UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 24-CV-21615-MOORE/Elfenbein

GREAT AMERICAN INSURANCE COMPANY,

Plaintiff,

vs.

THE HONORABLE JAMES J. HUGHES, *et al.*

Defendants.

_____/

GREAT AMERICAN INSURANCE COMPANY'S MOTION AND MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR PRELIMINARY INJUNCTION

DATED: June 6, 2024.

GREAT AMERICAN INSURANCE COMPANY

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Pursuant to Rule 65(a) of the Federal Rules of Civil Procedure, Great American Insurance Company ("Great American") moves the Court to enter a preliminary injunction against the defendants, who are officials of the Miccosukee Tribe of Indians of Florida ("the Tribe"), precluding: (1) the unlawful exercise of tribal court jurisdiction over a lawsuit that the Tribe filed against Great American; and (2) ongoing violations of Great American's due process rights.

I. PRELIMINARY STATEMENT

The Tribe submitted a multi-million-dollar insurance claim to Great American under a Crime Protection Policy. When a coverage dispute arose, the parties entered into a tolling agreement with a mandatory forum selection clause requiring the Tribe to file any lawsuit arising from the insurance claim in this Court or Miami-Dade County Circuit Court. The Tribe breached the agreement shortly thereafter by suing Great American in the Tribe's own tribal court.

Great American's complaint seeks to enjoin the officials who control the Miccosukee Court and the Miccosukee Court of Appeals from unlawfully exercising jurisdiction over the coverage dispute, and to enjoin ongoing violations of Great American's due process rights. This Court should enter a preliminary injunction now to maintain the status quo until a trial on the merits.

A preliminary injunction is appropriate because Great American will almost certainly prevail on the merits. The Tribe's efforts to regulate non-Indians are presumptively invalid, so the defendants bear the burden of establishing jurisdiction. They cannot satisfy that burden because the forum selection clause precludes the Miccosukee Court from exercising jurisdiction, the underlying claim did not arise from acts Great American committed inside the Tribe's reservation, and the underlying dispute does not pose a threat to tribal self-government or internal relations.

Moreover, the tribal entities that are controlled by the defendants have already committed serious violations of Great American's due process rights under federal common law and the

Indian Civil Rights Act ("ICRA")—and they will almost certainly continue to do so in the absence of an injunction. The Tribe's entire judiciary is dominated and controlled by the very same business entity that has sued Great American, individuals who have direct financial interests in the outcome, and the father of a key witness. In short, Great American's adversary is presiding over the case.

II. STATEMENT OF FACTS

The Tribe's Public and Business Institutions

The Tribe is a federally recognized Indian tribe located in Miami-Dade County, Florida. The Miccosukee Constitution vests governing authority in the Miccosukee General Council ("the General Council"). (Miccosukee Const., Ex. A-1 at Art. III, § 1.) The General Council consists of all adult members of the Tribe and is led by five elected officers, a Chairman, Assistant Chairman, Secretary, Treasurer, and Lawmaker. (*Id*. at Art. III, §§ 1-2.) When the General Council is not in session, its officers sit as the Miccosukee Business Council ("the Business Council"). (*Id*. at Art. III, § 3.) The Business Council, therefore, consists of the five elected officers of the Tribe. (*Id*.)

The Business Council runs the Tribe's day-to-day operations, including control over the use of tribal lands, funds, and business interests, and the power to contract on behalf of the Tribe. (*Id*. at Art. V.) The Tribe's Bylaws state that the Chairman "shall have general and active management of the business activities of the tribe[.]" (Bylaws, Ex. A-1 at Art. II, § 1(b).)

The Tribe's Criminal and Civil Code ("the Miccosukee Code") establishes a judicial system consisting of the Miccosukee Court and the Miccosukee Court of Appeals. (Miccosukee Code, Ex. A-2 at Tit. I.) The Miccosukee Court has two judges and an alternate judge, each of whom must be a member of the Tribe. (*Id*. at Tit. I, §§ 4, 8.) The Business Council nominates judges for election by the General Council and sets thier compensation. (*Id*. at Tit. I, §§ 6, 13.) The

Miccosukee Code does not address juries in civil cases. With respect to criminal cases, the composition of juries is limited to voting members of the Tribe. (*Id*. at Tit. II, § 3.)

The Miccosukee Court of Appeals consists of all members of the General Council. (*Id*. Tit. I, § 5.) The Miccosukee Code does not address appeals in civil cases, but Title II, which addresses appeals in criminal cases, states that the Chairman of the General Council presides over appeals. (*Id*. at Tit. II, § 13.) The Business Council has the power to disallow any appeal. (*Id*.) The Miccosukee Code states, without limitation, that, upon receiving a notice of appeal, "the Business Council shall disallow the appeal or refer it to the Court of Appeals within ten (10) days." (*Id*.)

The Miccosukee Constitution provides that "[a]ll members of the Miccosukee Tribe shall be accorded … equal opportunities to participate in the economic resources and activities of the tribe[.]" (Miccosukee Const., Ex. A-1 at Art. VI, § 1.) Chief among those economic activities is a casino and other gaming facilities. (Clay Br., Ex. A-3 at 10-15.) The Tribe distributes revenue from gaming operations to each member. (*Id*.) From 2004 to 2006, "each tribe member—man, woman, and child—received large payments, starting at almost $100,000 annually and climbing to nearly $160,000." *Clay v. Comm'r of Internal Revenue*, 990 F.3d 1296, 1298 (11th Cir. 2021).

The Defendants

The defendants in this case are elected and appointed officials of the Tribe who are sued in their official capacities pursuant to the *Ex parte Young* doctrine. Hon. James J. Hughes and Hon. Curtis Osceola ("Defendant Curtis Osceola") are judges of the Miccosukee Court. (8/25/2023 Order, Ex. A-11; Politis Decl., Ex. B at ¶¶ 10-12.) Hon. Amparo Lozano is the Clerk of Court of the Miccosukee Court. The remaining defendants are the elected officers of the General Council and the Business Council: (1) Hon. Talbert Cypress, Chairman; (2) Hon. Lucas K. Osceola,

Assistant Chairman; (3) Hon. Kenneth H. Cypress, Treasurer; (4) Hon. William J. Osceola, Secretary; and (5) Hon. Petties Osceola, Jr., Lawmaker. (Bios, Ex. A-19.)

The Insurance Claim

Great American issued three successive crime protection policies to the Tribe that were in place between October 1, 2014, to October 1, 2019. (Policies, Ex. C-1 to C-3.) The policies covered loss resulting directly from employee dishonesty, subject to certain terms and conditions, provided that the Tribe discovered the loss during the policy period. (*Id.*) On August 9, 2019, the Tribe notified Great American of a potential claim and then submitted a proof loss about month later seeking to recover a claimed loss of $5,283,637.50. (Notice, Ex. C-4; Proof of Loss, Ex. C-5.)

The Tribe claims that, from January 2011 to May 2015, several casino employees caused electronic gaming machines to recognize false coin deposits by connecting wires to specific surfaces inside the cabinets, printed credit vouchers, and redeemed the vouchers for cash. (Proof of Loss, Ex. C-5.) The Tribe initially claimed that it discovered the loss on April 2, 2019. (*Id.*)

The Tribe eventually produced documents showing that it discovered the loss no later than May 28, 2015, directly contradicting the proof of loss, which listed the date of discovery as April 2, 2019. (5/28/2015 Mem., Ex. C-6; Police Report, Ex. C-7.) For example, on May 28, 2015, the Tribe's Acting Gaming Director and Acting Gaming Agent sent a memorandum to its Chairman that provided a detailed description of the false coin deposit scheme. (5/28/2015 Mem., Ex. C-6.)

The Tribe also produced a report from its internal police department. (Police Report, Ex. C-7.) The police report indicates that Curtis Osceola, Jr., a non-party, played a significant role in the investigation. (*Id.*) For example, Curtis Osceola, Jr. received an anonymous email in 2015 implicating casino employees in suspicious transactions, told another employee about the coin-in error as early as May 2015, was interviewed by the investigating detective several times, and is

mentioned in the report at least 16 times. (*Id*.) On July 22, 2015, Curtis Osceola, Jr. met with the detective and "re-create[d] the event where someone could load credits onto a machine without inserting actual money." (*Id*. at 5.) Curtis Osceola, Jr. later made public comments taking credit for discovering a "massive internal fraud scheme[.]" (Osceola Article, Ex. A-17.)

On April 8, 2021, Great American denied the claim because the Tribe: (1) did not discover the loss during the policy period of the relevant policy; (2) failed to provide timely notice; (3) failed to submit a timely proof of loss; and (4) lost or destroyed critical records during the four-year gap between discovering the loss and notifying Great American. (4/8/2021 Letter, Ex. C-8.) Great American denied a request to reconsider on May 27, 2021. (5/27/2021 Letter, Ex. A-18.)

Due to his role in the 2015 investigation, Curtis Osceola, Jr. is a key witness on the issue at the heart of the coverage dispute—the date on which the Tribe discovered the loss. In addition to being a witness, Curtis Osceola, Jr. is the son of Defendant Curtis Osceola, a judge who is presiding over the underlying case. (Politis Decl., Ex. B at ¶¶ 12.) Curtis Osceola, Jr. is also the Tribe's Chief of Staff and works closely with the Business Council. (LinkedIn, Ex. A-4.) His job duties are to "coordinate, assist, and advise the Tribal Government and its leadership[.]" (*Id*.)

The Tolling Agreement and Forum Selection Clause

On August 5, 2022, the Tribe's outside counsel asked Great American to enter into a tolling agreement. (8/5/2022 Email, Ex. A-5.) Great American initially declined because it did not believe there was any urgency. (Tolling Agreement Emails, Ex. A-6.) Great American's position was that the five-year contractual period of limitations, which is triggered when the Tribe discovers a loss, expired in mid-2020. (*Id*.) If the Tribe's position that discovery occurred on April 2, 2019, was correct, however, the limitations period would not expire until April 2, 2024. (*Id*.) From Great American's perspective, therefore, a tolling agreement was unnecessary. (*Id*.)

The Tribe's counsel responded by admitting that the Tribe discovered the loss no later than August of 2017. (*Id*.; Proof of Loss, Ex. C-5.) Great American agreed to toll the limitations period, and the Tribe's counsel prepared a draft agreement. (*Id*.) Great American's counsel revised the draft, with the most significant change being the addition of a mandatory forum selection clause. (Redlined Tolling Agreement, Ex. A-7.) The final, signed agreement includes the following clause:

> The Parties agree that any lawsuits arising out of this Agreement, the Alleged Loss, or the Claim shall be filed in the United States District Court for the Southern District of Florida, unless it lacks jurisdiction, in which case any such lawsuit shall be filed in the Circuit Court for Miami-Dade County.

(Tolling Agreement, Ex. A-8.)

The Miccosukee Court Proceedings

The Tribe breached the tolling agreement less than four months after signing it by filing a complaint in the Miccosukee Court on December 8, 2022. (Underlying Compl., Ex. A-9.) Great American moved for dismissal on several grounds, including lack of jurisdiction. (GAIC's Mot. to Dismiss, Ex. A-10.) The Miccosukee Court denied the motion via an order dated August 25, 2023. (8/25/2023 Order, Ex. A-11.) The order was signed by both Miccosukee Court judges, Defendant James J. Hughes and Defendant Curtis Osceola. (*Id*.; Politis Decl., Ex. B at ¶¶ 10-12.)

Since the Miccosukee Code does not address appeals in civil cases, Great American contacted the Miccosukee Court's legal advisor, Jennifer Suarez, to ask if the Miccosukee Court of Appeals reviews interlocutory orders. (Politis Decl., Ex. B at ¶¶ 5-9.) Suarez stated that interlocutory orders can be appealed and are treated the same as appeals from final orders. (*Id*.) Based on Ms. Suarez's response, Great American filed a notice of appeal on September 12, 2023. (Notice of Appeal, Ex. A-12.) On December 27, 2023, however, Talbert Cypress, Chairman of the General Council and the Business Council, disallowed the appeal. (12/27/2023 Order, Ex. A-13.)

He signed the order in his capacity as "Chairman, Miccosukee Business Council[,]" but the order was entered under the caption of, and purports to be an order of, the Miccosukee Court. (*Id*.)

Despite the fact that Great American has not had an opportunity to conduct discovery, it has already adduced evidence that the Business Council is acting as both plaintiff and judge in the Miccosukee Court proceedings. During negotiations, the Tribe's counsel confirmed that the Business Council must approve any settlement: "Pursuant to the Miccosukee Tribe's operations, any settlement demand, offer, and/or counteroffer has to be reviewed, discussed, and approved by its Business Council." (9/26/2022 Email, Ex. A-14.) In other words, the entity that is prosecuting the litigation against Great American is the very same entity that disallowed Great American's appeal by entering an order under the trial court's caption. (12/27/2023 Order, Ex. A-13.)

III. STANDARD

"The court may issue a preliminary injunction only on notice to the adverse party." Fed. R. Civ. P. 65(a)(1). The Court must consider the following factors: "(1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." *Otto v. City of Boca Raton, Fla.*, 981 F.3d 854, 860 (11th Cir. 2020) (quotation omitted).

IV. ARGUMENT

1. GREAT AMERICAN HAS A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS.

"A substantial likelihood of success on the merits requires a showing of only *likely* or probable, rather than *certain*, success." *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1232 (11th Cir. 2005) (emphasis in original). Great American can easily clear that hurdle because: (A)

the Miccosukee Court lacks jurisdiction; (B) the defendants are committing serious and ongoing violations of Great American's due process rights; and (C) there are no meritorious defenses.

A. The Miccosukee Court Lacks Jurisdiction.

"[B]y virtue of their incorporation into the American republic," Indian tribes "lost the right of governing persons within their limits except themselves." *Plains Commerce Bank v. Long Family Land & Cattle Co, Inc.*, 554 U.S. 316, 328 (2008) (cleaned up) ("*Plains Commerce*"); *Montana v. United States*, 450 U.S. 544, 565 (1981) ("the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe"). A tribe's attempt to regulate nonmember activities is, therefore, "presumptively invalid." *Plains Commerce*, 554 U.S. at 330.

A tribal court's jurisdiction is only as broad as a tribe's power to regulate the activities of nonmembers. *Nevada v. Hicks*, 533 U.S. 353, 367 (2001). Due to the significant limitations on a tribe's ability to regulate nonmembers, tribal courts are not courts of general jurisdiction *Id*.

The defendants bear the burden of establishing a judicially recognized exception to the rule against tribal jurisdiction over nonmembers. *Plains Commerce*, 554 U.S. at 330. They cannot satisfy that burden because: (i) the mandatory forum selection clause precludes tribal jurisdiction; and (ii) none of the judicially recognized exceptions to the presumption against jurisdiction apply.

i. The Forum Selection Clause Precludes Tribal Court Jurisdiction.

"[A] valid forum selection clause will divest a tribal court of jurisdiction over a dispute when a forum selection clause provides for litigation of such dispute elsewhere." *Halcon Operating Co. v. Rez Rock N Water, LLC*, No. 1:17-CV-202, 2018 WL 4092052, at *7 (D.N.D. July 9, 2018) (citing *Enerplus Resources, Corp. v. Wilkinson*, 865 F.3d 1094, 1097 (8th Cir. 2017) (tribal court jurisdiction precluded by forum selection clause)); *see Lexington Ins. Co. v. Smith*, 94 F.4th 870, 887 (9th Cir. 2024) ("insurers[] can easily insert forum-selection clauses into their

agreements with tribes and tribal members, thereby precluding the exercise of tribal court jurisdiction") (citing *Plains Commerce*, 554 U.S. at 346 (Ginsburg, J., concurring in part) ("a nonmember company can include 'forum selection, choice-of-law, or arbitration clauses in its agreements' with tribal members to avoid tribal court and the application of tribal law")).

The clause at issue in this case requires that any lawsuit arising from the insurance claim "shall be filed" in this Court or in the Circuit Court for Miami-Dade County. (Tolling Agreement, Ex. A-8.) The term "shall" is mandatory and makes the specified forums exclusive. *Muzumdar v. Wellness Int'l Network, Ltd*., 438 F.3d 759, 762 (7th Cir. 2006). If the Court enforces the clause, therefore, the Miccosukee Court lacks jurisdiction. *Halcon Operating Co.*, 2018 WL 4092052, at *7 (citing *Enerplus Resources, Corp.*, 865 F.3d at 1097); *see Lexington Ins. Co.*, 94 F.4th at 887 (9th Cir. 2024) (citing *Plains Commerce*, 554 U.S. at 346 (Ginsburg, J., concurring in part)).

Courts enforce forum selection clauses absent only the most extraordinary circumstances. *Robb v. Island Hotel Co. Ltd*., No. 18-CV-60544, 2018 WL 11466939, at *3 (S.D. Fla. Oct. 31, 2018) (citing *Atl. Marine Const. Co. v. U.S. Dist. Ct.*, 571 U.S. 49, 63 (2013)). As the parties seeking to avoid the clause, defendants bear a "heavy burden of proof[.]" *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 592 (1991). To satisfy the burden, they must prove: (1) the clause "was induced by fraud or overreaching"; (2) its enforcement would "deprive[] [the Tribe] of its day in court because of inconvenience or unfairness"; (3) "the chosen law would deprive [the Tribe] of a remedy"; or (4) "enforcement of the clause would contravene public policy." *Krenkel v. Kerzner Int'l Hotels Ltd.*, 579 F.3d 1279, 1281 (11th Cir. 2009). The defendants cannot satisfy that burden.

The Tolling Agreement was not induced by fraud or overreaching. To the contrary, the Tribe's own counsel proposed the agreement and took the lead in drafting it. (8/5/2022 Email, Ex. A-5; Tolling Agreement Emails, Ex. A-6.) While Great American added the relevant language, it

highlighted the issue by sending a redlined draft to the Tribe's counsel. (Redlined Tolling Agreement, Ex. A-7.) Far from "overreaching," the forum selection clause was the only significant consideration Great American requested in exchange for tolling the limitations period. (*See id.*)

Nor would enforcement of the clause deprive Miccosukee of its day in court due to inconvenience or unfairness. Miami-Dade County Circuit Court and the Miccosukee Court are separated by just 40 miles. (Directions, Ex. A-15.) Moreover, both parties would have better access to evidence in state court. Whereas the Miccosukee Court cannot compel witnesses to appear or produce documents outside the reservation, the Uniform Interstate Depositions and Discovery Act would provide access to such evidence in a state court proceeding. Fla. Code § 92.251, *et seq.* In fact, a state court may provide better access to evidence *inside the reservation* since the Miccosukee Court does not have any statutes, rules, or orders authorizing discovery.

The defendants also cannot claim the Tribe would have been deprived of a remedy if a state court applied Florida law. In fact, the Miccosukee Court itself applied Florida law, however incorrectly, in denying Great American's motion to dismiss. (8/25/2023 Order, Ex. A-11 at 3 n.2).

Finally, enforcing the clause would promote public policy. "[E]nforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system." *Atl. Marine Const. Co.*, 571 U.S. at 63 (quotation omitted). "[F]orum-selection clauses respect ancient concepts of freedom of contract." *Great Lakes Ins. SE v. Raiders Retreat Realty Co., LLC*, 144 S. Ct. 637, 643 (2024). By contrast, the Tribe's attempt to regulate a nonmember is presumed invalid. *Plains Commerce*, 554 U.S. at 330.

ii. The Defendants Cannot Establish a Judicially Recognized Exception.

Regardless of whether the forum selection clause divests the Miccosukee Court of jurisdiction, the defendants cannot satisfy their burden of overcoming the presumption against

tribal jurisdiction over nonmembers. *See Plains Commerce*, 554 U.S. at 330. The Supreme Court has recognized two exceptions, which are commonly referred to as the "*Montana*" exceptions. *Plains Commerce*, 554 U.S. at 329-30. The *Montana* exceptions provide that: (1) "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe"; and (2) it may exercise authority over conduct within its reservation that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566.

Both exceptions apply only to "nonmember conduct inside the reservation that implicates the tribe's sovereign interests." *Plains Commerce*, 554 U.S. at 332. Tribal court jurisdiction cannot exist, therefore, absent "activities on tribal land" by the nonmember over which the Tribe exercised regulatory authority. *Stifel, Nicolaus & Co. v. LAC Du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184, 207-08 (7th Cir. 2015); *MacArthur v. San Juan County*, 497 F.3d 1057, 1071-72 (10th Cir. 2007) (same); *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 782 (7th Cir. 2014).

Furthermore, "[t]he *Montana* exceptions apply only to the extent they are 'necessary to protect tribal self-government or to control internal relations.'" *Kodiak Oil & Gas (USA), Inc. v. Burr*, 932 F.3d 1125, 1138 (8th Cir. 2019) (quoting *Hicks*, 533 U.S. at 359) (other citations omitted); *Jackson*, 764 F.3d at 768 (no jurisdiction over conduct that does not "implicate the sovereignty of the tribe or the regulation of tribal lands"). The Eighth Circuit has limited jurisdiction "to cases arising under tribal law." *Kodiak Oil & Gas (USA) Inc.*, 932 F.3d at 1135.

Earlier this year, a panel of the Ninth Circuit issued the first and only appellate court opinion holding that the first *Montana* exception, *i.e.*, the "consensual relationships" exception, can apply to off-reservation conduct by nonmembers. *Lexington Ins. Co.*, 94 F.4th at 887. The

opinion is not yet final, however, because it is pending *en banc* review after the Ninth Circuit ordered the appellee to respond to a petition for rehearing *en banc*. (3/27/2024 Order, Ex. A-16.)

The panel's opinion in *Lexington Ins. Co.* ignores the fact that sovereignty is "center[ed] on the land held by the tribe and on tribal members within the reservation." *Plains Commerce*, 554 U.S. at 327. Since a tribe's land is the only source of sovereign rights vis-à-vis a nonmember, the Supreme Court's "*Montana* cases have always concerned nonmember conduct on the land." *Id*. at 334. This Court, therefore, should adopt the majority rule and hold that tribal court jurisdiction extends only to claims that arise from on-reservation conduct committed by the nonmember. *Stifel, Nicolaus & Co.*, 807 F.3d at 207-08; *MacArthur*, 497 F.3d at 1071-72; *Jackson*, 764 F.3d at 782.

Neither of the *Montana* exceptions applies in this case for two reasons. First, the dispute between the Tribe and Great American does not arise from on-reservation conduct. The underlying complaint asserts in conclusory fashion that Great American subjected itself to the Tribe's "regulation" by issuing insurance contracts to the Tribe. (Underlying Compl. Ex. A-9.) It does not, however, identify any conduct that Great American engaged in, and over which the Tribe exercised regulatory authority, while Great American was physically present inside the reservation. (*See id*.)

The Tribe's failure to allege on-reservation conduct was not an oversight. Great American was not present on the reservation when they engaged in the conduct upon which the Tribe's claims are based. (Archbold Decl., Ex. C, at ¶¶ 10-11, 17-19.) Great American issued the relevant policies from its office in Connecticut. (*Id*.) The employee who handled the claim, Tracey A. Archbold, was located in New Jersey when she determined that the claim was not covered and when she drafted and sent the coverage declination letter. (*Id*., at ¶¶ 17-19; 4/8/2021 Letter, Ex. C-10.) Since none of those acts occurred inside the reservation, neither *Montana* exception applies. *Stifel, Nicolaus & Co.*, 807 F.3d at 207-08; *MacArthur*, 497 F.3d at 1071-72; *Jackson*, 764 F.3d at 782.

Second, tribal court jurisdiction is not necessary to protect the Tribe's self-government or internal relations. *Kodiak Oil & Gas (USA), Inc.*, 932 F.3d at 1138. *Jackson*, 764 F.3d at 768. The underlying claim arises from a coverage dispute with a nonmember. The Tribe's self-government and internal relations are not implicated, and the underlying dispute does not arise under tribal law.

Finally, the "consensual relationship" exception does not apply for the additional reason that Great American could not have reasonably anticipated being hauled into tribal court. Since nonmembers "have no say in the laws and regulations that govern tribal territory[,] … those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions." *Plains Commerce*, 554 U.S. at 337. Tribal jurisdiction cannot be exercised, therefore, if the nonmember could not "reasonably have anticipated" it. *Id*., at 338.

Great American did not consent and could not have anticipated being sued in tribal court in light of the forum selection clause. (Tolling Agreement, Ex. A-8.) Even the opinion that is pending *en banc* review in *Lexington Ins. Co.* recognizes that the "consensual relationship" exception does not allow a tribe to dupe a nonmember into submitting to tribal jurisdiction by breaching a forum selection clause: "insurers[] can easily insert forum-selection clauses into their agreements with tribes … precluding the exercise of tribal court jurisdiction." 94 F.4th at 887.

The Tribe's status as a party to the Great American policies is not sufficient, by itself, to overcome the presumption against tribal court jurisdiction over nonmembers. A contrary holding would transform tribal courts into courts of unlimited jurisdiction over all nonmembers who contract with tribes in any location and for any purpose—beyond the review of all state and federal courts of the United States. Such a broad interpretation would impermissibly "swallow the rule" against tribal court jurisdiction. *Plains Commerce*, 554 U.S. at 330 (quotation omitted).

B. The Defendants Are Violating Great American's Due Process Rights.

"[T]ribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). Significant non-constitutional constraints, however, restrict a tribe's authority. "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." *Id*. Also, the extent to which Indian tribes can regulate the affairs of non-Indians is a matter of federal common law. *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985).

Congress exercised its plenary authority by passing the ICRA, which prohibits tribal courts from "depriv[ing] any person of liberty or property without due process of law[.]" 25 U.S.C. § 1302(8). *Santa Clara Pueblo* held that the ICRA does not create a private right of action in cases arising from intratribal disputes unless the plaintiff seeks *habeas corpus* relief. 436 U.S. at 59-72. *Santa Clara Pueblo* does not bar Great American's due process claim for at least two reasons.

First, Great American does not need to bring a direct action under the ICRA because federal common law also restricts the Tribe's authority over non-Indians. *Nat'l Farmers Union Ins. Cos.*, 471 U.S. at 851. The question of whether a tribal court has exceeded the limits of its jurisdiction over non-Indians arises under federal common law. *Id*. at 851-53. It stands to reason, therefore, that the manner in which a tribal court exercises such jurisdiction should be subject to review by federal courts if it violates fundamental common law rights. "[T]he United States has manifested [a] great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty." *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 208 (1978).

Due process, including the right to an impartial tribunal, is fundamental to the American-Anglo legal tradition and predates the Constitution. *Tumey v. State of Ohio*, 273 U.S. 510, 523-24

(1927). To determine what constitutes due process, the Supreme Court "look[s] to the settled usages and modes of proceeding existing in the common and statute law of England." *Id*. Accordingly, this Court should hold that federal common law precludes tribal courts from depriving non-Indian litigants of the fundamental due process right to an impartial tribunal.

Second, courts have recognized an exception to *Santa Clara Pueblo* that authorizes a private right of action under the ICRA when the following elements are met: "(1) the involvement of a non-Indian in the suit; (2) an attempt by the plaintiff to seek a remedy in a tribal forum; and (3) the unavailability of an adequate tribal remedy." *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla.*, 692 F.3d 1200, 1209 (11th Cir. 2012) (citing *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F.2d 682, 685 (10th Cir. 1980)). The Eleventh Circuit declined to apply the exception in *Contour Spa* on grounds of sovereign immunity. *Id*. That holding does not apply to this case because, as explained in Section I.c.i., the defendants are not immune.

This Court should adopt the exception because *Santa Clara Pueblo* is inapposite. In *Santa Clara Pueblo*, a female member sued a tribe for sex discrimination because it extended membership to the children of males, but not females, who married outsiders. 436 U.S. at 51. The plaintiff did not have a private right of action because federal interference with "intratribal disputes" could "unsettle a tribal government's ability to maintain authority." 436 U.S. at 60. In such circumstances, "the role of courts in adjusting relations between and among tribes and their members [is] restrained." *Id*. at 72. That rationale does not apply to this case because it does not involve an intratribal dispute, let alone threaten the Tribe's authority over its members.

Great American can easily satisfy all three elements of the exception. First, the tribal court proceeding "involve[s] a non-Indian[,]" *i.e.*, Great American. *Contour Spa at the Hard Rock, Inc.*, 692 F.3d at 1209. The second and third elements are satisfied because Great American has sought

relief from the Tribe's judiciary, but the tribal courts are controlled by Great American's adversary. Since the Tribe cannot provide an impartial forum, there is no adequate tribal remedy.

As to the merits, the defendants have clearly violated Great American's due process rights and will continue to do so unless enjoined. Indeed, this Court has already held that the Business Council's role in resolving appeals in which it has an interest violates due process. *Miccosukee Tribe of Indians of Fla. v. Kraus-Anderson Constr. Co.*, No. 04-22774-CIV, 2007 WL 9701836, at *11-12 (S.D. Fla. May 25, 2007), *rev'd on other grounds*, 607 F.3d 1268 (11th Cir. 2010).

In this case, the Business Council's conflict of interest is acute. According to the Tribe's counsel, "any settlement demand, offer, and/or counteroffer has to be reviewed, discussed, and approved by [the] Business Council." (9/26/2022 Email, Ex. A-14.) Despite the fact that the Business Council is the plaintiff in the underlying case, it has unchecked authority to "disallow" any appeal by its adversary. (Miccosukee Code, Ex. A-2 at Tit. II, § 13.) In fact, it has already exercised that authority by disallowing Great American's appeal. (12/27/2023 Order, Ex. A-13.)

The Business Council's control over the underlying proceedings is not limited to appeals. Although the order disallowing Great American's appeal was signed by the Chairman of the Business Council, it was entered under the trial court's caption and purports to be an order of the trial court. (12/27/2023 Order, Ex. A-13.) Moreover, the trial court's judges are nominated, and their compensation is set, by the members of the Business Council. (Miccosukee Code, Ex. A-2 at Tit. I, §§ 6 & 13.) The Business Council has near complete control over the Tribe's judiciary.

The Business Council's conflict of interest is compounded by two additional facts. First, every judge presiding over the case, and every potential juror, has a direct financial interest in the outcome. Every member of the Tribe receives distributions from the gross receipts of the casino that sustained the loss the Tribe seeks to recover. *Clay*, 990 F.3d at 1298. (Miccosukee Const., Ex.

A-1 at Art. VI, § 1; Clay Br., Ex. A-3 at 10-15.) Since membership is necessary to qualify as a judge or juror, every potential judge or juror would literally receive a portion of the proceeds from any judgment against Great American. (Miccosukee Code, Ex. A-2 at Tit. I, §§ 3, 4, 8.)

Second, one of the presiding judges, Defendant Curtis Osceola, is the father of a key witness, Curtis Osceola, Jr. (Politis Decl., Ex. B at ¶¶ 12.) The issue at the heart of the underlying dispute is the timing of the Tribe's discovery of the alleged loss. (4/8/2021 Letter, Ex. C-10.) Since Curtis Osceola, Jr. was a central figure in the Tribe's discovery, he is a critical witness. (5/28/2015 Mem., Ex. C-6; Police Report, Ex. C-7; Osceola Article, Ex. A-17.) The fact that a judge's son is a material witness creates a temptation to act in a biased manner. *See* 28 U.S.C. § 455(b)(5)(iv).

It should go without saying that due process requires, at a bare minimum, an impartial tribunal. *Williams v. Pennsylvania*, 579 U.S. 1, 16 (2016). Under the common law of England, "the slightest pecuniary interest of any officer, judicial or quasi judicial, in the resolving of the subject-matter which he was to decide, rendered the decision voidable." *Tumey*, 273 U.S. 510 at 524. "Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself." *Id*.

The bottom line is that the Tribe's judiciary is dominated and controlled by Great American's opponent in the litigation, individuals who have direct financial interests in the outcome, and the father of a key witness. It is impossible for Great American to receive a fair trial.

C. There Are No Meritorious Defenses.

The defendants have asserted sovereign immunity during preliminary discussions. Sovereign immunity, however, does not bar suits for declaratory or injunctive relief against tribal officials who are sued only in their official capacities. *Michigan v. Bay Mills Indian Cmty.*, 572

U.S. 782, 796 (2014); *Tamiami Partners By & Through Tamiami Dev. Corp. v. Miccosukee Tribe of Indians of Fla.*, 63 F.3d 1030, 1045 (11th Cir. 1995); *see Ex parte Young*, 209 U.S. 123 (1908).

The defendants also claim Great American did not exhaust tribal remedies. That defense also fails. Exhaustion of tribal remedies is a prudential rule of comity, and not a jurisdictional prerequisite for suit. *Strate v. A-1 Contractors*, 520 U.S. 438, 450 (1997). The Court should not require Great American to seek further relief in the Tribe's judicial system for three reasons.

First, exhaustion is not required when tribal jurisdiction is clearly absent because exhaustion "would serve no other purpose other than delay." *Hicks*, 533 U.S. at 369 (quoting *Strate*, 520 U.S. at 459-460). Tribal jurisdiction is clearly absent for the reasons explained above.

Second, exhaustion is not required when it would be "futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *Nat'l Farmers Union Ins. Cos.*, 471 U.S. at 856 n.21. The only option left is for Great American to wait until a judgment is entered and then notice a second appeal to the Business Council. (12/27/2023 Order, Ex. A-13; Miccosukee Code, Ex. A-2 at Tit. II, § 13.) Since the Business Council is acting as the plaintiff in the underlying proceedings, an appeal to the Business Council is not an "adequate opportunity" to challenge jurisdiction. It is difficult to imagine anything more futile than appealing to the opposing party.

Third, exhaustion is not required where an assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith," *Nat'l Farmers Union Ins. Cos.*, 471 U.S. at 856 n.21. The Tribe acted in bad faith by extracting a tolling agreement in exchange for a mandatory forum selection clause and then blatantly violating that clause a few months later. Moreover, the Tribe's entire judicial system is dominated and controlled by Great American's adversary in the litigation, judges who have direct financial interests in the outcome, and the father of a key witness.

2. GREAT AMERICAN WILL SUFFER IRREPARABLE HARM ABSENT AN INJUNCTION.

"An injury is 'irreparable'" if it "cannot be undone through monetary remedies." *Cunningham v. Adams*, 808 F.2d 815, 821 (11th Cir. 1987). If the Court does not enter a preliminary injunction, Great American will be forced to litigate in a forum that lacks jurisdiction despite a mandatory forum selection clause requiring the dispute to be litigated elsewhere. Courts have held that "being forced to engage in expensive and time-consuming litigation in a forum for which it did not bargain" is sufficient, standing alone, to establish irreparable harm. *Halcon Operating Co.*, 2018 WL 4092052, at *8; *Enerplus Res. (USA) Corp.*, 2016 WL 8737869, at *4 .

Although the cost of participating in the underlying proceeding is a monetary harm, it nevertheless cannot be redressed through monetary damages because the Tribe's sovereign immunity would preclude Great American from suing to recover its attorney's fees and costs. A financial injury that cannot later be recovered because of sovereign immunity constitutes irreparable injury. *See Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011).

Finally, the ongoing violations of Great American's fundamental due process rights are also irreparable harms that cannot be undone by monetary damages. *Gayle v. Meade*, 614 F. Supp. 3d 1175, 1205 (S.D. Fla. 2020) ("'deprivation of constitutional rights unquestionably constitutes irreparable injury.'") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

3. THE BALANCE OF HARMS WEIGHS IN FAVOR OF A PRELIMINARY INJUNCTION.

Since the defendants are sued in their official capacities only, a preliminary injunction would cause them no personal harm whatsoever. It would simply preserve the status quo until this Court makes a final determination on the issue of tribal court jurisdiction. *Crowe*, 640 F.3d at 1158 (rejecting the argument that a preliminary injunction would harm a tribal court's authority). Accordingly, the "balance of harms" weighs heavily in favor of issuing a preliminary injunction.

4. A PRELIMINARY INJUNCTION WOULD NOT BE ADVERSE TO THE PUBLIC INTEREST.

The public interest is not served by the Tribe's presumptively invalid efforts to exercise adjudicative authority over a nonmember in connection with a dispute that does not threaten the Tribe's self-government, implicate intratribal relations, or arise under tribal law. *Crowe*, 640 F.3d at 1158 ("We simply are not persuaded the exertion of tribal authority over . . . a non-consenting, nonmember, is in the public's interest."). Moreover, tribal autonomy and self-government could not possibly be implicated since the Tribe agreed to a forum selection clause.

On the other hand, a preliminary injunction will actually serve the public interest for at least two reasons. First, public policy strongly favors the enforcement of negotiated forum selection clauses. *Atl. Marine Const. Co.*, 571 U.S. at 63. Second, public policy and basic notions of fundamental fairness and due process strongly favor the resolution of claims before an impartial tribunal. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

V. CONCLUSION

The defendants are committing grave and ongoing violations of Great American's fundamental rights under federal law by forcing Great American to litigate a multi-million-dollar coverage dispute in a forum that not only lacks jurisdiction but is dominated and controlled by Great American's adversary, judges and jurors who stand to receive direct financial benefits if the tribal court enters a judgment against Great American, and the father of a key witness. The Court should enjoin the defendants from continuing to violate Great American's fundamental right to a fair trial before an impartial forum.

DATED: June 6, 2024.

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5 and Local Rule 5.1(e), I hereby certify that, on **June 6, 2024**, the foregoing **Great American Insurance Company's Motion and Memorandum of Law in Support of Its Motion for Preliminary and Injunction**, including the exhibits and proposed order filed therewith, were served via email on the following attorney, who represents the defendants and previously authorized the filing of a joint motion [ECF No. 13] on their behalf, but who has not yet filed a notice of appearance:

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