In the
United States Court of Appeals For The Eleventh Circuit

No. 21-13493-F

EVANS ENERGY PARTNERS, LLC,
Plaintiff -Appellant,

v.

SEMINOLE TRIBE OF FLORIDA, INC.,
Defendant - Appellee.

Appeal from the United States District Court for the
Middle District of Florida
District Court No.: 2:20-cv-978-FtM-66MRM

APPELLEE'S BRIEF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Askar, Bassam "Sam," member of Evans Energy Partners, LLC

Askar, Kousay "Casey," member of Evans Energy Partners, LLC

Badalamenti, John L., U.S. District Court Judge

Evans Energy Partners, LLC, Appellant

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Lerner, Allan, general counsel for Seminole Tribe of Florida, Inc.

McCoy, Mac, U.S. District Court Magistrate Judge

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Seminole Tribe of Florida

Seminole Tribe of Florida, Inc., Appellee

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No publicly traded company or corporation has an interest in the outcome of the case or appeal.

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STATEMENT REGARDING ORAL ARGUMENT

Defendant/Appellee Seminole Tribe of Florida, Inc. ("STOFI") believes oral argument will aid the Court in understanding the procedural history of this case and the controlling legal issues warranting this Court's affirmance.

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JURISDICTIONAL STATEMENT

The district court lacked jurisdiction in this case for at least three reasons. First, STOFI has tribal sovereign immunity. *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (holding sovereign immunity is "jurisdictional in nature."). Second, Appellant Evans Energy Partners LLC ("EEP") failed to exhaust Tribal Court remedies before bringing this action to challenge Tribal Court jurisdiction. *See Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 999 F.2d 503, 508 (11th Cir. 1993) (holding "the district court only had subject matter jurisdiction to hear challenges to the tribal court's jurisdiction after a full opportunity for tribal court determination of jurisdictional questions."). Third, there is no independent federal basis for subject matter jurisdiction raised by EEP's claim to compel arbitration of a breach of contract dispute over EEP's alleged rights under its Management Agreement with STOFI. *Badgerow v. Walters*, 20-1143, 2022 WL 959675, at *3, _ S. Ct. __ (March 31, 2022) (stating "the federal court must have what we have called an 'independent jurisdictional basis' to resolve the matter" that is being compelled to arbitration) (citations omitted).

This Court has appellate jurisdiction under 28 U.S.C. § 1291 to review the district court's final judgment dismissing the case without prejudice. The district court issued the final judgment on September 21, 2021. Doc 43. EEP filed a notice of appeal on October 12, 2021. Doc 44.

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STATEMENT OF THE ISSUES

1. Whether STOFI clearly waived tribal sovereign immunity in this case.

2. Alternatively, whether dismissal of the alleged declaratory relief claim was proper for EEP's failure to exhaust Tribal Court remedies.

3. Alternatively, whether the district court had subject matter jurisdiction over EEP's alleged claim to compel arbitration.

4. Alternatively, whether the alleged dispute was arbitrable against STOFI.

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STATEMENT OF THE CASE

A. Nature of the Case.

EEP agreed to resolve all disputes with STOFI arising out of their Management Agreement in Seminole Tribal Court. EEP also agreed that, while a narrow carve-out allowed EEP to bring an arbitration to terminate the Management Agreement and claim a termination fee, STOFI would not under any circumstances be a party to that arbitration. EEP's sole recourse against STOFI, therefore, was in Tribal Court, and STOFI preserved its tribal sovereign immunity against any claim in any other jurisdiction. But when STOFI sued EEP in Tribal Court after EEP breached the Management Agreement (and a related Loan Agreement), EEP refused to participate. EEP has now spent the last three years disavowing its consent to Tribal Court jurisdiction, to which it had contractually agreed, and insisting without success that it can force STOFI to arbitrate.

An American Arbitration Association ("AAA") panel was the first to dismiss EEP's contentions. The panel found EEP's touted arbitration terms so ambiguous that it left the panel without authority to decide whether STOFI had agreed to arbitrate. EEP then tried the district court, which dismissed EEP's case again, finding STOFI has tribal sovereign immunity and could not have waived it in the Management Agreement. This Court has no basis to reverse. Sovereign immunity waivers must be clear to be enforceable, and a three-person arbitration panel and the

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district court all agree the language EEP relies on is ambiguous. In fact, the contract terms exclude any reasonable possibility that STOFI agreed to waive tribal sovereign immunity in arbitration. The district court correctly dismissed the action without prejudice.

The district court had plenty of other grounds to dismiss as well. Tribal sovereign immunity waivers must comply with the sovereign's underlying rules for waiving immunity. In this case, the purported waiver language did not. STOFI's Charter and Bylaws restrict any waiver of tribal sovereign immunity to "income or chattels especially pledged or assigned pursuant to such contract." No resolution of STOFI's Board of Directors and nothing in the Management Agreement pledged or assigned any specific property of STOFI. Any alleged waiver would be unenforceable in any case.

Further, EEP's flagrant refusal to exhaust Tribal Court remedies precluded the district court from considering EEP's alleged claims. The district court also lacked subject matter jurisdiction to compel arbitration over an alleged breach of contract dispute arising from the Management Agreement that presented no independent basis for federal court jurisdiction. And EEP could not force STOFI to arbitrate when EEP specifically agreed to exclude STOFI from any arbitration, and when EEP was not alleging any claim within the narrow arbitration language. This Court can affirm on any one of these grounds.

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B. The Course of Proceedings and Disposition in the Court Below.

The proceedings in this case began in Seminole Tribal Court in June 2016, when STOFI filed a petition against EEP for declaratory relief and damages arising out of EEP's breaches of a Loan Agreement and Management Agreement. Doc 12 at 4. STOFI asked for a declaration that STOFI properly terminated for cause EEP's management of STOFI's petroleum business, and that STOFI did not owe any fee under the Management Agreement. *Id*. STOFI filed the case in Seminole Tribal Court pursuant to Management Agreement's dispute resolution provision, Paragraph 7.13, which contained a mandatory forum selection clause:

> ***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 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 [the] 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.

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Doc 1-1 at 16-17 (emphasis added). (Under Article X of the Tribe's Amended Constitution and By Laws, the Tribal Council vested all "judicial powers of the Seminole Tribe" in the Tribal Courts. Doc 12-3 at 9.)

Despite being served, EEP refused to participate in the Tribal Court proceedings or assert any objections to STOFI's claims or the Tribal Court's jurisdiction. *Id*. Instead, EEP purposefully defaulted in the Tribal Court, and STOFI won a judgment in the amount of $2,526,522.46. *Id*. at 3-5. The Tribal Court Judgment further declared that STOFI properly terminated the Management Agreement for cause and did not owe any fee to EEP. Doc 1-3.

In January 2019, years after STOFI initiated the Tribal Court proceedings, EEP commenced an arbitration in the AAA against STOFI. Doc 1-4. EEP alleged STOFI had supposedly breached the Management Agreement by terminating the agreement "without valid cause" and for failing to pay a contractual termination fee. Doc 1-4 at 9. EEP alleged $8 million in damages. *Id*.

STOFI moved to dismiss the arbitration. STOFI asserted, among other things, that it had never agreed to arbitrate and that the AAA lacked jurisdiction over STOFI. STOFI maintained that any threshold dispute over arbitrability had to be decided by the Tribal Court under the Management Agreement's broad forum selection clause. Doc 1-5 at 5. A three-person arbitration panel granted STOFI's motion and dismissed the case, concluding that "[c]ertainly, there is enough ambiguity in

Paragraph 7.13 to defeat the panel's jurisdiction to decide whether it can decide arbitrability." Doc 1-5 at 9. The arbitral ruling contained a detailed discussion of the numerous contradictions and ambiguities in Paragraph 7.13. Doc 1.5 at 4-5, 9-11.

Following dismissal of the arbitration, EEP sued STOFI in the Middle District of Florida. In its lawsuit, EEP sought to compel arbitration of EEP's alleged breach of contract claim under the Management Agreement and for a declaratory judgment that the Tribal Court supposedly exceeded its jurisdiction in entering judgment against EEP. Doc 1. STOFI moved to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), asserting tribal sovereign immunity together with several other threshold challenges to subject matter jurisdiction and EEP's ability to compel any claim to arbitration. Doc 12.

The district court dismissed the action on the basis of tribal sovereign immunity in a detailed 15-page Order. Doc 42. The issue came down to whether EEP's alleged sovereign immunity waiver language was enforceable against STOFI. Doc 42 at 7. STOFI asserted two arguments against the validity of the alleged waiver. First, STOFI argued the alleged waiver failed to comply with STOFI's Charter and Bylaws, as it must to be valid. Doc 12 at 20-22. Second, STOFI argued that the alleged waiver was ambiguous and therefore unenforceable under the controlling law that sovereign immunity waivers must be clear. Doc 12 at 22-24. The district court disagreed that the dispute resolution terms conflicted with STOFI's

Charter and Bylaws but agreed that the supposed tribal sovereign immunity waiver language was ambiguous and unenforceable. Doc 42, at 11-15. The district court therefore granted STOFI's Rule 12(b)(1) motion for lack of subject matter jurisdiction "on the basis of sovereign immunity" and dismissed the case without prejudice. *Id*. at 15. EEP appealed. Doc 43.

C. Statement of Facts.

STOFI is a tribal federal corporation, chartered and approved by the U.S. Department of the Interior, pursuant to section 17 of the Indian Reorganization Act of 1934, 25 U.S.C. § 5124. Doc 12 at 1. STOFI's purpose is to engage in commercial enterprise for the economic betterment of the members of the Seminole Tribe of Florida (the "Tribe"), who are STOFI's shareholders. *Id*. at 1-2.

On or about May 31, 2013, STOFI purchased all the assets of EEP and its affiliated companies for the purpose of operating a wholesale and commercial petroleum distribution business. *See* 1-2 at 2-3. As part of this purchase, on or about May 31, 2013, STOFI and EEP entered into a Loan Agreement and a Management Agreement. *Id*. Under the Loan Agreement, STOFI loaned EEP approximately $1.5 million to be paid back to STOFI in monthly installments. *Id*. at 3. Under the Management Agreement, EEP was appointed to operate and manage the day-to-day operations of the business. *Id*.

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EEP had no intention of performing its obligations under these agreements. It failed to make a single payment under the Loan Agreement and commenced a campaign of self-dealing and profiteering at the expense of STOFI in violation of the Management Agreement. Doc 1-2 at 3, 4. Among other wrongdoing, EEP diverted substantial monies for purposes wholly unrelated to the petroleum distribution business and wrongfully obtained from STOFI hundreds of thousands of dollars in improper expense reimbursements. *Id*. STOFI terminated the Management Agreement for cause on April 4, 2016 in response, and commenced Tribal Court proceedings pursuant to the Management Agreement's mandatory forum selection provision to recover its damages and confirm its right to terminate the agreement for cause. Doc 1-2 at 1, 5.

D. Standard and Scope of Review.

This Court reviews dismissal of a complaint for sovereign immunity de novo. *E.g*., *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla.*, 692 F.3d 1200, 1203 (11th Cir. 2012) (citations omitted).

SUMMARY OF THE ARGUMENT

The district court properly dismissed the case on the basis of STOFI's tribal sovereign immunity. There is no dispute STOFI has tribal sovereign immunity. The only dispute here was alleged waiver. The district court correctly construed the purported waiver language to be irreconcilably ambiguous. The arbitration panel had

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reached that same conclusion. No reasonable interpretation of the dispute resolution provision supports a finding that STOFI waived its tribal sovereign immunity. This Court can affirm on that basis alone.

The record also supports a number of alternative grounds for dismissal. EEP's alleged waiver terms do not comply with STOFI's Charter and Bylaws, which independently renders the alleged waiver unenforceable. Further, the district court lacked subject matter jurisdiction over either of EEP's claims and had no basis to exercise supplemental jurisdiction. EEP also alleged no arbitrable dispute against STOFI. On any one of these grounds, this Court can affirm.

ARGUMENT

I. STOFI has tribal sovereign immunity and is immune from EEP's lawsuit.

Tribal sovereign immunity is a threshold "consideration [that] determines whether a court has jurisdiction to hear an action." *Taylor v. Alabama Intertribal Council, Title IV J.T.P.A.*, 261 F.3d 1032, 1034 (11th Cir. 2001). Indian tribes "are domestic dependent nations that exercise inherent sovereign authority over their members and territories" and therefore "possess the common-law immunity from suit traditionally enjoyed by sovereign powers." *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1287 (11th Cir. 2015) (internal citations and quotations omitted). Tribes therefore "enjoy immunity from suits on contracts, whether those contracts involve

governmental or commercial activities and whether they were made on or off a reservation." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998).

EEP does not dispute the established law that STOFI, as a federal corporation of the Seminole Tribe, is entitled to tribal sovereign immunity. *See Maryland Cas. Co. v. Citizens Nat'l Bank of W. Hollywood*, 361 F.2d 517, 518 (5th Cir. 1966) (holding STOFI immune from garnishment proceedings). Nor does EEP dispute that STOFI is generally entitled to claim tribal sovereign immunity in this case. Immunity applies to all federal suits, including suits for damages, declaratory relief, and injunctive relief. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Courts must construe the law liberally in favor of Indian tribes invoking tribal sovereign immunity. *See, e.g.*, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980) (holding ambiguities should be construed generously to comport with "traditional notions of sovereign immunity and with the federal policy of encouraging tribal independence"); *Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1285 (11th Cir. 2001) (same); *State of Fla. v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1242 (11th Cir. 1999) (finding "ambiguities in federal laws implicating Indian rights must be resolved in the Indians' favor"). EEP's only argument for avoiding STOFI's tribal sovereign immunity is alleged waiver. STOFI can contractually waive tribal sovereign immunity, but only under certain limited conditions. Two conditions are relevant in this case.

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First, the alleged contractual waiver must be *clear*. *See, e.g., Kiowa*, 523 U.S. at 754 (holding suits against tribes are "barred unless the tribe *clearly waived* its immunity or Congress expressly abrogated that immunity by authorizing the suit.") (emphasis added); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991) (stating "[s]uits against Indian tribes are . . . barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation."). Implicit or ambiguous waivers of sovereign immunity are unenforceable. *See Santa Clara*, 436 U.S. at 58 (finding it "settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed.") (citations, internal quotation marks omitted). The district court correctly found there was no *clear* waiver, and in fact no waiver of any kind, by STOFI in this case.

Second, a proper and enforceable waiver of tribal sovereign immunity must comply with the sovereign entity's rules for waiving immunity. The alleged waiver EEP argues for therefore must strictly comply with STOFI's Charter and Bylaws. *See Sanderlin*, 243 F.3d at 1287 (holding no waiver when tribal Charter reserved tribal sovereign immunity waiver "pursuant to a resolution duly enacted by the Tribal Council" and there was no such resolution); *Maryland Cas.*, 361 F.2d at 518 (finding STOFI had the right to assert tribal sovereign immunity by virtue of its Charter, which must be "liberally construed in favor of [STOFI] and all doubtful expressions therein resolved in favor of the Seminole Tribe."). EEP would have to

satisfy both conditions to defeat STOFI's sovereign immunity defense, but it can satisfy neither. Dismissal was proper.

A. STOFI did not clearly waive tribal sovereign immunity.

EEP failed to convince the district court and any of three arbitrators that the alleged waiver language is clear. EEP hopes this Court gives it a different result, but the operative language makes that impossible. EEP *concedes* the language is ambiguous. EEP admits the terms in Section 7.13 are "poorly worded," have confounding redundancies, and that there is "some ambiguity" about Seminole Energy's role. EEP Br. 25, 28, 30. The district court correctly set forth the ambiguities and contradictions that render "the language of Section 7.13 [] far too muddled to constitute a clear waiver." See Doc 42 at 3,4, 11-15. The arbitration panel's outline description of the dispute resolution provision no less convincingly makes the case that Section 7.13 is patently ambiguous:

> The arbitration provision in Paragraph 7.13 of the parties Management Agreement contains several distinct and seemingly contradictory terms. The key language in Paragraph 7.13 includes:
>
> - a broadly worded clause stating that "[A]ny dispute, controversy, claim, question or difference arising out of this Agreement shall be finally settled 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." The del[e]gatee of this power is presumably the Tribal Court;
>
> - a carve out that states:

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> Notwithstanding what is set forth above, the Company through its parent company the Seminole Tribe of Florida, Inc., agrees to a 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 . . . .
>
> Management Agreement ¶ 7.13;

- a clause that precluded naming STOFI "or any of its affiliated entities" in any arbitration or court proceeding; and, lastly,

- declaring that Evans Energy's rights under this provision would be restricted to compelling Seminole Energy to participate in an arbitration.

Doc 1-5 at 4.

EEP does not dispute these ambiguities but contends they supposedly do not matter. According to EEP, the purported tribal sovereign immunity language is clear even if all the provisions around it are not. EEP contends the other terms are supposedly "extraneous." The argument attempts to isolate language EEP thinks is helpful while ignoring crucial language excluding STOFI from any arbitration. But even the language EEP cherry-picks is not helpful to EEP, as it only highlights that STOFI is *not* waiving tribal sovereign immunity. And EEP's attempt to enforce discrete words from the dispute resolution provision while ignoring obviously relevant language as supposedly "extraneous" is frivolous. *See, e.g.*, *Florida Polk County v. Prison Health Servs., Inc.*, 170 F.3d 1081, 1084 (11th Cir. 1999) ("[T]he

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provisions of a contract should be construed so as to give every provision meaning."); *Jameson v. Mutual Life Ins. Co. of N.Y.*, 415 F.2d 1017, 1020 (5th Cir. 1969) ("An interpretation which gives a reasonable meaning to all provisions is preferable to one which leaves a portion of the [contract] useless, inexplicable or creates surplusage.").

Two fundamental ambiguities preclude EEP's waiver argument. First, the party that is supposedly waiving sovereign immunity, referred to as "the Company," is never identified, though that party is clearly *not* STOFI. Second, the limited waiver language, providing for a narrow arbitration for specified limited relief, is totally contradicted by language excluding from any arbitration the only parties who could possibly claim tribal sovereign immunity, STOFI and its affiliates. The district court correctly identified these and other irreconcilable ambiguities in its Order of dismissal.

1. The "Company" purportedly waiving tribal sovereign immunity cannot be STOFI and is unidentified.

It is crucial to know who is waiving tribal sovereign immunity. The dispute resolution provision never identifies who that is. The only thing the provision makes clear is that it is *not* STOFI. Not even the cherry-picked language EEP quotes out of context is clear. As the district court correctly found, the ambiguity on this question starts in the first line of the limited arbitration carve-out: "***the Company*** through its

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parent company the Seminole Tribe of Florida, Inc., agrees to a waiver of its Sovereign Immunity in order to allow Evans Energy to initiate a binding arbitration … for sole and exclusive purpose of terminating the Management Agreement and compelling the payment of the Termination Fee. . . .” Doc 1-1 at 16 (emphasis added). Under this language, STOFI is a “parent company” that is waiving sovereign immunity on behalf of another entity known only as “the Company.” The district court called this a “strange” and “glaring” redundancy, the first of many incomprehensible and conflicting provisions to come. That is true only if the generally defined term for “Company,” STOFI, is applied to the dispute resolution provision. EEP assumes this. Throughout its brief EEP repeatedly and without discussion inserts “[STOFI]” behind “the Company” when quoting the dispute resolution provision. EEP’s only basis for doing that is that “The Company” is supposedly a defined term. There is no definition section in the Management Agreement, however. EEP relies on boilerplate language in the opening paragraph of the agreement that introduces STOFI as “the **SEMINOLE TRIBE OF FLORIDA, INC**., a Federal corporation with a mailing address of 6300 Stirling Road, Suite 325, Hollywood, Florida 33024 (hereinafter, called (the ‘Company’)).” Doc 1-1 at 1 (emphasis in original). But making STOFI the “Company” in the dispute resolution terms of Section 7.13 renders the “parent company” clause not just strangely and glaringly redundant but totally nonsensical surplusage, and absurd

interpretations are invalid under controlling contract law, as EEP admits. EEP Br. 29; *see, e.g.*, *Koch Bus. Holdings, LLC v. Amoco Pipeline Holding Co.*, 554 F.3d 1334, 1338 (11th Cir. 2009) (finding "[e]ven the literal meaning of a contract must be rejected if it would be clearly unreasonable and yield an arbitrary result.") (citation, internal quotation marks omitted); *Jameson*, 415 F.2d at 1020.

STOFI cannot logically be a parent company for itself, and it does not need to act as a proxy on behalf of itself. The "Company" in the dispute resolution provision can *only* mean an entity separate from STOFI, on whose behalf STOFI can waive sovereign immunity. STOFI would not need to bind "the Company" to a waiver if that entity were already a signatory to the contract. The "Company" that purports to waive sovereign immunity in Section 7.13 is clearly *not* the generally defined "Company" in the first paragraph of page 1, i.e. STOFI. Section 7.13 therefore acts as an exception to the general usage of "Company" in other parts of the agreement. That is consistent with the rule that a specific provision, here Section 7.13, controls over an irreconcilable general provision. *E.g., United States v. Pielago*, 135 F.3d 703, 710 (11th Cir. 1998) (stating the rule that "[w]hen two contract terms conflict, the specific term controls over the general one"). This construction makes sense of the "parent company" terms.

EEP's attempted solution is to keep pretending that "Company" must mean STOFI, even when that renders the "parent company" clause absurd and

meaningless. As EEP itself concedes, that is not how contracts are interpreted. *E.g.*, *Koch*, 554 F.3d at 1338. Under the Surplusage Canon,"[i]f possible, every word and ever provision is to be given effect…. None should be ignored. *None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence*." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012) (emphasis added). The principle EEP hangs its argument on, the "presumption of consistent usage," has a long-established context exception. *See id.* at 170-71; *Yates v. United States*, 574 U.S. 528, 537 (2015) (observing "[i]n law as in life, however, the same words, placed in different contexts, sometimes mean different things"). In this case context means everything. STOFI cannot rationally be the "Company" that is waiving tribal sovereign immunity when *all the other words in the sentence* make clear that STOFI is not, nor intended to be, that party.

The question remains what "Company" is waiving sovereign immunity. The Management Agreement never clearly answers the question. The district court speculated that it could be Seminole Energy, but a host of provisions confound that possibility, as even EEP admits. *See* EEP Br. 25 (conceding that "'Seminole Energy' may have created some ambiguity in the Agreement"). Neither the Management Agreement nor the record proffered by EEP addresses STOFI's or EEP's relationship with Seminole Energy in any way. Certainly nothing establishes that

STOFI was Seminole Energy's "parent company," as the district court pointed out. Doc 42 at 14 (finding "[t]he precise nature of that entity and its relationship to STOFI are not remotely apparent from the [Management] Agreement."). Paragraph 7.13 specifically bars not just STOFI but STOFI's "other affiliated entities" from arbitration. Yet Paragraph 7.13's stated purpose with respect to arbitration supposedly is to allow EEP to name Seminole Energy and *only* Seminole Energy in an arbitration, suggesting Seminole Energy was never to be affiliated with STOFI.

The conundrum need not be resolved here, since the agreement is ambiguous on this question in any event. *See, e.g., S. Coal Corp. v. Drummond Coal Sales, Inc.*, No. 20-14560, 2022 WL 894141, *3-4 (11th Cir. March 28, 2022) (holding a "contract is ambiguous if 'capable of more than one meaning when viewed objectively by a reasonably intelligent person'") (citation, internal quotation marks omitted). The "Company" waiving sovereign immunity is unknown, but it is clearly *not* STOFI. EEP's argument that the sovereign immunity language plucked out of context is supposedly made clear by a shorthand reference in the first paragraph is baseless. On this threshold ambiguity alone, the purported waiver is unenforceable and the Court can affirm the dismissal without prejudice.

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2. The purported limited sovereign immunity waiver terms are in irreconcilable conflict.

Contract provisions that cancel each other out, and that therefore "are in irreconcilable conflict, or, as the law pompously says, 'mutually repugnant,'" are ambiguous. *See e.g., Land O' Sun Realty Ltd. v. REWJB Gas Investments*, 685 So. 2d 870, 871–72 (Fla. 3d DCA 1996) (citations omitted). The "internal conflict" represents a "paradigmatic ambiguity." *Id*. (citations omitted). The dispute resolution provision in this case presents exactly that kind of insolvable contradiction. The limited sovereign immunity waiver *only* allows a narrow arbitration for limited relief. But the parties who could conceivably assert sovereign immunity, STOFI and its affiliates, are explicitly excluded from any arbitration. The result is that an unnamed nonparty has agreed to a limited waiver of sovereign immunity to allow EEP to sue in arbitration, while EEP has agreed not to sue the only parties who *could* assert sovereign immunity defenses in arbitration. That leaves effectively no sovereign immunity waiver to enforce against any party or nonparty. That essential conflict precludes enforcement of the waiver.

EEP has no solution to this other than to ignore the exclusion language altogether and dismiss it as "extraneous." Only by ignoring entire terms can EEP argue that STOFI waived sovereign immunity and agreed to arbitration. The "extraneous" terms argument depends on the surgical removal of the words, "agrees

to a waiver of its Sovereign Immunity," from the arbitration terms that immediately follow, and from which STOFI is explicitly excluded. EEP calls these terms "two independently enforceable layers," EEP Br. 27, but the language refutes that. The natural reading of the sentence, in proper context, is that an unnamed "Company" that is not STOFI "agrees to a limited waiver of its Sovereign Immunity *in order to allow Evans Energy to initiate a binding arbitration*…." Doc 1-1 at 16 (emphasis added). The limited waiver and arbitration terms are not even separate clauses, let alone separate "layers." The sum and substance of the limited sovereign immunity waiver is the ability to bring an arbitration. Without an arbitration to bring or a party to sue in arbitration there is no waiver. There is thus no ability to sever the waiver language from the arbitration language, and no basis either for ignoring the exclusion of STOFI and its affiliates from arbitration: "*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*." Doc 1-1 at 16-17 (emphasis added). There is no ignoring this exclusion—it is the clearest language in the entire dispute resolution provision.

EEP cites no case supporting its bizarre and unnatural reading of the contract. The whole argument is at war with the established rule that "[c]ourts are not to isolate a single term or group of words and read that part in isolation." *E.g.*, *In re Sims*, 781 Fed. Appx. 884, 887 (11th Cir. 2019). The point of this bedrock principle is that *no*

term in a contact is extraneous. *See* Scalia & Garner, *Reading Law* at 167 (explaining the Whole-text Canon that a "judicial interpreter [should] consider the entire text, in view of its structure and of the physical and logical relation of its many parts").

EEP's main case, *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001), lends no support for EEP's argument that sovereign immunity waivers must be isolated out of context and separated from all surrounding words. EEP cites *C&L Enterprises* for its holding that agreements to arbitrate may waive sovereign immunity. But *C&L Enterprises* was a case where the Indian tribe *unambiguously* agreed to arbitrate "[a]ll claims or disputes" with the plaintiff, as well as agreed "to the governance of Oklahoma law, and to the enforcement of arbitral awards 'in any court having jurisdiction thereof.'" *Id*. at 414-15. The tribe in *C&L Enterprises* nonetheless claimed sovereign immunity from suit in any forum "on earth or even on the moon," notwithstanding its express agreement to arbitrate all disputes in the AAA under Oklahoma law and with enforcement in any court. *Id*. at 421. The Supreme Court rejected that argument, holding that an explicit agreement to arbitrate all disputes under the state law of Oklahoma necessarily represented a clear agreement not merely to arbitrate the dispute, but to the "real world objective" of enforcing an award in court. That met the controlling standard that the sovereign immunity waiver must be clear. *Id*. at 418 (holding "[w]e are satisfied that the Tribe in this case has waived, with the requisite clarity"). The

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lack of an explicit statement that the tribe was "waiving sovereign immunity" therefore did not render the waiver ambiguous.

Unlike the tribe in *C&L Enterprises*, STOFI did not agree to arbitrate *any* dispute with EEP. It agreed, rather, to resolve all disputes with EEP in Tribal Court. As the district court and three arbitrators found, the narrow arbitration terms in this case were far from clear. They were rife with contradiction, ambiguity, and unsolvable questions about who had agreed to arbitrate. The district court correctly reasoned that, "unlike the contract in *C&L Enterprises*, the [Management] Agreement is ambiguous because it appears the parties contemplated creating a third entity—Seminole Energy—that would be compelled to arbitrate instead of STOFI," though the "precise nature of that entity and its relationship to STOFI are not remotely apparent from the [Management] Agreement." Doc 42 at 14. EEP fully admits this "ambiguity regarding 'Seminole Energy,'" but contends the ambiguity supposedly "relates to the manner in which the arbitration was to proceed." EEP Br. 36. No it did not. It related to *who* if anyone EEP could compel to arbitration, a crucial fact necessary to knowing who if anyone was waiving sovereign immunity. The one clear thing in the agreement is that STOFI itself neither waived tribal sovereign immunity nor could be compelled to arbitration. Those are not separate issues but the same issue.

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C&L Enterprises did not supplant the rule that sovereign immunity waivers must be clear. It applied that rule to situations where a tribe unambiguously and clearly agreed to arbitrate all disputes. As the Supreme Court held, "[t]he clause *no doubt* memorializes the Tribe's commitment to adhere to the contract's dispute resolution regime," and "*specifically authorizes* judicial enforcement of the resolution arrived at through arbitration." *C&L Enterprises*, 532 U.S. at 422 (emphasis added). *C&L Enterprises* repeatedly makes the point: "There is nothing ambiguous about th[e] language [of the arbitration clause]." *Id*. at 420 (quotation omitted). *C&L Enterprises* suggests nothing to detract from the established law that sovereign immunity waivers remain unenforceable without a clear agreement. Here, not only was there *no* clear agreement, STOFI was *expressly* excluded from arbitration altogether. Doc 1-1 at 16-17.

EEP cites a series of out-of-Circuit cases echoing *C&L Enterprises*' holding, EEP Br. 25-26, but these cases do not help EEP. The Eighth Circuit's 1995 decision in *Rosebud Sioux Tribe v. Val-U Const. Co. of S. Dakota, Inc.*, 50 F.3d 560 (8th Cir. 1995) anticipated *C&L Enterprises*' holding that sovereign immunity waivers require no "magic words," and that a clear broad arbitration agreement may suffice. *Id*. at 562. As in *C&L Enterprises*, there was no question in *Rosebud* that the tribe's agreement to resolve disputes in arbitration was explicit and unambiguous. *See id*. (holding that "[t]he language of this [arbitration] clause is spare but explicit that

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disputes under the contract 'shall be decided by arbitration'"). In *Oglala Sioux Tribe v. C & W Enterprises, Inc.*, 542 F.3d 224 (8th Cir. 2008), a post-*C&L Enterprises* decision, not only had the tribe contractually granted an explicit "limited waiver of its immunity for any and all disputes," which the court found "unambiguous," but the tribe had actively consented to and participated in arbitration without any objection to jurisdiction. *See id*. at 230-31.

Other cases EEP cites support STOFI. *Bank One, N.A. v. Shumake*, 281 F.3d 507 (5th Cir. 2002) held that the Court did not need to reach any question of waiver "because in the instant case *the Tribe was not a party to the contract*." *Id*. at 515 (emphasis added). *Bank One* reinforces the obvious fact that an arbitration agreement cannot waive sovereign immunity when the tribe is not a party to it. Nor is *Allen v. Gold Country Casino*, 464 F.3d 1044 (9th Cir. 2006) helpful to EEP's appeal, as that case found *C&L Enterprises* inapplicable to an argument that mere statements in employment documents referencing adherence to federal and state law "did not amount to an unequivocal waiver of the Casino's sovereign immunity." *See id*. at 1047. The California state appeals court in *Big Valley Band of Pomo Indians v. Superior Court*, 35 Cal. Rptr. 3d 357 (Ct. App. 2005) held that a limited waiver of tribal immunity through a clear agreement to arbitrate disputes "effectuate[d] waiver only for purposes of compelling arbitration or entering judgment on an arbitration award," and therefore did not act "as [the tribe's] consent to be sued for

all causes of action arising from a contract containing an arbitration clause." *Id*. at 364-65. *Big Valley* stands for the proposition that waivers are "strictly construed," and that there is a "strong presumption" against them." *Id*. at 364 (citing *Demontiney v. U.S. ex rel. Dept. of Interior*, 255 F.3d 801, 811 (9th Cir. 2001); *Ramey Const. v. Apache Tribe of Mescalero Reserv*, 673 F.2d 315, 320 (10th Cir. 1982)). None of these cases supports EEP's argument that STOFI could have waived sovereign immunity through vague language and an explicit *exclusion* of STOFI from arbitration.

Courts have distinguished *C&L Enterprises* on other grounds relevant to this case, as well. Many courts have distinguished *C&L Enterprises* when the parties had not agreed to a state choice of law provision, given the significance Oklahoma's incorporated arbitration law played in the Supreme Court's decision. *See, e.g.*, *Equitas Disability Advocates, LLC v. Daley, Debofsky & Bryant, P.C.*, 177 F. Supp. 3d 197, 213 (D.D.C. 2016) (finding "Equitas's reliance on *C&L Enterprises* [] is similarly misplaced … the contract's choice of law clause makes it plain enough that a court having jurisdiction to enforce the award in question is the Oklahoma state court." (internal quotations omitted)); *Housh v. Dinovo Investments, Inc.*, No. CIV.A. 02-2562-KHV, 2003 WL 1119526, at *9 (D. Kan. Mar. 7, 2013) (finding *C&L Enterprises* distinguishable because "*C&L Enterprises* concluded that th[e] arbitration clause … *combined with the Oklahoma choice of law provision*,

established that as to enforcement of an arbitration award, the parties intended the OUAA to apply.") (emphasis added). The Management Agreement contains no similar choice of law provision but, rather, directs all disputes between STOFI and EEP to Tribal Court.

At least two state courts have distinguished *C&L Enterprises* on the basis that, as here (*see infra* § I.B.), the purported waiver of sovereign immunity contravenes procedures and restrictions for waiving sovereign immunity under tribal governing documents. *See, e.g., Churchill Fin. Mgmt. Corp. v. ClearNexus, Inc.*, 341 Ga. App. 798, 804 (2017) (rejecting finding of waiver and application of *C&L Enterprises* because, "[b]ased on persuasive authority of other jurisdictions," the tribal entity was "required to follow a specific procedure in order to waive tribal sovereign immunity under its charter, and the necessary procedure was not followed."); *Lobo Gaming, Inc. v. Pit River Tribe of California*, C037661, 2002 WL 922136, at *4 (Cal. Ct. App. May 7, 2002) (finding *C&L Enterprises* "has no bearing on a case such as this, where the purported waiver contravened the Tribe's Constitution."). Another state court found *C&L Enterprises* inapposite when the agreement to arbitrate did not compel *all disputes* to arbitration but, as is this case, severely restricted the scope of arbitration. *See, e.g., First Am. Casino Corp. v. E. Pequot Nation*, No. 541674, 2001 WL 950243, at *5 (Conn. Super. Ct. July 16, 2001) (finding that tribe did not waive sovereign immunity because "[u]nlike the facts in

[*C&L Enterprises*], the agreement does not contain an express agreement to arbitrate *all* disputes arising from the contract[.]" (emphasis in original)).

EEP tries to connect *C&L Enterprises*' holding with other provisions in the Management Agreement to argue that STOFI somehow agreed to arbitrate *despite* Paragraph 7.13's clear exclusion of STOFI from arbitration. EEP points out that STOFI is the only other party to the Management Agreement, but that means nothing. It is settled law that nonparties to a contract can compel, and be compelled, to arbitration. *See Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009) (holding nonparties may enforce or be subject to the Federal Arbitration Act under "'traditional principles' of state law [that] allow a contract to be enforced by or against nonparties to the contract."). In this case, EEP specifically agreed that nonparty Seminole Energy would be the only party it *could* name in arbitration. As the district court correctly reasoned, the fact that STOFI and EEP were the only two parties "does not give any immediate insight into what 'Seminole Energy' was supposed to be," other than the entity that EEP seemingly had the right to compel to arbitration under Paragraph 7.13.

EEP's other arguments follow the same speculative path. EEP argues that in Paragraph 2 of the Management Agreement, payment of the termination fee must come from STOFI and, since arbitration was limited to terminating the Management Agreement and compelling payment of a termination fee, STOFI supposedly must

have agreed to arbitrate. But nothing in the agreement says that STOFI is the exclusive party to pay a termination fee. The agreement states, "Evans Energy shall be entitled to a termination payment…" Doc 1-1 at 4. A separate provision says that "[t]he Company shall pay the Termination Fee to Evans Energy" pursuant to a two-year payment schedule. *Id*. These terms imply nothing about arbitration.

Under the mandatory forum selection provisions of Paragraph 7.13, EEP could have recovered a termination fee from STOFI in Tribal Court, though never in arbitration, assuming EEP had a basis for it (which it did not). Paragraph 7.13 explicitly allowed EEP to sue Seminole Energy in arbitration to both terminate the Management Agreement and for a termination fee. By the provision's clear terms, STOFI obviously was not intended to be the party potentially liable for a termination fee. None of this amounts to a clear agreement by STOFI to arbitrate.

EEP also contends cryptically that "STOFI is the only party that is presumptively immune from suit under sovereign immunity." EEP Br. 28. EEP appears to be speculating about whether Seminole Energy would have had any right to assert an immunity defense, but that is baseless. As the district court found in rejecting essentially the same argument below, "EEP does not cite any evidence or contractual document to support this reading [about the supposed necessity of Paragraph 7.13's purported sovereign immunity waiver]—the Court is simply supposed to take EEP's word for it." Doc 42 at 12. That EEP has to resort to

unsupported inferences from provisions unrelated to arbitration and speculation about what Seminole Energy *would have been* only reinforces that the purported sovereign immunity waiver was ambiguous. EEP's arguments amount to a contention, unsupported by the Management Agreement or the record, that STOFI implicitly agreed to arbitrate. But that is not enough for a sovereign immunity waiver. *Santa Clara*, 436 U.S. at 58; *Sanderlin*, 243 F.3d at 1288.

EEP must reach back to the 1883 decision in *Merriam v. United States*, 107 U.S. 437, 441 (1883), involving a contract dispute over "a quantity of oats," for alleged support of its interpretation of the Management Agreement. *Merriam* was a parol evidence case, in which the Supreme Court had to look to evidence outside the terms of the parties' agreement itself to determine their intent, and to enable the Court to "Avail[itself] of the light thrown on the contract in this case by the circumstances under which it was made." *Id*. at 442. Parol evidence is not possible for a contractual sovereign immunity waiver, however. As the district court correctly reasoned, resort to parol evidence is only possible if the provisions are ambiguous, at which point the purported sovereign immunity waiver is already unenforceable. Doc 42 at 14; *see also, e.g., S. Coal*, 2022 WL 894141 at *4 (finding under New York law that only "[o]nce the district court determined that the Agreement was ambiguous, it could properly hear extrinsic evidence…." EEP offers no substantive challenge to that reasoning, other than its cryptic cite to *Merriam*. Any contention

that the district court could have looked outside of the Management Agreement for clarity therefore is waived, as well as meritless. See *E.g., Shell v. AT&T Corp.*, 20-12533, 2021 WL 3929916, at *6 n.6 (11th Cir. Sept. 2, 2021) (finding the appellant "fails to 'plainly and prominently' raise these issues in the argument section of his brief and therefore we find that these issues are waived."). Any argument that the district court should have looked outside of the Management Agreement to make sense of the waiver terms is an admission that they are unenforceable.

On this basis as well, this Court can affirm.

B. The purported tribal sovereign immunity waiver conflicts with STOFI's Charter and Bylaws.

The law is clear that any alleged contractual waiver of tribal sovereign immunity must comply with STOFI's Charter and Bylaws to be enforceable. *See, e.g.*, *Sanderlin*, 243 F.3d at 1287. In this case STOFI's Amended Corporate Charter grants 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*.

Doc 12-1 at 4-5 (emphasis added). Under the Bylaws, STOFI's Board of Directors "may authorize any officer, agent or agents to enter into any contract … on behalf of the corporation, *not inconsistent with the Corporate Powers*," and those powers

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in turn are specifically "subject to all conditions of this charter …." Doc 12-1 at 6 (emphasis added). Under these restrictions, neither STOFI itself nor the signatory to the Management Agreement, STOFI's president Tony Sanchez, had the power to waive tribal sovereign immunity in this case. The purported waiver was not "expressly stated" in the Management Agreement, as STOFI waived no immunity at all, *see supra* § I.A. And the Management Agreement did not identify any specific "income or chattels especially pledged or assigned" by STOFI as a "termination fee." The district court found otherwise but erred in doing so. This Court can affirm dismissal on this basis. *See Jennings v. Stephens*, 135 S. Ct. 793, 798 (2015) (holding an appellee may "urge in support of a decree any matter appearing before the record, although his argument may involve an attack upon the reasoning of the lower court.").

The Management Agreement defines a "termination fee" to be equal to "Fifty Percent (50%) of the Fair Market Value of the Business [presumably Seminole Energy] as calculated on an Income Approach Basis," and then sets forth a procedure for reconciling differing conclusions that "appraisers" might reach in assessing fair market value. Doc 12-1 at 4. Fair market value is not "chattels," meaning physical property, and it is not income. It is, rather, an assumption about the value of a hypothetical sale of a business, and as the Management Agreement contemplates, opinions may and often do differ. Courts have "uniformly defined" fair market value

as "the amount of money which a purchaser willing but not obliged to buy the property would pay to an owner willing but not obliged to sell it, taking into consideration all uses to which the property is adapted and might in reason be applied." *See, e.g.*, *Am. Reliance Ins. Co. v. Perez*, 689 So. 2d 290, 291 (Fla. 3d DCA 1997) (citations omitted). The "Income Approach Basis" as that term is used under in the Management Agreement is not itself "income" but is a formula for estimating fair market value. At its most basic level the income approach takes net income (revenue less costs of goods sold and operating expenses), *if any*, adjusts for such factors as taxes, depreciation, and interest, and divides that number by a capitalization rate, the determination of which "involves the consideration of many factors" and is often the subject of intense disagreement among competing experts. *E.g.*, *United States v. Tampa Bay Garden Apartments, Inc.*, 294 F.2d 598, 607 (5th Cir. 1961); *see United States v. 6.45 Acres of Land*, 409 F.3d 139, 143 (3d Cir. 2005) (applying he income approach). In this case, Seminole Energy never came into existence, *see* Doc 42 at 12, making its fair market value under the contract $0. Yet EEP alleged inexplicably that it was owed $8 million in damages in arbitration. *See* Doc 1-4 at 9.

The district court nonetheless found that the Management Agreement's fair market value formula satisfied the Charter, reasoning that the formula in the contract "'especially pledge[s] and assign[s]' liquidated damages to EEP upon the

termination of the [Management] Agreement." But STOFI's Charter does not waive sovereign immunity for "liquidated damages." The Charter *prohibits* money damages of any kind and limits the waiver of immunity to specifically identifiable pledged property "chattels" or traceable "income." The Management Agreement's formula for deciding fair market value does not pledge any property or income. It effectively sets a buyout price unsecured by any asset. Fair market value, being an assumption about value, is not tangible property or any specific sum of money or any other kind of asset reasonably capable of being "*pledged*." Under no circumstances could STOFI's Charter and Bylaws be construed to waive tribal sovereign immunity for such a claim. *See Maryland Cas.*, 361 F.2d at 521 (construing the "income or chattels especially pledged or assigned" provision "liberally … in favor of [STOFI]," with "all doubtful expressions therein resolved in favor of [STOFI]"). Nor could any demand for "fair market value" plausibly be described as "liquidated damages"—essentially a stipulated amount of monetary damages predetermined by contract when damages are otherwise not "readily ascertainable." *E.g.*, *Resnick v. Uccello Immobilien GMBH, Inc.*, 227 F.3d 1347, 1350 (11th Cir. 2000). This was the opposite of an agreed amount of damages. The Management Agreement specifically contemplated contested opinions on fair market value, and EEP's demand for $8 million in damages for failure to pay a termination fee made disagreement over fair market value a certainty.

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Neither the Management Agreement nor EEP's demand for damages complied with STOFI's limited authority under its Charter and Bylaws to waive tribal sovereign immunity. For these reasons as well, the purported waiver was unenforceable.

II. This Court has numerous alternative grounds to affirm the district court's dismissal.

This Court can affirm on any basis supported in the record. *See Jennings*, 135 S. Ct. at 798. Though the district court only reached the question of STOFI's tribal sovereign immunity, and this Court can affirm on that basis alone, several alternative grounds STOFI raised below support affirming dismissal.

A. EEP's failure to exhaust Tribal Court remedies precluded its claim for declaratory relief (Count I).

In Count I, EEP seeks a declaration that the Seminole Tribal Court exceeded its jurisdiction by entering its Judgment. EEP purported to ground that alleged claim on federal question jurisdiction, 28 U.S.C. § 1331. But "[f]ederal question jurisdiction does not exist merely because an Indian tribe is a party." *Miccosukee Tribe of Indians of Fla. v. Kraus-Anderson Construction Co.*, 607 F.3d 1268, 1273 (11th Cir. 2010) (citations omitted). The complaint "still must claim a right to recover under the Constitution and laws of the United States." *Id*. A challenge to Tribal Court jurisdiction could in limited circumstances create federal question jurisdiction, but not in this case because EEP failed to exhaust tribal remedies.

Despite having specifically agreed to the jurisdiction of the Tribal Court to resolve "Any dispute, controversy, claim, question or difference," Doc 1-1 at 16, EEP strategically elected not to raise its supposed jurisdictional objections (or any defense at all) directly with the Tribal Court. The district court under the circumstances had authority to dismiss the claim and correctly did so. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987) (stating "[r]egardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a 'full opportunity to determine its own jurisdiction.'"); *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985) (holding "[u]ntil petitioners have exhausted the remedies available to them in the Tribal Court system … it would be premature for a federal court to consider any relief."); *Tamiami*, 999 F.2d at 508 (holding "the district court only had subject matter jurisdiction to hear challenges to the tribal court's jurisdiction after a full opportunity for tribal court determination of jurisdictional questions."). As the Eighth Circuit has persuasively explained the policy behind allowing Tribal Courts the ability to "make an initial evaluation of jurisdictional questions," Tribal Court exhaustion requirements "assist[] in the orderly administration of justice, provid[e] federal courts with the benefit of tribal expertise, and clarify[] the factual and legal issues that are under dispute and relevant for any jurisdictional evaluation." *DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d

877, 882 (8th Cir. 2013). EEP refused to let that happen.

Instead, EEP deliberately sat on its hands, elected not to raise any jurisdictional objection in Tribal Court, and then tried to attack the Tribal Court's jurisdiction and default Judgment for the first time in district court. EEP admitted its refusal to participate in the Tribal Court proceeding was intentional and strategic. In trying to justify its actions, EEP claimed its "refusal to participate in STOFI's [supposedly] sham lawsuit in Tribal Court was precisely to avoid any argument that EEP had waived its ability to arbitrate the underlying dispute or otherwise accepted the jurisdiction of the Tribal Court." Doc 12-5 at 25. But EEP had already accepted Tribal Court jurisdiction by explicitly consenting to that forum to resolve "[a]ny dispute controversy, claim, question or difference" with STOFI arising out of the Management Agreement. Doc 1-1 at 16. That broad language easily encompasses a dispute over whether EEP's purported claims should be compelled to arbitration. In refusing to appear before the Tribal Court, EEP simply decided to violate the very dispute resolution provision it was claiming the right to enforce.

No exception to Tribal Court exhaustion applies in these circumstances. The Supreme Court has recognized limited exceptions for the exhaustion requirement "where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, … where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack

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of an adequate opportunity to challenge the court's jurisdiction." *Nat'l Farmers*, 471 U.S. at 857 n.21.

EEP has no basis to claim harassment or bad faith. As other Circuits have held, "it must be the Tribal Court that acts in bad faith to exempt the party from exhausting available Tribal Court remedies." *See Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1201-02 (9th Cir. 2013) (citing *Juidice v. Vail*, 430 U.S. 327, 338 (1977)). In this case, EEP intentionally refused to appear in Tribal Court and had no dealings with the Tribal Court whatsoever. It cannot possibly show harassment or bad faith conduct on the part of the Tribal Court.

Nor can EEP's refusal to bring its jurisdictional challenges in Tribal Court be excused on the basis of any "express jurisdictional prohibition." This exception requires that there be no "colorable" argument that the Tribal Court has jurisdiction. *See Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 920 (9th Cir. 2008) (federal courts are required "to dismiss or to abstain from deciding claims over which tribal court jurisdiction is 'colorable'"). In this case the Tribal Court had a host of obvious jurisdictional grounds to claim. EEP specifically and expressly consented to Tribal Court jurisdiction. Entering into consensual agreements with a tribe is one of the established exceptions to the general bar on jurisdictions over nonmembers. *See Montana v. United States*, 450 U.S. 544, 565 (1981) (holding "[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."); *Miccosukee*, 607 F.3d at 1275 (finding that "*Montana* plainly states that a nonmember, such as Kraus–Anderson, can consent to tribal court jurisdiction by contract."). EEP undeniably under the Management Agreement agreed to Tribal Court jurisdiction.

The Tribal Court also had jurisdiction under other provisions of the Management Agreement and Loan Agreement, which gave STOFI "authority to regulate the activities of" EEP. *See Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997) (finding "[c]ivil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts."). The agreements, and EEP's breaches of those agreements, further "threaten[ed] or ha[d] some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. Under any one of these established grounds, the Tribal Court had at *least* a colorable claim to jurisdiction. The Tribal Court in fact had jurisdiction outright.

Nor could EEP claim an exception to the exhaustion requirement on futility grounds. *White v. Pueblo of San Juan*, 728 F.2d 1307, 1313 (10th Cir. 1984). EEP's refusal to participate in Tribal Court was nothing more than gamesmanship. Mere "speculative futility is not enough to justify federal jurisdiction." *Id.* (finding no futility where the plaintiffs failed to file a complaint in Tribal Court because they

believed it would be futile to seek a tribal remedy). What EEP was required to do (and what STOFI successfully did in the now dismissed arbitration) was to appear and assert its jurisdictional objections. EEP elected not to do that for misguided strategic reasons. But self-serving contentions that the Tribal Court proceedings were supposedly a "sham," and meritless concerns about waiver, did not excuse EEP's obligation to raise its objections in Tribal Court. *See Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 34 (1st Cir. 2000) (explaining that "the requirements for [the futility] exception are rigorous: absent tangible evidence of bias ... a party cannot skirt the tribal exhaustion doctrine simply by invoking unfounded stereotypes"); *Johnson v. Jones*, 605CV1256ORL22KRS, 2005 WL 8159765, at *3 (M.D. Fla. Nov. 3, 2005) (finding "parties may not be relieved from the exhaustion requirement by *merely alleging* that tribal courts will be incompetent or biased") (emphasis in original; quotations omitted).

Dismissal can be affirmed, therefore, for the independent reason of EEP's failure to exhaust Tribal Court remedies.

B. The district court lacked subject matter jurisdiction over EEP's claim to compel arbitration (Count II).

The Federal Arbitration Act ("FAA") "is non-jurisdictional: The statute does not itself supply a basis for federal jurisdiction over FAA petitions." *Cmty. State Bank v. Strong*, 651 F.3d 1241, 1252 (11th Cir. 2011). The FAA thus "bestow[s] no

federal jurisdiction but rather requir[es] [for access to a federal forum] an independent jurisdictional basis over the parties' dispute." *Vaden v. Discover Bank*, 556 U.S. 49, 59 (2009) (brackets in original; internal quotation marks omitted). For this reason, "the parties must identify an independent basis for federal jurisdiction over a petition to compel arbitration brought pursuant to the FAA." *Cmty. State Bank*, 651 F.3d at 1252.

To assess whether independent jurisdiction exists, the Supreme Court has instructed that a court is to "look through" a § 4 petition and order arbitration if, save for the arbitration agreement, the court would have jurisdiction over the substantive dispute. *Vaden*, 556 U.S. at 53. "[J]urisdiction should be predicated on the *substantive dispute between the parties*, not the arbitrability issue actually to be decided by the district court." *Cmty. State Bank*, 651 F.3d at 1255 (emphasis in original). Thus, under § 4 of the FAA "a party seeking to compel arbitration may gain a federal court's assistance only if, save for the agreement, the entire, actual controversy between the parties, as they have framed it, could be litigated in federal court." *Vaden*, 556 U.S. at 66 (quotations omitted). Further, where, as here, the dispute sought to be compelled to arbitration has already been "embodied" in pending litigation, "federal jurisdiction over the subsequent FAA petition *must* be assessed from the face of the preexisting complaint." *Cmty. State Bank*, 651 F.3d at 1253 (emphasis added). Here, EEP seeks to compel a dispute to arbitration that has

already been "embodied" in a prior-filed arbitration complaint. *See* Doc 1-4. That complaint consisted of a single common law claim for breach of the Management Agreement. Nothing in that dispute touches on federal law or provides an independent basis for federal jurisdiction.

On this additional basis, as well, this Court can affirm dismissal.

C. There was no basis for supplemental jurisdiction.

EEP cannot salvage its jurisdictionally deficient claims by relying on supplemental jurisdiction. The statute makes clear the necessary conditions for supplemental jurisdiction:

> ***in any civil action of which the district courts have original jurisdiction,*** the district courts shall 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 under Article III of the United States Constitution.

28 U.S.C. § 1367(a) (emphasis added). Here, because the district court lacked subject matter jurisdiction over either one of EEP's alleged claims, there was no jurisdictional hook to exercise supplemental jurisdiction. The threshold requirement of an action in which the district court has "original jurisdiction" is lacking.

The only alleged claim even arguably subject to federal question jurisdiction is EEP's Count I for a supposed declaratory judgment against the Tribal Court's jurisdiction. That would require EEP's failure to exhaust Tribal Court remedies to be an issue of comity rather than a failure of subject matter jurisdiction, despite this

Court holding to the contrary. *See Tamiami*, 999 F.2d at 508. Even so, supplemental jurisdiction would be unavailable. One reason is that EEP's two alleged claims do not "form part of the same case or controversy under Article III." *Id*. The "constitutional 'case or controversy' standard confers supplemental jurisdiction over all state claims which arise out of a *common nucleus of operative facts* with a *substantial* federal claim." *E.g*., *Parker v. Scrap Metal Processors, Inc*., 468 F.3d 733, 743 (11th Cir. 2006) (emphasis added). The federal and state claims therefore must "involve[] the same facts, occurrences, witnesses, and evidence." *Palmer v. Hosp. Auth. of Randolph County*, 22 F.3d 1559, 1566 (11th Cir. 1994).

EEP's claims are not sufficiently related to meet this standard. The alleged declaratory relief claim (Count I) raises legal and factual issues pertaining to the Tribal Court's jurisdiction and the underlying Tribal Court proceedings. On the other hand, EEP's alleged claim to compel STOFI to arbitration under § 4 of the FAA (Count II) raises wholly different issues not relevant to the Tribal Court's jurisdiction, including sovereign immunity and the enforceability and scope of the arbitration provision. These disputes are distinct, as they involve totally different legal issues and different evidence. On this basis as well supplemental jurisdiction is unavailable.

Moreover, EEP's attempt to use an admittedly non-arbitrable declaratory judgment claim to extend supplemental jurisdictional over a claim under § 4 of the

FAA contravenes *Vaden*'s "look through" analysis. *Vaden* contemplates that the use of supplemental jurisdiction involving a claim under § 4 of the FAA should require the *whole controversy* before the district court be compelled to arbitration. *See Vaden*, 556 U.S. at 69 n.18. The dissent had criticized the majority holding on the concern that the ruling would create federal jurisdiction over too many state law claims. The majority responded with the observation that "if a federal court would have jurisdiction over the parties' *whole controversy*, we see nothing anomalous about the court's ordering arbitration of a state-law claim constituting part of that controversy.") *Id*. (emphasis added). This analysis assumes the entire case would go to arbitration. That is not the case here.

Indeed, EEP turns *Vaden*'s "look through" framework under § 4 on its head. The "look through" analysis, applicable solely to Count II, identifies no independent federal court jurisdiction on the allegedly arbitrable dispute, *see supra* § II.C. The district court (in theory) would be compelling arbitration of a dispute over which it has no jurisdiction to speak of, while the supposed "federal question" claim, being non-arbitral, stayed behind. By compelling a breach of contract claim to arbitration that could otherwise not be brought in federal court, the district court would be violating the central premise of *Vaden*, that the district court must have some independent jurisdictional basis *to compel a claim* to arbitration under § 4 of the FAA.

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As *Vaden* instructs, "a federal court should determine its jurisdiction by 'looking through' *a § 4 petition* to the parties' underlying substantive controversy." *Vaden*, 556 U.S. at 62 (emphasis added). The § 4 "petition" in this case is entirely Count II. It is not Count I, which is non-arbitral and has nothing to do with the FAA. Nothing in *Vaden* authorizes a district court to "look through" to alleged claims wholly unrelated to the § 4 petition.

The Supreme Court just recently reinforced the constraints on a federal court's jurisdiction to act under the FAA over controversies that do not invoke subject matter jurisdiction. In *Badgerow* the Supreme Court refused to extend *Vaden*'s "look through" analysis to petitions to confirm or vacate arbitral awards under §§ 9 and 10 of the FAA. *Badgerow*, 2022 WL 959675, at *3. The *Badgerow* court based that holding on the unique jurisdictional language in § 4 that led the *Vaden* Court to adopt the "look through" analysis. That language is notably absent in §§ 9 and 10. The Supreme Court reasoned, "[a]ttending to the language of Section 4 thus required approv[ing] the 'look through' approach as a means of assessing jurisdiction *over petitions to compel arbitration*." *Badgerow*, 2022 WL 959675 at *5 (emphasis added; internal quotation marks and citations omitted). Because that specific jurisdictional language does not appear in §§ 9 and 10, a district court must confine its determination of jurisdiction over a petition to confirm or vacate an award to the "face of *the application itself*." *Id*. (emphasis added). This holding comports with

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the traditional rule that "courts of the United States are courts of limited jurisdiction, defined (within constitutional bounds) by federal statute." *Id*. at *4.

In this case, a § 4 "look through" does not help EEP because the controversy at issue in Count II is entirely state-law based. An examination of "the application itself" yields the same result, as the "application" is nothing more than Count II. Under no circumstances could the district court claim supplemental jurisdiction through Count I, which has nothing to do with the FAA.

The district court therefore could not claim supplemental jurisdiction and appropriately dismissed the case.

D. The alleged dispute is not arbitrable.

STOFI moved to dismiss Count II under Rule 12(b)(6) for failure to state a cause of action, but the district court could have summarily decided the merits, or lack of merit, of EEP's claim to compel arbitration pursuant to § 6 of the FAA. That section provides that applications to compel arbitration "shall be made and heard in the manner provided by law for the making and hearing of motions." 9 U.S.C. § 6; *see also* Fed. R. Civ. P. 81(a)(6)(B) (providing the procedures of the FAA govern over the rules of civil procedure when they differ). The purpose of § 6 is to "ensure[] that FAA applications get streamlined treatment—a kind of expedited review, as compared to what a party would receive if she brought a normal contract suit."

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Badgerow, WL 959675, at *7 (citation, internal quotation marks omitted). In this case the district court could easily and summarily deny EEP's petition.

As the Supreme Court has stressed, the "FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010) (citations omitted). The "central or primary purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms." *Id*. at 682 (citations, internal quotation marks omitted). Parties may therefore "agree to limit the issues they choose to arbitrate," and "parties may specify *with whom* they choose to arbitrate their disputes." *Id*. at 683 (emphasis in original, citations omitted). Accordingly, "nothing in the [FAA] authorizes a court to compel arbitration of any issues, *or by any parties*, that are not already covered in the agreement." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (emphasis added).

EEP had no plausible basis to compel STOFI to arbitration. Nothing could be clearer than the statement in Paragraph 7.13, "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*." Doc 1-1 at 16-17. (emphasis added). If this were not clear enough, the provision clarifies that any arbitration is restricted to compelling Seminole Energy to participate in a limited

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arbitration proceeding: "Evans Energy's rights under this Section 7.13 *shall be restricted to compelling Seminole Energy to participate in an arbitration proceeding* for the express purpose set forth herein." *Id.* (emphasis added). No court could compel STOFI to arbitration under this language consistent with the controlling law of the FAA.

EEP's alleged dispute was also not arbitrable. EEP seeks in Count II to compel STOFI to arbitrate whether it breached the Management Agreement and supposedly owes damages from its failure to pay a "termination fee." Doc 1 at 11-12. The extremely narrow scope of the arbitration provision, however, restricts EEP's ability "to initiate a binding arbitration proceeding … for [the] *sole and exclusive purpose* of terminating the Management Agreement *and* compelling payment of the Termination Fee …" Doc 1-1 at 16-17 (emphasis added). EEP did not seek to compel arbitration to terminate the Management Agreement and compel payment of the termination fee. As the Complaint concedes, STOFI long ago terminated the Management Agreement, on April 4, 2016—over 4 ½ *years* before EEP filed the instant Complaint. Doc 1 at 6. Nor is EEP seeking to "compel[] payment of the Termination Fee." It is seeking $8 million in unexplained money damages for the supposed breach of failing to pay a termination fee. There is no agreement under Paragraph 7.13 between anyone to arbitrate these alleged claims. *See Stolt-Nielsen*, 559 U.S. at 683; *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)

(finding arbitration is simply "a way to resolve those disputes—*but only those disputes*—that the parties have agreed to submit to arbitration") (emphasis added).

On this basis as well, this Court can affirm dismissal of Count II.

CONCLUSION

For these reasons, this Court should affirm the district court's dismissal of EEP's case without prejudice.

April 11, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Counsel for Appellee hereby submits its Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements pursuant to Fed. R. App. P. 32(a), and certify:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 11,228 words.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font, Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2022, I filed the foregoing brief using this Court's CM/ECF system. I further certify that a copy of the foregoing brief has been served via electronic mail through this Court's CM/ECF system on all counsel of record listed on the Service List.

By: /s/*Peter W. Homer*

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