judgment and Count II sought to compel arbitration of a breach of contract claim, both Counts arise from the agreement and involve the same facts, occurrences, witnesses, and evidence.

This Court has appellate jurisdiction over the instant appeal, pursuant to 28 U.S.C. § 1291, as the Judgment dismissing EEP's case without prejudice is a final appealable order. *See United States v. Wallace & Tiernan Co.,* 336 U.S. 793, 794 n.1 (1949) ("That the dismissal was without prejudice to filing another suit does not make the cause unappealable, for denial of relief and dismissal of the case ended this suit so far as the District Court was concerned."); and *Corley v. Long-Lewis, Inc.*, 965 F. 3d 1222 (11th Cir. 2020).

EEP's appeal is from a final Judgment [Appx 47-48 V2] that disposes of EEP's case and is timely as the Judgment was entered on September 21, 2021 and EEP filed its Notice of Appeal [Appx 49-67] on October 12, 2021.

STATEMENT OF THE ISSUES

Whether the lower court erred in dismissing EEP's Complaint and holding that Paragraph 7.13 of the Agreement did not constitute STOFI's clear waiver of sovereign immunity.

STATEMENT OF THE CASE AND OF THE FACTS

The nature of this case involves the lower court's dismissal of EEP's action against STOFI [Appx 8-94 V1]. The lower court dismissed EEP's Complaint and action on the narrow issue of tribal sovereign immunity [Appx 32-46 V2]. In granting dismissal, the lower court held that STOFI, a tribal corporation, was presumptively protected from suit [Appx 39 V2] absent a clear waiver of sovereign immunity and that such clear waiver must be unequivocally expressed and cannot be implied [Appx 44 V2]. The lower court concluded that the subject contract between EEP and STOFI did not contain a clear waiver of sovereign immunity and as such dismissal of the Complaint was required [Appx 42-46 V2]. The salient facts of the case, as set forth in the Complaint, are as follows:

In or about 2013, EEP was engaged in the wholesale and commercial distribution of petroleum products which included fuels, lubricants and related specialty products in Florida, under the trade name "Askar Energy" ("AE") [Appx 11 V1].

In 2013, STOFI decided to enter the petroleum distribution business and approached EEP with the idea that a partnership between the two companies would allow EEP's business to prosper [Appx 11 V1].

In furthering this contemplated business endeavor, the parties originally agreed that EEP's wholesale fuel distribution operation had a value of

$20,000,000.00, that STOFI would purchase a fifty percent (50%) interest in the business for $10,000,000.00, and that EEP would continue to manage the day-to-day operations of AE [Appx 11 V1].

EEP had every intention of participating in the joint venture as an equal partner with STOFI, however, as STOFI's purchase transaction was concluding, STOFI represented that in order for the joint venture to enjoy the tax advantages and other benefits that it promised, STOFI would need to own one hundred percent (100%) of the AE operation. Therefore, to effectuate STOFI's complete ownership interest in the joint venture, STOFI agreed to purchase EEP's assets used in the operation of AE at the discounted price of $10,000,000.00 [Appx 11 V1].

Nevertheless, as the parties intended to operate AE as equal partners, on May 31, 2013, EEP and STOFI entered into a Management and Operations Agreement ("Agreement"). The Agreement designates STOFI as the "Company" and EEP as "Evans Energy." The Agreement provides that EEP would operate AE (defined in the Agreement as "the Business") and manage its day-to-day activities in exchange for fifty percent (50%) of the profits generated by the Business. The Agreement also provides that EEP would be entitled to payment equal to fifty percent (50%) of the Fair Market Value of the AE Business in the event that the Agreement was terminated (the "Termination Fee") [Appx 12 V1].

Regarding termination, Paragraph 2.2, titled "Termination for Cause," provides that the Agreement may be terminated immediately for "Cause" and contains specific defined events giving rise to Cause [Appx 21-23 V1]. Immediately following the "Termination for Cause" section is Paragraph 2.4, which controls what is to occur "[i]n the event of the termination" of the Agreement, and provides, in part:

> In the event of the termination of this Agreement, Evans Energy shall be entitled to a termination payment equal to Fifty Percent (50%) of the Fair Market Value of the Business as calculated on an Income Approach Basis (the "Termination Fee").

[Appx 23 V1].

Accordingly, in the event of termination, the Termination Fee was payable by STOFI to EEP, regardless of whether the Agreement was terminated for cause. Moreover, Paragraph 2.5 controls the procedure for payment of the Termination Fee, providing:

> The Company [STOFI] shall pay the Termination Fee to Evans Energy [EEP] as follows:
>
> 2.5.1 Thirty Percent (30%) of the Termination Fee shall be paid in cash within sixty (60) days after the Termination of the Agreement.
>
> 2.5.2 The balance of the Termination Fee shall be paid in Twenty Four (24) equal monthly installments of principal and interest beginning ninety (90) days after the termination of this Agreement. The indebtedness shall be

> evidenced by a Promissory Note. The Promissory Note shall bear interest at the annual rate of six percent (6%) per year. The Promissory Note shall include a waiver of sovereign immunity by the Company.

[Appx 23 V1].

The purpose of this Termination Fee was to protect EEP's fifty percent (50%) interest in AE's operations even though the business would be owned solely by STOFI. As such, to safeguard EEP's right to enforce the Termination Fee against STOFI, STOFI waived tribal sovereign immunity in the Agreement as to enforcement of STOFI's obligation to pay the Termination Fee [Appx 12 V1]. Specifically, Paragraph 7.13 of the Agreement provides:

> Enforcement. Any dispute, controversy, claim, question or difference arising out of this Agreement shall be finally settled by a binding proceeding administered by the Tribal Council of the Seminole Tribe of Florida or as specifically delegated under the provisions of the Amended Constitution and By Laws of the Seminole Tribe of Florida. Notwithstanding what is set forth above, the Company through its parent company the Seminole Tribe of Florida, Inc., agrees to a limited waiver of its Sovereign Immunity in order to allow Evans Energy to initiate a binding arbitration proceeding administered under the rules of the American Arbitration Association for sole and exclusive purpose of terminating the Management Agreement and compelling the payment of the Termination Fee as set forth in Section 2 above and said waiver shall include a waiver of immunity for collection of any sum awarded through the binding arbitration proceeding. The parties specifically agree 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. 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.

[Appx 35-36 V1].

After execution of the Agreement, EEP operated AE from AE's office located at 3170 Horseshoe Dr. S., Naples, Florida 34104 [Appx 13 V1].

Subsequently, on April 4, 2016, STOFI's general counsel, Allan Lerner, terminated the Agreement. STOFI's termination of the Agreement triggered STOFI's obligation to pay the Termination Fee to EEP as required by Paragraph 2.4 of the Agreement [Appx 13 V1].

However, STOFI refused to pay EEP the Termination Fee [Appx 14 V1]. Rather, on June 27, 2016, STOFI filed a Petition for Declaratory Relief and Damages against EEP in the Seminole Trial Court of the Seminole Tribe of Florida [Appx 15 V1]. Therein, in addition to seeking damages, STOFI sought a declaration that EEP was not entitled to payment of the Termination Fee and that STOFI was not obligated to pay the Termination Fee to EEP [Appx 15 V1; 38-70 V1]

On May 2, 2019, the Seminole Trial Court of the Seminole Tribe of Florida, by way of default, entered a Final Judgment against EEP ("Tribal Judgment") [Appx 71-72 V1]. Therein, the Tribal Court entered damages against EEP in the amount

of $2,533,522.46 and declared that EEP was not entitled to payment of the Termination Fee under the Management Agreement [Appx 16 V1; 71-72 V1].

On January 18, 2019, EEP delivered a demand for arbitration ("Demand for Arbitration"), pursuant to Paragraph 7.13 of the Agreement, to the American Arbitration Association, naming EEP as claimant and STOFI as respondent [Appx 16 V1; 73-82 V1]. Therein, EEP brought a single count against STOFI for breach of contract for STOFI's failure to pay the Termination Fee when due [Appx 73-82 V1].

On September 29, 2020, the Arbitration Panel filed an Opinion and Order [Appx 83-94 V1] finding that EEP "cannot show that there is clear and unmistakable evidence that the parties intended to empower the Panel with the authority to decide the gateway question of who decides the arbitrability of their dispute." [Appx 16 V1; 83 V1].

As a result, the Arbitration Panel held that "until that preliminary issue is resolved by a court of competent jurisdiction, the Panel lacks the jurisdiction to decide subject matter jurisdiction in order to proceed. […] Furthermore, the Panel's decision only relates to its own jurisdiction and does not foreclose Evans Energy from seeking a determination of the arbitrability of its dispute in a different forum." [Appx 17 V1; 83-84 V1].

Thereafter, on December 15, 2020, EEP filed its Complaint in the district court against STOFI, pleading two Counts: Count I for a declaration that EEP was

not subject to Tribal Court jurisdiction and that the Tribal Court Judgment is void; and Count II for an order compelling arbitration pursuant to 9 U.S.C. § 4 regarding STOFI's breach of the Agreement in failing to pay the Termination Fee [Appx 8-94 V1].

On March 8, 2020, STOFI filed a Rule 12(b)(1) and Rule 12(b)(6) Motion to Dismiss the Complaint ("Motion to Dismiss"). In its Motion to Dismiss, STOFI argued that dismissal of the Complaint was warranted because: (1) EEP failed to exhaust tribal remedies therefore the lower court was divested of subject-matter jurisdiction; (2) that STOFI was entitled to tribal sovereign immunity; and (3) that Count II was outside the scope of the arbitration clause of the Agreement [Appx 95-202 V1].

After the parties briefed the issues, the district court entered an Order granting STOFI's Motion to Dismiss on the sole basis of tribal sovereign immunity [Appx 32-46 V2]. Specifically, on the issue of whether STOFI waived tribal sovereign immunity, the lower court analyzed the language of the Agreement, particularly Paragraphs 2.4 and 7.13, and noted that "'the Company' (a term defined on page one of the M&O Agreement to mean STOFI) agrees to a limited waiver of sovereign immunity for purposes of arbitrating issues regarding the termination fee in paragraph 2.4." [Appx 34 V2]. However, the court ultimately reasoned that a reading of Paragraph 7.13 with the Agreement as whole led to the conclusion that the

"Agreement is ambiguous because it appears the parties contemplated creating a third entity—Seminole Energy—that would be compelled to arbitrate instead of STOFI." As a result, the lower court held that "there was not a clear waiver of STOFI's tribal sovereign immunity[.]" [Appx 45 V2]. Thereafter, the Judgment dismissing the action was entered [Appx 47-48 V2].

The lower court erred as Paragraph 7.13 constitutes a clear, express waiver of sovereign immunity. This Court reviews "de novo the district court's dismissal of a complaint for sovereign immunity." *Sanderlin v. Seminole Tribe of Florida*, 243 F. 3d 1282, 1285 (11th Cir. 2001). *See also Seminole Tribe of Florida v. State of Fla*., 11 F. 3d 1016, 1021 (11th Cir. 1994) ("The granting or denial of a sovereign immunity defense is an issue of law subject to *de novo* review by this court.").

SUMMARY OF ARGUMENT

In dismissing the Complaint, the lower court erred in applying the "clear waiver" sovereign immunity standard to portions of Paragraph 7.13 that were extraneous to STOFI's waiver of sovereign immunity. Reversal of the Order and Judgment is warranted as Paragraph 7.13 of the Agreement contains a clear express waiver of STOFI's sovereign immunity, providing:

> the Company [STOFI] through its parent company the Seminole Tribe of Florida, Inc., agrees to a limited waiver of its Sovereign Immunity in order to allow Evans Energy to initiate a binding arbitration proceeding administered under the rules of the American Arbitration Association for sole and exclusive purpose of terminating the Management Agreement and compelling the payment of the Termination Fee as set forth in Section 2 above[.]

[Appx 35 V1].

This provision satisfies the clear, unequivocal waiver standard set forth in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Any ambiguities with respect to the creation of the "Seminole Energy" entity are extraneous to the analysis of the narrow issue of waiver of sovereign immunity. STOFI and EEP are the only parties to the Agreement; STOFI is the party obligated to pay the Termination Fee; and the Agreement expressly provides that STOFI waived sovereign immunity for the purpose of allowing EEP to initiate arbitration for the purpose of compelling payment of the Termination Fee. This is the only reasonable interpretation of STOFI's express waiver of sovereign immunity in the Agreement.

ARGUMENT

I. The Lower Court's Order and Judgement are Erroneous as a Matter of Law and Should be Reversed as STOFI Expressly Waived Sovereign Immunity.

The lower court's Order [Appx 32-46 V2] and Judgment [Appx 47-48 V2] are erroneous as a matter of law and should be reversed as Paragraph 7.13 of the Agreement unequivocally provides that STOFI expressly agreed to a waiver of sovereign immunity to allow EEP to seek enforcement of STOFI's payment obligation of the Termination Fee through an arbitration proceeding. On the narrow issue of waiver, that is the only reasonable interpretation of STOFI's express waiver of sovereign immunity in the Agreement. The Supreme Court in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) held that a waiver of sovereign immunity must be unequivocal, the *Santa Clara* Court does not require that every provision of the Agreement be unequivocal.

It is well-settled that "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo*, 436 U.S. at 58.

It is equally well-settled that a tribe may waive sovereign immunity and that "to relinquish its immunity, a tribe's waiver must be 'clear.'" *C&L Enterprises, Inc. v. Citizen Bank Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001) (quoting *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.

S. 505, 509 (1991) ("Suits against Indian tribes are [] barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation."). *See also Florida v. Seminole Tribe of Florida*, 181 F. 3d 1237, 1241 (11th Cir. 1999)("A suit against an Indian tribe is therefore barred unless the tribe clearly waived its immunity[.]").

As such, "a waiver of sovereign immunity[2] cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58 (citations and quotations omitted).

Notably, a waiver of sovereign immunity need not be complex, does not require any "magic words[,]" and simplicity does not undermine a waiver's "clarity or explicitness." *Rosebud Sioux v. Val-U Const. Co*., 50 F. 3d 560, 563 (8th Cir.

[2] Although the Supreme Court has held that sovereign immunity applies to a tribe's off reservation conduct, in *Michigan v. Bay Mills Indian Community*, Justices Ginsburg, Thomas, and Scalia argued that the Court's application of sovereign immunity to off reservation conduct, in *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc*., 523 US 751 (1998), was in error and should be overturned. *See Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2045, 2054 (2014) (Thomas, J., dissenting) ("[i]n *Kiowa*, this Court adopted a rule without a reason: a sweeping immunity from suit untethered from commercial realities and the usual justifications for immunity, premised on the misguided notion that only Congress can place sensible limits on a doctrine we created. The decision was mistaken then, and the Court's decision to reaffirm it in the face of the unfairness and conflict it has endangered it doubly so."); 132 S. Ct. 2024, 2054 (2014) (Ginsburg, J., dissenting) (reaffirming her decision to join in Justice Steven's dissenting opinion in *Kiowa* and stating that "this Court's declaration of an immunity thus absolute was and remains exorbitant."); and 132 S. Ct. 2024, 2045 (2014) (Scalia, J., dissenting) ("I am now convinced that *Kiowa* was wrongly decided; that, in the intervening 16 years, its error has grown more glaringly obvious[.]").

1995) (finding that the following language in a contract was a clear expression of waiver of a tribe's sovereign immunity: "All questions of dispute under this Agreement shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association."). *See e.g. Tamiami Partners v. Miccosukee Tribe of Indians*, 788 F. Supp. 566, 568 (S.D. Fla. Mar. 5 1992) (holding that an agreement to arbitrate which included the phrase "[t]his waiver of sovereign immunity shall not become effective until[…]" was a "clear and unambiguous" waiver of sovereign immunity.).

Moreover, in addition to express waivers of sovereign immunity, contractual arbitration provisions may also serve as a clear waiver of sovereign immunity. In *C&L*, the Supreme Court was presented with the question of "whether the Tribe waived its immunity from suit in state court when it expressly agreed to arbitrate disputes with C & L relating to the contract, to the governance of Oklahoma law, and to the enforcement of arbitral awards 'in any court having jurisdiction thereof.'" *C & L Enterprises, Inc.*, 532 U.S. at 414. In answering in the affirmative, the Supreme Court unanimously ruled that even in the absence of an express waiver of sovereign immunity, arbitration provisions alone may constitute a clear waiver of a tribe's sovereign immunity. *Id*.

As in this case, the *C&L* case arose out of the breach of a commercial, off-reservation contract by a federally recognized Indian Tribe. *C & L Enterprises, Inc.*,

532 U.S. at 415. The contract executed by the parties involved the installation of a foam roof on a building that was owned by the Potawatomi Tribe on non-reservation land that was owned by the Tribe. *Id.* The contract proposed by the Tribe, and accepted by C&L Enterprises, Inc., contained an arbitration clause. *Id.* According to the arbitration clause, all disputes arising between the parties were to be resolved by arbitration pursuant to the rules of the American Arbitration Association. *Id*. The Tribe strenuously argued that the arbitration clause did not constitute a waiver of immunity and that no court "on earth or even on the moon" had jurisdiction over the matter. *Id.* at 421. The Supreme Court disagreed, and noted that the American Arbitration Association rules, along with Oklahoma's Arbitration Code, clearly contemplated enforcement of the arbitration decision within the states' local or Federal courts. *Id.* at 420. By agreeing to the arbitration clause, the Tribe agreed to waive its sovereign immunity with respect to enforcement pursuant to the clause, even though the Tribe had not passed a resolution through its tribal council or otherwise explicitly waived its sovereign immunity in accordance with the Tribe's bylaws or constitution. *Id.* at 423.

Notably, Justice Ginsburg, in speaking for the Court, stated:

> The clause no doubt **memorialized the Tribe's commitment to adhere to the contract's dispute resolution regime**. That regime has a real world objective; it is not designed for regulation of a game lacking practical consequences. And to the real world end, the contract

> specifically authorizes judicial enforcement of the resolution arrived at through arbitration. *See Eyak*, 658 P.2d, at 760 ("[W]e believe it is clear that any dispute arising from a contract cannot be resolved by arbitration, as specified in the contract, if one of the parties intends to assert the defense of sovereign immunity…The arbitration clause… **would be meaningless** if it did not constitute a waiver of whatever immunity [the Tribe] possessed.")[.]

Id. at 422. (emphasis added). *See also Oglala Sioux Tribe v. C & W Enterprises, Inc*., 542 F.3d 224, 230 (8th Cir. 2008) ("The [*C&L*] Court found, as this Circuit has done previously, that an arbitration clause alone was sufficient to expressly waive sovereign immunity to a state court enforcement action.")(The Eight Circuit additionally noted that the express contractual waivers of sovereign immunity, as is present with STOFI in this case, further bolstered the conclusion that there was a waiver of sovereign immunity.); *Big Valley Band of Pomo Indians v. Superior Court*, 133 Cal. App. 4th 1185, 1191 (2005) ("When a tribe consents to arbitration it makes a limited waiver of its sovereign immunity."); *Bank One, N.A. v. Shumake,* 281 F.3d 507, 515 (5th Cir. 2002) ("The [C&L] Court held that when a tribe consents to dispute resolution by arbitration, it waives its sovereign immunity."); and *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006)("In *C & L* Enterprises, the Supreme Court held that the tribe waived its immunity by expressly agreeing to arbitration of disputes and to 'enforcement of arbitral awards 'in any court having jurisdiction thereof.'").

In this case, STOFI's waiver of sovereign immunity is even more plainly expressed than the waiver in *C&L*, and doubly so. STOFI not only expressly agreed to allow EEP to initiate an arbitration proceeding administered by the AAA for the purpose of compelling payment of the Termination Fee (a *C&L* waiver), but Paragraph 7.13 also expressly provides that STOFI "agrees to a limited waiver of its Sovereign Immunity[.]" [Appx 35 V1].

As such, concerning the narrow issue of waiver of sovereign immunity, a plain reading of the Agreement only leads to one reasonable interpretation, STOFI's express waiver of sovereign immunity. Specifically, the introductory paragraph of the Agreement defines STOFI as the "Company" and EEP as "Evans Energy." [Appx 20 V1]. Regarding termination of the Agreement, Paragraph 2.2, titled "Termination for Cause," provides that the Agreement may be terminated immediately, by either party, for "Cause" and contains specific defined events giving rise to Cause. [Appx 21-23 V1].

Immediately following the "Termination for Cause" section is Paragraph 2.4, which controls what occurs "[i]n the event of the termination" of the Agreement, and provides, in part:

> In the event of the termination of this Agreement, Evans Energy shall be entitled to a termination payment equal to Fifty Percent (50%) of the Fair Market Value of the Business as calculated on an Income Approach Basis (the "Termination Fee").

[Appx 23 V1].

In the event of termination for cause or otherwise, STOFI was obligated to pay the Termination Fee to EEP. Paragraph 2.5 controls the procedure for payment of the Termination Fee, providing:

> **The Company [STOFI] shall pay the Termination Fee to Evans Energy [EEP]** as follows:
>
> 2.5.1 Thirty Percent (30%) of the Termination Fee shall be paid in cash within sixty (60) days after the Termination of the Agreement.
>
> 2.5.2 The balance of the Termination Fee shall be paid in Twenty Four (24) equal monthly installments of principal and interest beginning ninety (90) days after the termination of this Agreement. The indebtedness shall be evidenced by a Promissory Note. The Promissory Note shall bear interest at the annual rate of six percent (6%) per year. The Promissory Note shall include a waiver of sovereign immunity by the Company.

[Appx 23 V1].

Moreover, to safeguard EEP's right to enforce the above Termination Fee against STOFI, STOFI waived tribal sovereign immunity in the Agreement as to allow enforcement of STOFI's obligation to pay the Termination Fee by means of arbitration – that is the crux of this dispute. Specifically, Paragraph 7.13 provides:

> Enforcement. Any dispute, controversy, claim, question or difference arising out of this Agreement shall be finally settled by a binding proceeding administered by the Tribal Council of the Seminole Tribe of Florida or as specifically delegated under the provisions of the Amended

> Constitution and By Laws of the Seminole Tribe of Florida. **Notwithstanding what is set forth above, the Company through its parent company the Seminole Tribe of Florida, Inc., agrees to a limited waiver of its Sovereign Immunity in order to allow Evans Energy to initiate a binding arbitration proceeding administered under the rules of the American Arbitration Association for sole and exclusive purpose of terminating the Management Agreement and compelling the payment of the Termination Fee as set forth in Section 2 above and said waiver shall include a waiver of immunity for collection of any sum awarded through the binding arbitration proceeding**. The parties specifically agree 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. **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**.

[Appx 35-36 V1] (emphasis added).

In the Order, the lower court analyzed the Agreement, particularly Paragraphs 2.4 and 7.13, under *Santa Clara* and *C & L*, and noted that "'the Company' (a term defined on page one of the M&O Agreement to mean STOFI) agrees to a limited waiver of sovereign immunity for purposes of arbitrating issues regarding the termination fee in paragraph 2.4." [Appx 34 V2].

Under *Santa Clara*, this should have been the end of the lower court's waiver of sovereign immunity analysis. However, the lower court went on to reason that:

> Here, the M&O Agreement also incorporates the AAA's rules. But unlike the contract in C & L Enterprises, the

> M&O Agreement **is ambiguous because it appears the parties contemplated creating a third entity—Seminole Energy—that would be compelled to arbitrate instead of STOFI**. The precise nature of that entity and its relationship to STOFI are not remotely apparent from the M&O Agreement.

[Appx 45 V2] (emphasis added).

Regarding "Seminole Energy," the lower court noted that both parties "here seem to agree that 'Seminole Energy' was an entity that should have been created under the terms of the M&O Agreement, but for some reason never was." [Appx 43 V2]. The lower court comprehensively addressed the Agreement's reference to the term "Seminole Energy":

> "Seminole Energy" is not a defined term, although it appears in at least three more places within the M&O Agreement. (Id. at ¶¶ 3.2.1, 3.6, 4.7.) For example, in paragraph 3.2.1, EEP agrees that it will not enter into any agreements with STOFI's (i.e., the Company's) "respective Affiliates, Seminole Energy, [or] Managers or Officer[s]" without STOFI's prior approval. (Id. at ¶ 3.2.1.) This language seems to suggest that Seminole Energy may be an "affiliated entity" of STOFI under paragraph 7.13. But if that were true, then paragraph 7.13 would simultaneously permit and prohibit arbitration with Seminole Energy. Moreover, paragraph 4.3 provides, "Seminole Energy shall further refrain from intentionally taking any action that will be detrimental to the operations or financial performance of the Company." (Id. at ¶ 4.7.) This language appears to imply that STOFI and Seminole Energy are distinct entities capable of independent (or even conflicting) action.

[Appx 35 V2].

Under the foregoing, the lower court held that "[p]erhaps the Court could discern the true nature of Seminole Energy by looking at parol evidence of the parties' intent. But relying on parol evidence would necessarily imply that the M&O Agreement is ambiguous." [Appx 45 V2]. The lower court went on to state that while extrinsic evidence could very well resolve who "Seminole Energy" was supported to be, "the Court cannot disregard the Supreme Court's demand for a clear and unambiguous waiver of tribal sovereign immunity." [Appx 46 V2].

As a result, the lower court held that "[b]ecause there was not a clear waiver of STOFI's tribal sovereign immunity, the Court is compelled to grant STOFI's motion to dismiss." [Appx 46 V2].

While "Seminole Energy" may have created some ambiguity in the Agreement, the lower court erred in applying the high *Santa Clara* standard to matters outside the specific issue of STOFI's express waiver of sovereign immunity.

Santa Clara provides that a "clear" unambiguous waiver of tribal sovereign immunity "must be unequivocally expressed" and "cannot be implied." *Santa Clara Pueblo*, 436 U.S. at 58. "The term 'ambiguous' means doubtful and uncertain. 1 Bouvier's Law Dictionary 117 defines ambiguity: 'Duplicity, indistinctness, or uncertainty of meaning of an expression used in a written instrument.'" *Arkansas Amusement Corporation v. Kempner*, 57 F. 2d 466, 472 (8th Cir. 1932). This definition must be viewed through a lens of reasonableness. A determination of

ambiguity in a contract requires that it be susceptible to more than one **reasonable** interpretation – unreasonable interpretations do not render a contract ambiguous. *See Global Satellite Communication v. Starmill UK*, 378 F. 3d 1269, 1274 (11th Cir. 2004)(holding that a contract "phrase is simply ambiguous, it lends itself to several possible reasonable interpretations[.]"); and *Giddens v. Equitable Life Assur. Soc. of US*, 445 F. 3d 1286 (11th Cir. 2006)("Where the language of the contract is unambiguous and only one reasonable interpretation is possible, the contract must be enforced as written.").

As such, "[c]ontract language is not ambiguous if it has a definite and precise meaning, unattended by danger of misconception in the purport of the [contract] itself, and concerning which there is no reasonable basis for a difference of opinion." *Hunt Ltd. v. Lifschultz Fast Freight, Inc*., 889 F. 2d 1274, 1277 (2d Cir. 1989)(citation and quotation omitted)(addition in original). Critically, "[l]anguage whose meaning is otherwise plain does not become ambiguous merely because the parties urge different interpretations in the litigation. The court is not required to find the language ambiguous where the interpretation urged by one party would strain[] the contract language **beyond its reasonable and ordinary meaning**." *Id*. (citation and quotation omitted) (emphasis added).

Reversal of the Order and Judgment is warranted as Paragraph 7.13 of the Agreement contains not only an unambiguous express waiver of STOFI's sovereign immunity, but also a clear *C & L* arbitration waiver, providing:

> the Company [STOFI] through its parent company the Seminole Tribe of Florida, Inc., **agrees to a limited waiver of its Sovereign Immunity** in order to allow Evans Energy to initiate a **binding arbitration proceeding administered under the rules of the American Arbitration Association** for sole and exclusive purpose of terminating the Management Agreement and compelling the payment of the Termination Fee as set forth in Section 2 above[.]

[Appx 35 V1] (emphasis added). As such, STOFI's waiver of sovereign immunity is comprised of two independently enforceable layers, the express waiver and the agreement to arbitrate waiver. A similar dual waiver was discussed in *Oglala Sioux Tribe*, where the court recognized that sovereign immunity may be waived by both express waivers and arbitration agreements, holding "[a]s the Supreme Court discussed in *C & L Enterprises*, the arbitration agreement alone is enough to waive immunity. We find that, in the three contracts containing an explicit waiver of immunity and an agreement to arbitrate, the Tribe has waived sovereign immunity with respect to a suit brought to enforce an arbitral award." *Oglala Sioux Tribe*, 542 F. 3d at 231.

In this case, the lower court held that the Agreement was ambiguous because it appears that the parties contemplated creating "Seminole Energy" and that

"Seminole Energy" would be the entity compelled to arbitration. However, the lower court stretched application of the *Santa Clara* standard beyond the appropriate waiver consideration. The ambiguity regarding "Seminole Energy" relates to the manner in which the arbitration was to proceed, an issue that is distinct and separate from STOFI's express waiver of sovereign immunity.

Indeed, Paragraph 7.13 constitutes STOFI's clear waiver of sovereign immunity under *Santa Clara* and its progeny. That is the only reasonable interpretation. STOFI and EEP are the only two parties to the Agreement; STOFI is the only party obligated to pay the Termination Fee; STOFI is the only party that is presumptively immune from suit under sovereign immunity; and the Agreement expressly provides that STOFI waived sovereign immunity for the purpose of allowing EEP to initiate arbitration for the purpose of compelling payment of the Termination Fee from STOFI.

Any ambiguities with respect to the creation of the "Seminole Energy" entity and its role under the Agreement are extraneous to the analysis of the narrow issue of STOFI's waiver of sovereign immunity and should be interpretated under ordinary contract principles, not under the *Santa Clara* heightened standard.

As to those extraneous portions of Paragraph 7.13, where a contract may reasonably be viewed as having more than one possible meaning, "[i]t is a fundamental rule that in the construction of contracts the court may look not only to

the language employed, but to the subject-matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made." *Merriam v. United States*, 107 U.S. 437, 441 (1883).

Moreover, it is well established that an interpretation of a contract that leads to absurdities should be disregarded. *Interline Brands, Inc. v. Chartis Specialty Ins. Co*., 749 F.3d 962, 966 (11th Cir. 2014). To that end, "[t]he words of a contract will be given a reasonable construction, where that is possible, rather than an unreasonable one, and the court will likewise endeavor to give a construction most equitable to the parties, and one which will not give one of them an unfair or unreasonable advantage over the other." *James v. Gulf Life Ins. Co*., 66 So. 2d 62, 63 (Fla. 1953).

As such, "[w]here the language of an agreement is contradictory, obscure, or ambiguous, or where its meaning is doubtful, so that it is susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes a rational and probable agreement must be preferred." *Id.* (emphasis added).

Under the ordinary contract principles, STOFI and EEP are the only two parties to the Agreement and STOFI is defined as "Company" therein. Irrespective of whether STOFI created the "Seminole Energy" DBA or not, STOFI would still

be the party responsible for paying the Termination Fee and waiving sovereign immunity to allow arbitration. Any extraneous ambiguities or redundancies in the Agreement are outside of consideration of STOFI's waiver of sovereign immunity and should not prevent the lower court from addressing the merits of this case. To suggest otherwise would run afoul of, *Santa Clara* and ordinary contract interpretation principles, creating a contract that is essentially meaningless.

In sum, while portions of Agreement may be poorly worded, the *Santa Clara* standard only requires that the waiver of sovereign immunity be clear, not the Agreement in its entirety. That standard is met here. There is no ambiguity as to the identity of the parties to the Agreement, EEP and STOFI, and there is no ambiguity that STOFI expressly waived sovereign immunity to allow EEP to compel STOFI to pay the Termination Fee. There is no other reasonable interpretation with respect to the narrow issue of waiver of sovereign immunity.

CONCLUSION

For all the reasons enumerated herein, this Court should reverse the lower court's Order and Judgment and remand this matter.

Respectfully submitted this 6th day of December, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(g), I hereby certify that this computer-generated document complies with the applicable type-volume limitation and contains 6,770 words.

/s/ *Donald G. Peterson*
Donald G. Peterson, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 6, 2021, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to counsel of record: Peter W. Homer, Esq. [phomer@homerbonner.com] [marodriguez@homerbonner.com] Howard S. Goldfarb, Esq. [hgoldfarb@homerbonner.com] [dthomas@homerbonner.com] and Christopher King, Esq. [cking@homerbonner.com], HOMER BONNER JACOBS ORTIZ, PA, 1200 Four Seasons Tower, 1441 Brickell Avenue, Miami, FL 33131.

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