**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

# REPLY 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.

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### I. The District Court Appropriately Held that STOFI's Charter and Bylaws do not Preclude Waiver of Sovereign Immunity.

In its Answer Brief, Appellee, SEMINOLE TRIBE OF FLORIDA, INC. ("STOFI"), argues that STOFI's Charter and Bylaws preclude waiver of sovereign immunity. The lower court's Order [Appx 32-46 V2][1] appropriately rejected STOFI's argument as a basis for dismissal of the Complaint.

In support of its position, STOFI points to its Amended Corporate Charter as granting STOFI the power:

> [t]o waive its sovereign immunity from suit, but only if expressly stated by contract that such is the case and that such waiver shall not be deemed a consent by the said corporation or the United States to the levy of any judgment, lien or attachment upon the property of the Seminole Tribe of Florida, Inc., other than income or chattels especially pledged or assigned pursuant to such contract.

(Answer Brief, p. 29) (quoting Doc 12-1 at 4-5).

STOFI reasoned that under the foregoing language, waiver of sovereign immunity "was not 'expressly stated' in the Management Agreement, as STOFI waived no immunity at all […] [a]nd the Management Agreement did not identify

[1] This Reply 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]."

any specific 'income or chattels especially pledged or assigned' by STOFI as a 'termination fee.'" (Answer Brief, p. 30).

In the Order, the lower court succinctly summarized STOFI's argument as follows:

> there is no argument—in either STOFI's motion to dismiss or its reply—that the M&O Agreement was entirely unauthorized. Rather, STOFI carefully threads the needle by contending that no board resolution "pledged or assigned" any specific property to satisfy disputes arising under the M&O Agreement. For this reason, STOFI claims that any waiver of sovereign immunity must be ineffective.

[Appx. 41-42 V2].

In rejecting STOFI's argument, the lower court cited to Article II, Section 5 of STOFI's Bylaws as providing "that any delegation of authority by STOFI's board of directors 'shall be by written resolution,' except, 'these authorities and responsibilities specifically outline in Article IV hereto.'" [Appx 40 V2] (quoting Doc. 12-1 at 8). The lower further pointed to Article IV, section 3(d) as providing STOFI's president with the power to "execute bonds, mortgages, and other contracts when authorized by the Board." [Appx 41 V2] (quoting Doc. 12-1 at 13).

The court then correctly reasoned that:

> Under the plain language of the bylaws, a contractual waiver of sovereign immunity by STOFI does not equate to consent for any judgment or lien on STOFI's property, "other than income or chattels especially pledged or

> assigned pursuant to such contract." (Doc. 12-1 at 5) (emphasis added). **Section 2.4 of the M&O Agreement clearly provides that if the Agreement is terminated, EEP "shall be entitled" to fifty percent of the joint venture's fair market value.** (Doc. 1-1 at 4.) It also provides a joint appraisal process by which the parties can assess the fair market value. (Id.) **In other words, section 2.4 "especially pledge[s] and assign[s]" liquidated damages to EEP upon the termination of the M&O Agreement. STOFI's argument is, therefore, not supported by the plain language of its governing documents**.

[Appx. 42 V2] (emphasis added).

In addition to being defeated by the plain language of its own governing documents, STOFI's position is precisely what the Supreme Court foreclosed by the holding in *C&L Enterprises, Inc. v. Citizen Bank Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001).

In *C&L*, the Supreme Court unanimously ruled that arbitration provisions in a contract may constitute a clear waiver of a tribe's sovereign immunity. In that case, the arbitration clause provided that all disputes arising between the Tribe and C&L Enterprises, Inc. were to be resolved by arbitration pursuant to the rules of the American Arbitration Association. *Id*. at 415. On appeal, 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.

As such, by agreeing to the arbitration clause, the Tribe agreed to waive its sovereign immunity with respect to enforcement pursuant to the clause. *Id*. at 423.

Justice Ginsburg, in speaking for the Court, reasoned:

> 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.

Just as in *C&L*, STOFI, in this case, through the Agreement expressly agreed to allow EEP to initiate an arbitration proceeding administered by the AAA for the purpose of compelling payment of the termination fee, 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[.]" [Appx. 35-36 V1].

STOFI's argument that it did not explicitly waive sovereign immunity because it failed to do so in compliance with its Charter and Bylaws is not only erroneous but is also foreclosed *by C&L*, which recognizes a limited exception to the rule and permits an "implied" waiver of sovereign immunity by operation of a tribe's agreement to arbitrate.

Accordingly, the lower court appropriate appropriately rejected STOFI's argument as a basis for dismissal of the Complaint.

## II. This Court Should Reject STOFI's Arguments as to Alternative Grounds for Affirming Dismissal.

### A. The District Court had Subject Matter Jurisdiction as to Count I.

In its Answer Brief, STOFI argues that the lower court lacked subject matter jurisdiction because EEP "specifically agreed to the jurisdiction of the Tribal Court" (Answer Brief, p. 34) and that "[n]o exception to Tribal Court exhaustion" applies in this case (Answer Brief. p. 35).

STOFI's arguments are unpersuasive because subject matter jurisdiction cannot be conferred upon the Tribal Court by contract, tribal exhaustion is inapplicable as there was no pending tribal action, and even if applicable, EEP satisfied the exceptions to the doctrine of tribal exhaustion as tribal courts lack jurisdiction over non-tribal members for off-reservation conduct.

### 1. Federal Question and the Boundaries of Tribal Court Jurisdiction.

The lower court had subject matter jurisdiction to determine whether the Tribal Court exceeded the lawful limits of its jurisdiction in entering a tribal judgment against EEP.

"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). Notably, 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).

Undoubtedly, Count I of the Complaint for declaratory judgment [Appx. 1-18 V1] presented an issue regarding whether the Tribal Court exceeded the lawful limits of its jurisdiction and as such the lower court had jurisdiction under § 1331.

*i. A Forum Selection Clause Does Not Confer Subject Matter Jurisdiction.*

In its Answer Brief, STOFI, relying on the forum selection clause of Section 7.13 [Appx. 65 V1], argues that EEP "specifically agreed to the jurisdiction of the Tribal Court to resolve '[a]ny dispute, controversy, claim, question or difference[.]'" (Answer Brief, p. 34). This point is quickly disposed of.

It is well-settled that "[a] forum selection does not suffice to create jurisdiction, which depends upon a grant of judicial authority from Congress. While consent may be sufficient to establish personal jurisdiction over a party to a contract, 'a tribal court's authority to adjudicate claims involving nonmembers concerns its subject matter jurisdiction, not personal jurisdiction.'" *Smith v. Western Sky Financial, LLC*, 168 F. Supp. 3d 778, 782 (E.D. Pa. March 4, 2016) (quoting *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 783 (7th Cir. 2014) (citing *Nevada v. Hicks*, 533 U.S. 353, 367 n. 8 (2001)).). "Therefore, **a nonmember's consent to tribal authority is not sufficient to establish the jurisdiction of a tribal court**." *Jackson,* 764 F.3d at 783 (emphasis added).

Accordingly, the referenced forum selection clause does not confer subject matter jurisdiction upon the Tribal Court and did not serve to divest the district court of subject matter jurisdiction.

*ii. The Exhaustion of Tribal Remedies Doctrine is Inapplicable when no Tribal Action is Pending.*

In its Answer Brief, STOFI argues that the district court lacked subject matter jurisdiction because "no exception to Tribal Court exhaustion applies" in this case. (Answer Brief, p. 35). STOFI's argument is without merit as tribal exhaustion is inapplicable because there was no pending tribal action.

Regarding the consideration of a pending tribal action in the context of tribal exhaustion, the court in *Jackson* noted that "[i]t is not at all clear, however, that the doctrine of tribal exhaustion requires a federal court to abstain from exercising jurisdiction when that exercise will not interfere with a pending tribal court action." *Jackson*, 764 F.3d at 784. Since the doctrine is a matter of abstention, and not jurisdiction, this Court should hold that tribal exhaustion is not required where there is no pending tribal court action. *See e.g. Garcia v. Akwesasne Housing Authority*, 268 F.3d 76, 80 (2d Cir.2001)(holding that tribal exhaustion was not required absent an ongoing tribal proceeding.).

Notably, the doctrine of tribal exhaustion does not concern this Court's subject matter jurisdiction because exhaustion "is required as a matter of comity, not as a jurisdictional prerequisite." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 n. 8 (1987). Because the tribal exhaustion rule does not impair jurisdiction, and instead is "analogous to principles of abstention articulated in *Colorado River Water*

*Conservation Dist. v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976)," *Id*., the doctrine must be interpreted narrowly in light of the "virtually unflagging obligation of federal courts to exercise the jurisdiction given them." *Colorado River*, 424 U.S. at 817.

For example, in *Garcia*, in rejecting application of tribal exhaustion, the court reasoned that "the comity and deference owed to a tribal court that is adjudicating an intra-tribal dispute under tribal law does not compel abstention by a federal court where a non-member asserts state and federal claims and nothing is pending in the tribal court." *Garcia*, 268 F. 3d at 80 (holding that the tribal exhaustion doctrine bars "interference by federal courts to defeat or circumvent the ongoing exercise of jurisdiction by tribal courts." *Id*. 81). *See also Seneca v. Seneca*, 293 AD 2d 56 (N.Y. App. Div. 2002) (holding that the tribal exhaustion doctrine "does not apply to this case because there is no action pending in a … tribal court"); and *Bassett v. Mashantucket Pequot Museum and Research*, 221 F. Supp. 2d 271, 282 (D. Conn. 2002) (declining to apply the tribal exhaustion doctrine where "there is currently no tribal proceeding pending" and "declin[ing] to ignore its 'virtually unflagging obligation... to exercise [its] jurisdiction.'").

In this case, there was no pending, ongoing tribal action when the Complaint was filed and as such exhaustion of tribal remedies is inapplicable.

Accordingly, the doctrine of tribal exhaustion did not serve to divest the

district court of subject matter jurisdiction.

*iii. The Exhaustion of Tribal Remedies Doctrine did not Divest the District Court of Jurisdiction.*

In its Answer Brief, STOFI argues that the district court lacked subject matter jurisdiction because "no exception to Tribal Court exhaustion applies" in this case. (Answer Brief, p. 35). STOFI's argument is without merit as EEP established exceptions to the tribal exhaustion doctrine.

It is true that while § 1331 encompasses the federal question of whether a Tribal Court has exceeded the lawful limits of its jurisdiction, under principles of comity, "exhaustion [of tribal remedies] is required before such a claim may be entertained by a federal court[.]" *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 US 845, 857 (1985).

However, *National Farmers* sets forth a number of exceptions to tribal exhaustion, holding that exhaustion is not required where "an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, or where the action is **patently violative of express jurisdictional prohibitions**, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *Id*. at 856, n. 21 (emphasis added).

Exhaustion is also not required "[w]hen ... **it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by [the**

**main rule established in *Montana v. United States*] or ... it is otherwise clear that the tribal court lacks jurisdiction so that the exhaustion requirement would serve no purpose other than delay**." *Burrell v. Armijo*, 456 F. 3d 1159, 1168 (10th Cir. 2006) (emphasis added).

In this case, exceptions to the tribal exhaustion doctrine are present as it is plain that no federal grant provides for tribal governance over nonmember EEP and it is otherwise clear that the Tribal Court lacked subject matter jurisdiction to adjudicate a nonmember's performance under the Agreement on off-reservation, non-Indian land and the issue of the termination fee, which was to be paid to EEP in Collier County, Florida.

Regarding the contours of Tribal Court jurisdiction, *Montana* sets forth the general rule that tribal courts lack jurisdiction over nonmembers of the tribe, expressly limiting tribal civil jurisdiction to conduct which occurs on reservations, providing "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands.". *Montana v. United States*, 450 U.S. 544, 565 (1981) (holding "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.").

The Supreme Court in *Montana* articulated two narrow situations in which a tribe may exercise jurisdiction over nonmembers: (1) "[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"; and (2) "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation 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 565-66.

As such, "*Montana* and its progeny permit tribal regulation of nonmember conduct **inside the reservation** that implicates the tribe's sovereign interests." *Plains Com. Bank v. Long Fam. Land and Cattle Co*., 128 S. Ct. 2709, 2721 (2008) (emphasis added).

Regarding the first *Montana* exception, the Supreme Court in *Plains* reiterated its limitation to regulation and not adjudicatory authority, holding that "*Montana* expressly limits its first exception to the 'activities of nonmembers,' allowing these to be regulated to the extent necessary to protect tribal self-government [and] to control internal relations[.]" *Plains Com. Bank*, 128 S. Ct. at 2721 (citation omitted). The limitation of the first exception to matters of regulation, rather than jurisdiction, was emphasized by the Court's citation to *Horn Cty. Elect. Cooperative, Inc. v. Adams*, 219 F.3d 944, 951 (C.A.9 2000), quoting "*Montana* does not grant a tribe unlimited regulatory or adjudicative authority over a nonmember. Rather, *Montana*

limits tribal jurisdiction under the first exception to the regulation of the activities of nonmembers[.]" *Id*.

Regarding the second *Montana* exception, the *Plains* Court held that the tribe may only "exercise civil jurisdiction when non-Indians' 'conduct' menaces the 'political integrity, the economic security, or the health or welfare of the tribe.'" *Plains Com. Bank*, 128 S. Ct. at 2726 (quoting *Montana*, 450 U.S., at 566). "The conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community. One commentator has noted that 'th[e] elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences.'" *Id*. (quoting Cohen § 4.02[3][c], at 232, n. 220.).

Therefore, in analyzing Tribal Jurisdiction under *Montana* and its progeny, three considerations must be kept in mind: (1) "efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are presumptively invalid"; (2) "[t]he burden rests on the tribe to establish one of the exceptions to *Montana*'s general rule"; and (3) "[the *Montana*] exceptions are limited ones and cannot be construed in a manner that would swallow the rule or severely shrink it[.]" *Id*. at 2720 (citation and quotation omitted).

Critically, the Supreme Court, with one minor zoning regulation exception[2], has "**never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land**." *Plains Com. Bank*, 128 S. Ct. at 2722 (emphasis added). Indeed, the Supreme Court's "*Montana* cases have always concerned nonmember conduct on the land." *Id*. at 2722.

The *Jackson v. Payday Financial, LLC*, 764 F.3d 765 (7th Cir. 2014) case is illustrative. In *Jackson*, the Seventh Circuit addressed a tribal exhaustion argument in the context of tribal payday loans. In that case, the plaintiffs obtained loans from lenders associated with the Cheyenne River Sioux Tribe. *Id*. at 768-69. The plaintiffs then brought suit and the district court dismissed the case for improper venue, finding that the arbitration provision in the loan agreements required the plaintiffs to bring their claims in the tribal forum. *Id.* at 769-70.

On appeal, after finding the arbitration provision unenforceable, the Seventh Circuit considered the defendants' argument that the arbitration provision was a forum selection clause that required any litigation under the agreements to be conducted in the tribal court. *Id.* at 781-82. The Seventh Circuit disagreed. Based on the Supreme Court's ruling in *Montana*, the court determined that the plaintiffs had

[2] That exception was in *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), where the Supreme Court upheld a tribe's power to restrain particular uses of **non-Indian fee land on the reservation** through zoning regulations. *Id*. at 440-41, 443-44 (emphasis added).

not consented to tribal jurisdiction by entering into the loan agreements, because "tribal courts are not courts of general jurisdiction" and any claim to jurisdiction over nonmembers must implicate "'the tribe's inherent sovereign authority.'" *Id.* at 783 (citations omitted). Because the plaintiffs' claims did "not arise from the actions of nonmembers on reservation land and d[id] not otherwise raise issues of tribal integrity, sovereignty, self-government, or allocation of resources," the Seventh Circuit concluded that "[t]here **simply is no colorable claim that the courts of the Cheyenne River Sioux Tribe can exercise jurisdiction over the Plaintiffs**." *Id.* at 786 (emphasis added).

Moreover, in determining whether one of the *Montana* exceptions apply, courts are to look to the activities of the nonmembers on the reservation, not off the reservation, and not the conduct of the tribe.

For example, in *UNC Resources, Inc. v. Benally*, 514 F. Supp. 358 (D. N.M. 1981), the court held that tribal court jurisdiction did not extend to "conduct off the reservation" *Id.* 361-62, squarely holding "when the issue is Indian tribal power over non-Indians, any civil authority of the tribe stops at the reservation boundary. The Navajos therefore cannot assert jurisdiction over UNC based on its off-reservation uranium milling operations." *Id.* at 362. *See also Philip Morris USA, Inc. v. King Mountain Tobacco Co*., 569 F.3d 932, 938 (9th Cir.2009)("[T]ribal jurisdiction is, of course, cabined by geography: The jurisdiction of tribal courts does not extend

beyond tribal boundaries."); *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1091 (8th Cir.1998) ("[N]either *Montana* nor its progeny purports to allow Indian tribes to exercise civil jurisdiction over the activities or conduct of non-Indians occurring outside their reservations."); and *Wright v. Colville Tribal Enterprise Corp*., 111 P. 3d 1244, 1247-48 (Wash. 1st Div. 2005) (holding that "the *Montana* exceptions only apply when the activity in question occurred on the reservation or on non-Indian fee land. 'Non-Indian fee land' refers to land still within the reservation boundaries but alienated in fee simple to non-Indian owners" and finding the *Montana* exceptions inapplicable "because the activity at issue occurred entirely off the Colville reservation[.]").

Similarly, in this case, neither of the *Montana* exceptions apply and as such there is no colorable claim that the Tribe could exercise jurisdiction over EEP. The Tribe did not have adjudicative jurisdiction over EEP, a nonmember, for conduct outside of the reservation or Indian fee land that does not otherwise raise issues of tribal integrity, sovereignty, self-government, or allocation of resources.

None 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. To the contrary, EEP managed the day-to-day operations of the Business at STOFI's Naples office, located at 3170 Horseshoe Dr. S., Naples, Florida 34104, not on the reservation, [Appx. 13 V1] and the entire wholesale fuel distribution business

venture was conducted outside of Tribal land and the termination fee was to be paid to EEP in Collier County. STOFI does not and cannot argue that EEP is a Tribal company, that it is a member of the Tribe, or that any of the actions taken by EEP affected Tribal land in a significant way as to implicate the narrowly construed *Montana* exceptions. *See e.g. Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F. 3d 1125 (8th Cir. 2019) ("Even where there is a consensual relationship with the tribe or its members, the tribe may regulate non-member activities only where the regulation "stem[s] from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.") (citation omitted).

Moreover, while STOFI may have financial considerations at stake, the Supreme Court in *Plains* made it clear that mere monetary interest in the outcome of an otherwise foreign business venture is insufficient to confer jurisdiction over a nonmember. *See Plains Com. Bank*, 128 S. Ct. at 2726 ("The conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community.").

As such, neither of the *Montana* exceptions apply and there is no colorable claim that the Tribe can exercise jurisdiction over EEP, a nonmember, for conduct outside of the reservation. Accordingly, EEP has satisfied the exceptions to the tribal exhaustion doctrine because it is clear that the Tribal Court lacked subject matter jurisdiction to adjudicate the dispute between EEP and STOFI.

*Montana* and its progeny require a holding that the Tribal Court did not have

jurisdiction over nonmember EEO where the situs of the dispute is off-reservation. To hold otherwise would be equivalent to construing the *Montana* exceptions in a manner that swallows the rule or severely shrinks it.

Accordingly, the lower court had subject matter jurisdiction over this dispute and neither the forum selection clause nor tribal exhaustion divested the lower court of jurisdiction.

### B. The District Court had Subject Matter Jurisdiction as to Count II.

In its Answer Brief, STOFI argues that the district court lacked subject matter jurisdiction as to Count II, EEP's claim to compel arbitration pursuant to Section 4 of the Federal Arbitration Act ("FAA") (Answer Brief, pp. 38-44). STOFI's argument is without merit.

In *Vaden*, the Supreme Court established the FAA "look through" jurisdiction requirement, holding that the FAA does not bestow "federal jurisdiction but rather requir[es] [for access to a federal forum] an independent jurisdictional basis over the parties' dispute." *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1271 (2009). The look through analysis includes whether the FAA claim is subject to supplemental jurisdiction. *Id*. 1277, n. 18 ("we see nothing anomalous about the court's ordering arbitration of a state-law claim constituting part of that controversy. Federal courts routinely exercise supplemental jurisdiction over state law claims. See 28 U.S.C. §

1367.").

The lower court had subject matter jurisdiction over Count II as the issues therein arise under Federal Law and form part of the same case or controversy as Count I.

**1. Arising Under Federal Law.**

In *Vaden*, the Supreme Court recognized the application of the "complete preemption doctrine" in conducting an FAA look through analysis, holding "[a] complaint purporting to rest on state law, we have recognized, can be recharacterized as one 'arising under' federal law if the law governing the complaint is exclusively federal." *Vaden*, 129 S. Ct. at 1273.

Under complete preemption, "[a] federal issue may be substantial where the state adjudication would undermine the development of a uniform body of [federal] law[]; [or] where the resolution of the issue has broader significance . . . for the Federal Government[.]" *Bd. of Comm'rs of the Se. La. Flood Prot. Auth.-E. v. Tenn. Gas Pipeline Co., LLC*, 29 F. Supp. 3d 808, 859-60 (E.D. La. 2014) (quoting *Gunn v. Minton*, 133 S. Ct. 1059, 1066-67 (2013)).

Moreover, "whether a question is substantial depends not on its importance to the parties, but rather its importance to the federal system as a whole." *Massachusetts v. Wampanoag Tribe of Gay Head*, 36 F. Supp. 3d 229, 234 (D. Mass. 2014). *See also Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern*

*Cal*., 463 US 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[.]").

Notably, 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) (emphasis added).

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, Count II implicates significant federal issues. Although the matter to be arbitrated is the breach of the Agreement, the issue of tribal jurisdiction 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.

Accordingly, Count II arises under federal law and establishes independent subject matter jurisdiction under Section 4 of the FAA.

***2.*** **Supplemental Jurisdiction.**

The lower Court also had supplemental jurisdiction over Count II as it forms part of the same case or controversy as Count I.

It is well-settled that courts have supplemental jurisdiction "over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy[.]" 28 U.S. Code § 1367(a). "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 where even if claims are "quite different, each claim involves the same facts, occurrences, witnesses, and evidence.").

The focus is not on the elements of the federal and state claims, but rather the

commonality of the nucleus of facts the claims are based on. As such, courts are to take "the nucleus of facts on which the federal question claims are based and compare[s] it to the nucleus of facts on which the state law claims are based." *Upper Chattahoochee Riverkeeper Fund v. Atlanta*, 701 F. 3d 669, 679 (11th Cir. 2012).

In this case, as set forth in the general allegations Complaint [Appx. 11-17 V1], Counts I and II form part of the same nucleus of facts. Namely that EEP and STOFI entered into the Agreement and STOFI breached the Agreement in failing to pay the termination fee. Although Count I seeks a declaration regarding the Tribal Court Judgment and Count II seeks to compel arbitration of a breach of contract claim, both Counts arise from the Agreement and involve the same facts, occurrences, witnesses and evidence.

Accordingly, the lower court had supplemental jurisdiction over Count II.

### C. The Dispute Between EEP and STOFI is Subject to Arbitration.

In its Answer Brief, STOFI argues that the dispute between EEP and STOFI is not arbitrable because STOFI did not agree to arbitrate this dispute. (Answer Brief, pp. 44-47). STOFI's position is without merit as the Agreement provides for arbitration of the dispute between EEP and STOFI.

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).

Here, STOFI's argument is juxtaposed against the language regarding arbitration in Section 7.13 of the Agreement, which provides, in part, that:

> 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 proceedings administered under the rules of the American Arbitration Association for sole and exclusive purpose of terminating the Management Agreement and compelling 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 V1].

Notably, the first paragraph of the Agreement defines STOFI as the "Company" [Appx. 20 V1] and Section 2.5 provides that the "Company shall pay

the Termination Fee" to EEP [Appx. 23 V1]. Undoubtedly, STOFI is the contractually defined "Company;" is the only entity required to pay the termination fee under Section 2.5; and STOFI is the signatory to the Agreement [Appx 36 V1].

STOFI's argument that it did not itself agree to arbitrate this dispute asks this Court to interpret the Agreement in a manner that is not only internally inconsistent but is an absurdity and runs afoul of well-settled contract interpretation principles.

The contractual language "prohibiting" naming STOFI as a party was merely STOFI's attempt to ensure that its non-existent DBA, Seminole Energy, be the named party to the proceeding rather than STOFI. However, this does not change the fact that 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 is still the legal party responsible for paying the termination fee as required in Sections 2.5 of the Agreement, and to participate in the arbitration proceeding as required in Section 7.13. To suggest otherwise, as STOFI does, would run afoul of contract interpretation principles and would create a contract that is essentially meaningless.

As to the scope of the arbitration dispute, STOFI argues that Section 7.13 mandates that EEP **both** terminate the Agreement **and** compel payment of the termination fee in arbitration, and because STOFI already terminated the Agreement, EEP can no longer accomplish both. Thus, STOFI argues that EEP is left without

recourse.

This interpretation again lends itself to absurd results and renders the majority of the Agreement a nullity. If STOFI's interpretation was correct, then Section 2.4 of the Agreement, governing payment of the Termination Fee, would be entirely negated, because STOFI could always prevent payment by simply serving a termination notice to EEP. This would be true even if the Agreement was not terminated, and EEP filed a petition for arbitration against STOFI to terminate the agreement, because STOFI could simply send out a termination notice after it was served and nullify the entire proceeding. This result is contrary to principles of reasonable contract interpretation.

Moreover, STOFI's interpretation of "and" as meaning jointly in the phrase "terminating the Management Agreement **and** compelling the payment of the Termination Fee" does not pass muster. The use of the word "and" in Section 7.13 is several, not joint, in that EEP could use arbitration to terminate the Agreement, compel payment of the termination fee, or both.

In *Chacon,* the court addressed the meaning and usage of the word "and" as follows:

> Authorities agree that the word "and" can be used in the several sense (A and B, jointly or severally) or in the joint sense (A and B, jointly but not severally). […] Observation of legal usage suggests that in most cases […] "and" is used in the several rather than the joint sense[.]

*Chacon v. Philip Morris USA, Inc*., 254 So.3d 1172, 1175 (Fla. 3d DCA 2018).

In this case, the Agreement as a whole supports the several use of "and." Section 2.2 of the Agreement provides that each party had the ability to immediately terminate the Agreement for cause as defined in that section.

Moreover, Section 2.4 of the Agreement provides that the Termination Fee is to be paid to EEP by STOFI regardless of which party terminated the Agreement or the reason for termination. Once the Agreement was terminated, arbitration became the only mechanism available to EEP to compel payment of the termination fee.

There is nothing in the Agreement to suggest that the use of the word "and" in Section 7.13 was meant to be used in the joint sense, as opposed to the several sense, because such an interpretation in the context of the Agreement as a whole would render an absurd result that would require EEP to seek arbitration in order to terminate the Agreement or, on the other hand, be left with no recourse to enforce payment of the termination fee if STOFI terminated the Agreement. The only reasonable use of "and" is several, that is EEP could seek arbitration to terminate the Agreement or to compel payment of the termination fee or both.

Accordingly, both STOFI and the issue of payment of the termination fee are within the scope of arbitration provision of the Agreement.

## CONCLUSION

For all the reasons enumerated herein and the reasons set forth in EEP's Initial Brief, this Court should reverse the lower court's Order and Judgment and remand this matter.

Respectfully submitted this 31st day of May, 2022.

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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 6,155 words.

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

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 31, 2022, 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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