IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

GREAT AMERICAN INSURANCE COMPANY,

CASE NO.: 24-CV-21615-MKK

Plaintiff,

vs.

Honorable JAMES J. HUGHES in his official capacity as Tribal Court Judge of the Miccosukee Tribal Court; Honorable CURTIS OSCEOLA in his official capacity as Tribal Court Judge of the Miccosukee Tribal Court; Honorable TALBERT CYPRESS in his official capacity as Chairman of the Miccosukee General Council a/k/a Miccosukee Business Council; Honorable LUCAS K. OSCEOLA in his official capacity as Assistant Chairman of the Miccosukee General Council a/k/a Miccosukee Business Council; Honorable KENNETH H. CYPRESS in his official capacity as Treasurer of the Miccosukee General Council a/k/a Miccosukee Business Council; Honorable WILLIAM J. OSCEOLA in his official capacity as Secretary of the Miccosukee General Council a/k/a Miccosukee Business Council; Honorable PETTIES OSCEOLA, JR. in his official capacity as Lawmaker of the Miccosukee General Council a/k/a Miccosukee Business Council; and, the Honorable AMPARO LOZANO in her official capacity as Clerk of the Miccosukee Tribal Court,

Defendants.
_____/

DEFENDANTS' RESPONSE AND MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION AND MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR PRELIMINARY INJUNCTION

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Defendants, collectively by and through the undersigned counsel, hereby file this consolidated Response in Opposition to the Plaintiff Great American Insurance Company's ("Plaintiff" or "Great American") Motion and Memorandum of Law in Support of its Motion for Preliminary Injunction (D.E. 15) (the "Motion"), and in support thereof states as follows:

SUMMARY OF ARGUMENT

Great American's Motion for Preliminary Injunction must be denied. With frequency, Great American omits significant amounts of material information and makes material representations of controlling law, requiring an extensive discussion to correct the record. The Court's inquiry begins with whether Great American can demonstrate a likelihood of success on the merits. It cannot for several reasons.

First, jurisdiction over the underlying tribal action, which is a civil dispute arising on the Tribe's land, presumptively lies with the tribal court, whereas Plaintiff cites case law concerning disputes arising on *non-tribal land owned by nonmembers of tribes*.

Second, the tribal exhaustion rule requires that Great American pursue all available remedies in tribal court before pursuing relief in this Court. Great American has prematurely called it quits in the tribal action before exhausting numerous available remedies.

Third, both of the *Montana* exceptions clearly apply, such that the Tribe and Defendants retain inherent authority to administer the underlying action. As to the first exception, Great American engaged in a consensual relationship with the Tribe through insurance policy contracts. As to the second exception, the loss at issue arose on the Tribe's land, Congress expressly authorized the Tribe to regulate gaming through a congressional act, and the loss at issue threatens and directly effects the Tribe's political integrity, economic security, health, and welfare.

Fourth, the forum selection clause is inapposite. Not only did the Tribe expressly reserve and not waive its sovereign rights and immunity in the tolling agreement, federal law provides that parties cannot confer federal jurisdiction by agreement. Thus, the forum selection clause is irrelevant to the question of whether this Court has jurisdiction over the underlying action, which it does not, particularly in light of the Tribe's express reservation of its sovereignty.

Fifth, the underlying claim at issue arose from acts committed inside the Tribe's reservation. The allegations in the underlying complaint concern whether Great American wrongfully denied a claim for a loss that occurred inside the Tribe's gaming facility.

Sixth, Great American has not been deprived of due process. It has failed to exhaust many available remedies in Tribal Court and its failure to pursue those remedies is both a jurisdictional bar to pursuing relief in this Court and reflects the spurious nature of its claim.

Finally, Great American has also failed to show the remaining elements of a claim for injunctive relief. It cannot show irreparable injury as a matter of law. Further, the proposed injunction will harm the Tribe's sovereignty and is adverse to the public interest, which is evidenced by decades of federal policy promoting tribal sovereignty, and potential harm to Defendants far outweigh Plaintiff's theoretical or purported financial injuries.

FACTUAL BACKGROUND

A. The Underlying Tribal Action.

1. Between October 2014 to October 2019, Great American issued three Commercial Crime Policies, ("First Policy" No. 150-08-56-07; "Second Policy" No. 150-08-56-08; and "Third Policy" No. 150-08-56-09), in favor of the Tribe, each providing, *inter alia*, coverage in the amount of $5 million for employee theft. (Together, the First, Second, and Third Policies are collectively referred to as the "Policies"). *See* Exhibit A at ¶31 (Affidavit of Jennifer Materi, Esq.); *and* Materi Aff. Ex. 4.

2. The Tribe suffered a loss due to employee theft at its gaming facility, which was investigated by the FBI, and submitted a claim to Great American under its Policies following completion of the FBI's investigation. Prior to that time, the FBI had barred the Tribe from discussing the ongoing investigation. *See* Exhibit A at ¶33; and Materi Aff. Ex. 5 at ¶¶18-19.

3. After a lengthy investigation into the claim, Great American ultimately denied the same, and on December 8, 2022, the Miccosukee Tribe of Indians of Florida d/b/a Miccosukee Indian Gaming (the "Tribe") filed an action styled, *Miccosukee Tribe of Indians of Florida d/b/a Miccosukee Indian Gaming v. Great American Insurance Company*, Case No. cv-22-59-A, Miccosukee Tribal Court (hereafter, the "Tribal Action"). *See* Exhibit A at ¶34.

4. On January 3, 2023, Great American filed a motion to dismiss the Tribe's complaint alleging (1) the forum selection clause in a tolling agreement mandated venue in a different forum, (2) the Tribe's claims were time-barred, (3) the claimed losses are not covered under the policies, and (4) the Tribal Court lacked jurisdiction over Plaintiff and the claims asserted. *See* Exhibit A at ¶36; and Materi Aff. Ex. 6.

5. The Tribe and Great American briefed the issues and presented oral arguments on

the motion to dismiss. On August 25, 2023, the Hon. James J. Hughes of the Miccosukee Tribal Court issued an order denying Great American's motion to dismiss. *See* Exhibit A at ¶¶38-40; *and* Materi Aff. Ex. 7.

6. On September 12, 2023, Great American filed a notice of appeal of the order denying Great American's motion to dismiss. *Id*. at ¶¶41-42.

7. On December 27, 2023, the Miccosukee Tribal Court of Appeals dismissed Great American's notice of appeal as an improper because the applicable procedure only authorizes appeals for final orders of the Court and "does not authorize the appeal of interlocutory orders. The scope only refers to actions by the trial Court that that conclude the litigation process." *Id*. at ¶¶43-44; *and* Materi Aff. Ex. 9.

B. The Tolling Agreement.

8. On or about August 22, 2022, the Tribe and Great American entered into a Tolling Agreement (the "Agreement"). *Id*. at ¶50; *see also* Materi Aff. Ex. 10.

9. The Agreement contains two paragraphs addressing forum selection. *See Id*.; Materi Aff. Ex. 10 at §14 and §15.

10. The Policies do not contain forum selection clauses. *See Id.;* Materi Aff. Composite Ex. 4.

11. The Tribe generally and expressly did not waive and preserved its sovereign immunity throughout various provisions of the Agreement, which are listed below in order of their enumeration in the Agreement.

12. Section 3 of the Agreement states in pertinent part, "Any defense, contention, argument, **privilege**, or legal right or duty **that existed prior to the Effective Period will be preserved**, completely and without limitation, **and will not be** enhanced or **diminished because of this Agreement**. The Parties intend by this provision that **neither the Insured [the Tribe]** nor the Insurer **shall legally benefit in any way or be prejudiced in any way from the fact of entering into this Agreement except as expressly stated herein**." *See* Exhibit 10 (emphasis added).

13. Section 4 of the Agreement states that "this Agreement and the negotiations leading up to it shall not be used in any litigation or proceeding as evidence of the respective rights, duties, or obligations of any of the Parties." *Id*. at §4.

14. Section 5 of the Agreement states, "This Agreement shall not set any precedent

with respect to legal or factual issues raised in any other claim, dispute, or litigation whether or not subject to this Agreement. This Agreement in no way affects the rights of any Party with respect to any other claims under the Policies." *Id*. at §5.

15. Section 7 of the Agreement states, "The Parties acknowledge and agree that this Agreement **shall in no way** affect, **waive**, or limit **any existing rights**, policy conditions, or defense of the Parties, other than as set forth in Paragraphs 2 and 3…" and "**All Parties reserve, and do not waive, all of their rights** pursuant to the terms and conditions of the Policies or applicable law, whether or not mentioned herein." *Id*. at §7. (Sections 2 and 3 of the Agreement do not contain a forum selection clause or a waiver of sovereign immunity).

16. Furthermore, in section 7 of the Agreement, the Parties expressly agreed that the "Agreement is not intended to be an insurance policy interpretation or modification." *Id*. at §7. (The Policies do not contain a forum selection clause or a waiver of sovereign immunity).

17. Finally, in section 15 of the Agreement, the Tribe and Great American expressly and specifically acknowledged the Tribe's reservation and non-waiver of its sovereign immunity: "Nothing in the Agreement shall be construed to limit or diminish . . . [the Tribe's] sovereignty nor to abridge or waive any sovereign rights, privileges or immunities of the Miccosukee Tribe of Indians of Florida . . . or their respective officers and representatives." *Id*. at §15.

C. The Tribe's Governing Structuring and Due Process

18. The Tribe is a federally recognized Indian tribe located in Miami-Dade County, Florida. *See* Exhibit A at ¶4.

i. The Tribal Constitution

19. On December 17, 1961, the Constitution and Bylaws of the Miccosukee Tribe of Indians of Florida was duly adopted (hereafter, the "Tribal Constitution" and "Tribal Bylaws"). *See* Exhibit A at ¶5.

20. Pursuant to the Tribal Constitution, the Tribe's powers are "subject to any limitations imposed by the Constitution of the United States or State or Federal laws applicable to Indians." *See Id.;* Materi Aff. Ex. 1 (Tribal Constitution) at Art. IV, §1.

ii. The Governing Councils

21. The Tribal Constitution vests its governing authority in the Miccosukee General Council, which is comprised of all adult Tribe members of the age of majority. *See id.* at Art. III, §1.

22. The elected officers of the General Council serve as the Miccosukee Business Council when the General Council is not in session. *See id*. at Art. III, §3.

iii. Tribal Court

23. On or about November 7, 1978, the Tribe created the Miccosukee Tribal Court and the Miccosukee Tribe of Indians of Florida Criminal and Civil Code (hereafter, the "Code"). *See* Exhibit A; Materi Aff. Exs. 2-3.

24. The Code provides that the judicial power of the Tribe is vested in the Miccosukee Court (the "Tribal Court") and the Miccosukee Court of Appeals (the "Tribal Appellate Court"). *See Id.;* Materi Aff. Ex. 2 (Code) at Tit. I, §1.

25. The Tribal Court consists "of two Judges and an Alternate Judge." *See* Code at Tit. I, §4.

26. The Tribal Appellate Court consists of the General Council. *See* Code at Tit. I, §5.

27. The Tribe reserves and asserts its sovereign immunity, *inter alia*, under Title I, §2 of the Code, the Tribe does not "recognize, grant, or cede to any governmental body any jurisdiction which does not otherwise exist by law."

iv. General Procedures of Tribal Court.

28. The Tribe's judicial process reflects and protects a guaranty of due process rights afforded under traditional notions of fairness and the Constitution.

29. For example, any judge "shall be disqualified to act in any proceeding . . . in which he or she has an interest; . . . has been a material witness; or . . . is related to any party or their attorney y marriage or blood in the first of second degree." *See* Code at Tit. I, §12.

30. Furthermore, a party, such as Great American, may seek disqualification upon following the proper procedure. *See* Code at Tit. I, §12.

31. The Code provides for uniform procedures to provide parties with, *inter alia*, notice of proceedings, opportunity to be heard, a record of proceedings, and an independent clerk of court to assist Judges in administering the judicial process. *See* Code at Tit. I, §§14-15, 17-18.

32. To commence a civil action, a party shall file a statement of claim in short and ordinary language. *See* Code at Tit. X

33. Parties, like Great American, are entitled to representation by attorneys upon motion for *pro hac vice* admission. *See* Code at Tit. I, §20.

34. Indeed, Great American's preferred counsel filed motions for admission *pro hac*

vice, which were summarily granted by the Tribal Court.

35. Other than court costs (and a $5,000.00 bond posted by the Clerk), the sums collected by the Tribal Court are expressly prohibited from being used to finance the activities of the Court. *See* Code at Tit. I, §21.

v. Civil Procedure of Tribal Court

36. Title X of the Code provides the applicable Civil Procedure. *See generally* Code at Tit. X.

37. Section I of the Tribal Court's Civil Procedure provides that the "applicable laws of the United States and authorized regulations of the Secretary of Interior and ordinances, customs, and usages of the Tribe" shall apply, and further, the "laws of the State of Florida" may be applied to cover any matter not covered by the foregoing authorities. *See* Code at Tit. X, §1.

38. The Tribal Court is directed to endeavor to settle cases amicably, failing which, the parties are entitled to a hearing or trial on the merits. *See* Code at Tit. X, §5.1.

39. All parties and witnesses participating in the trial are sworn, and the Judge is directed to conduct the trial in a manner to do substantial justice. *See* Code at Tit. X, §5.2.

vi. The Code does not provide for interlocutory appeals in civil cases.

40. The Code does not provide for interlocutory appeals.

41. However, parties have the right to a plenary appeal of final orders. *See* Code at Tit. II, Pt. II, §13.

42. In pertinent part, the Code provides "Appeals may be taken from the **final order** of the Miccosukee Court to the Miccosukee Court of Appeals by filing with the Clerk a notice of appeal within fifteen (15) days of the entry of the order." *See* Code at Tit. II, Pt. II, §13 (emphasis added).

D. The Subject Matter of the Tribal Action Arose within the Tribe's Reservation.

43. The subject matter of the Tribal Action, losses at the Tribe's gaming facilities, arose within the Tribe's reservation and, as set forth in the Tribal Action's complaint, "The [P]olicies were issued to the Plaintiff at the Miccosukee Reservation, and covered operations at and on the Plaintiff's Reservation." *See* Exhibit A at ¶64; *see also* Materi Aff. Ex. 5 at ¶5, 12.

44. "The [Policies] are meant to protect the interests of the [Tribe's] members and ensure funds for governmental services which help the elderly, the infirmed and the children of [the Tribe's] community." *See Id*. at ¶6.

45. The "Tribe and [Great American] conducted business on the Miccosukee Reservation, and the events, acts, or omissions giving rise to this action occurred on the Miccosukee Reservation." *Id*. at ¶8.

46. The losses at issue occurred on the Tribe's gaming premises. *See* Exhibit A at ¶67.

47. Between August 2019 and April 2021, the Tribe submitted its proof of loss to and cooperated with Great American in its investigation of the claim. *See Id.*; Materi Aff. Ex. 5 at ¶¶36-37.

48. To evaluate the claim, Great American requested and received all of the Tribe's information, including the Tribe's internal accounting in support of the Tribe's claim. *Id*. at ¶38; *see also* Exhibit A at ¶87.

49. "On August 26, 2020, [Great American] had its forensic accountant meet with [the Tribe] and a detective from the Police to verify the numbers for the Claim." *Id*. at ¶41.

50. The Policies are between Great American and the Tribe and provided coverage for losses on the Tribe's land. *See* Exhibit A at ¶72; *and* Materi Aff. Composite Exhibit 4.

E. The Conduct at Issue in the Tribal Action Threatens and Has a Direct Effect on the Political Integrity, Economic Security, and Health and Welfare of the Tribe.

51. The conduct at issue in the underlying Tribal Action threatens and has a direct effort on the political integrity, economic security, and health and welfare of the Tribe. *See* Exhibit A at ¶73.

52. The Tribe's political integrity, economic security, and health and welfare are administered and maintained through its various associations and organizations, such as more than 60 departments charged with ensuring the welfare of the Miccosukee Tribe, its citizens, and its interests, referenced previously. *Id*. at ¶74.

53. The departments – such as the Elderly Services Department, Housing Department, Miccosukee Indian Clinic, Wildfire Department, Emergency Management Department, Miccosukee Indian School, Daycare, Senior Center, Miccosukee Police Department, Miccosukee Fish & Wildlife Department, Water & Sewage Department, and Wilderness Department, among other departments – provide critical services to the members of the Miccosukee Tribe. *Id*. at ¶¶14, 75.

54. The funding for these services comes almost exclusively from the Miccosukee Tribe's gaming business, located on Miccosukee tribal land, which provides the crucial financial

resources to support the operation of the Miccosukee Tribe's government. *Id*. at ¶76.

55. The operation of the Tribe's gaming facility is a major attraction for bringing nonmembers to engage in lawful commerce with the Tribe. *Id*. at ¶77.

56. The Tribe's gaming facility is often a conduit that brings nonmembers into contact with other commercial services on the Tribe's lands, such as patronizing the Tribe's restaurants, stores, and outdoor activities. *Id*. at ¶78.

57. Thus, the lawful and orderly administration and operation of the Tribe's gaming facility is critical to the political integrity, economic security, health and welfare of the Tribe and its members. *Id*. at ¶79.

58. Any harm to the operation of the Tribe's gaming facility, including the loss of revenues generated by the Tribe's gaming operations, can jeopardize the Tribe's ability to operate and maintain its association and organizations that administer and operate the Tribal's community services that support the health and welfare of the Tribe. *Id*. at ¶80.

59. As a result, the Tribe utilizes risk financing to protect against unexpected losses via various insurance policies covering different potential threats. *Id*. at ¶81.

60. Consequently, the Tribe engaged in a consensual relationship with the Miccosukee Tribe, through its negotiation and execution of commercial contracts, namely the Policies, thereby subjecting Great American to the Tribe's jurisdiction. *Id*. at ¶82.

61. It should come as no surprise to Great American that it was providing insurance coverage to the Tribe. For example, the Policies are made out to the "Miccosukee Tribe of Indians of Florida d/b/a Miccosukee Indian Gaming" as the "Insured." *Id*. at ¶83.

62. Moreover, Great American enjoyed the benefit of engaging in this consensual relationship with the Tribe, because the Tribe paid substantial premiums to Great American, and Great American renewed the Policies several times. *Id*. at ¶84.

63. Great American was aware that the Miccosukee Tribe is a federally recognized Indian tribe at the time the first policy was issued, and knowingly and willingly entered into the insurance contract with the Miccosukee Tribe, covering the gaming business on tribal land against the threat of criminal activity. *Id*. at ¶85.

APPLICABLE STANDARD

"If this Court has subject-matter jurisdiction, it can issue a preliminary injunction only if Petitioner can demonstrate: (1) a substantial likelihood of success on the merits; (2) that he will

suffer irreparable injury unless the injunction issues; (3) the threatened injury to Petitioner outweighs whatever damage the proposed injunction may cause the Government; and (4) if issued, the injunction would not be adverse to the public interest." *Majano Garcia v. Martin*, 379 F. Supp. 3d 1301, 1304 (S.D. Fla. 2018) (citing *Four Seasons Hotels and Resorts, B.V. v. Consorcio Barr, S.A.,* 320 F.3d 1205, 1210 (11th Cir. 2003)). *See also Klay v. United Healthgroup, Inc.,* 376 F.3d 1092 (11th Cir.2004) (same).

"A preliminary injunction is, however, 'an extraordinary and drastic remedy not to be granted unless the [Petitioner] 'clearly carries the burden of persuasion' as to the four prerequisites." *Majano Garcia* 379 F. Supp. 3d at 1304 (quoting *Zardui-Quintana v. Richard*, 768 F.2d 1213, 1216 (11th Cir. 1985)). Failure to establish any of these four elements is "fatal." *Am. Civ. Liberties Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1198 (11th Cir. 2009).

ANALYSIS

I. GREAT AMERICAN FAILS TO DEMONSTRATE SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS COMPLAINT.

Plaintiff Great American failed to demonstrate substantial likelihood of success on the merits for at least six independent reasons, any of which are fatal to Plaintiff's claim for injunctive relief, as discussed below.

A. Civil Jurisdiction Presumptively Lies in the Tribal Court as the Loss Arose on Tribal Land.

Plaintiff argues that the "Tribe's efforts to regular non-Indians are presumptively invalid, so the defendants bear the burden of establishing jurisdiction." *See* D.E. 15 at 5. This is false. Jurisdiction presumptively lies with the Tribal Court because this is a contractual dispute that arose within the Tribe's territory, on the Tribe's land, where Great American entered into a consensual contract with the Tribe to insure its premises and property from theft, and the subject matter of the underlying Tribal Action threatens and has a direct effect on the political integrity, economic security, health, and welfare of the Tribe and its members.

Great American asserts that "[t]he Tribe's efforts to regulate non-Indians are presumptively invalid, so the defendants bear the burden of establishing jurisdiction." *See* D.E. 15 at 5. In support of this false representation, Great American cites to (but does not quote) *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008), *see* D.E.

15 at 12, which in turn, relied on *Atkinson Trading Co. v Shirley*, 532 U.S. 645, 651 (2001).

In *Plains Commerce*, the Supreme Court wrote, "[t]he burden rests on the tribe to establish one of the exceptions to *Montana's* general rule that would allow an extension of tribal authority to regulate nonmembers **on non-Indian fee land**." *Plains Commerce*, 554 U.S. at 330. There can be no dispute that the loss at issue arose on the Tribe's land, which Great American expressly agreed to insure in a contractual agreement.

Critically, both *Plains Commerce* and *Atkinson* involved disputes involving non-Indians who owned *non-Indian fee land* within a tribal territory. *See Plains Commerce*, 554 U.S. at 330 ("The Longs' discrimination claim challenges a non-Indian's sale of **non-Indian fee land**.") (emphasis added); *Atkinson*, 532 U.S. at 659 ("The Navajo Nation's imposition of a tax upon nonmembers **on non-Indian fee land** within the reservation is, therefore, presumptively invalid.") (emphasis added).

Here, Great American cannot claim that the underlying action arose on non-Indian fee land. Indeed, the underlying action concerns a dispute arising on the Tribe's gaming facility. And it is there where the Supreme Court has expressly stated that tribal jurisdiction presumptively lies.

In *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987), the Supreme Court wrote, "Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty . . . **Civil jurisdiction over such activities presumptively lies in the tribal courts** unless affirmatively limited by a specific treaty provision or federal statute.") (citations omitted) (emphasis added). Thus, jurisdiction presumptively lies in the Tribal Court. Great American has not cited any applicable specific treaty provision or federal statute and did not dispute that the Tribal Action concerns a loss that occurred on the Tribe's land. *See e.g.* D.E. 15 at 15 ("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 case.").

B. The Tribal Exhaustion Rule precludes depriving the Tribal Court of jurisdiction.

As established by clear Supreme Court and federal precedent that jurisdiction lies in the Tribal Court, Great American is required to exhaust its remedies in Tribal Court, denial of Great

American's motion is required.

"The tribal exhaustion rule provides that, absent exceptional circumstances, federal courts typically 'should abstain from hearing cases that challenge tribal court jurisdiction until tribal court remedies, including tribal appellate review, are exhausted.'" *Corp. of President of the Church of Jesus Christ of Latter-Day Saints v. RJ*, 221 F. Supp. 3d 1317, 1321 (D. Utah 2016); *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987); *National Farmers Union Insurance Co. v. Crow Tribe of Indians*, 471 U.S. 845, 855-56 (1985). These cases firmly establish the rule that federal court challenges to tribal court jurisdiction must first exhaust their tribal court remedies on any jurisdictional issue. In fact, "[t]he requirement of exhaustion of tribal remedies is not discretionary; it is mandatory." *Burlington N. R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1245 (9th Cir. 1991) (discussing *National Farmers*).

In *National Farmers*, the Supreme Court wrote that "the existence and extent of a tribal court's jurisdiction" require "a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." *National Farmers*, 471 U.S. at 856.

The Supreme Court holds that this examination "**should be conducted in the first instance in the Tribal Court itself.**" *Id*. (emphasis added). The reasoning behind this policy include Congress's commitment to "a policy of supporting tribal self-government and self-determination[,]" allowing the "forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge[,]" supporting "the orderly administration of justice in the federal court . . . by allowing a **full record to be developed in the Tribal Court**[,]" avoiding the risk of a "procedural nightmare" by pursuing parallel actions, providing the opportunity to "rectify any errors" made, encouraging "tribal courts to explain to the parties the precise basis for accepting jurisdiction[,]" and developing a body of case law to benefit future disputes. *Id*. at 856-57 (emphasis added). Further, "[t]he requirement of exhaustion of tribal remedies is not discretionary; it is mandatory." *Burlington N. R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1245 (9th Cir. 1991) (discussing *National Farmers*).

In *LaPlante*, the United States Supreme Court noted that, as here, jurisdiction in tribal *civil* actions is not subject to the same oversight as criminal proceedings. *See Laplante*, 480 U.S. 9, 15 (1987) ("Although the criminal jurisdiction of the tribal courts is subject to substantial

federal limitation . . . **their civil jurisdiction is not similarly restricted**.") (citation omitted) (emphasis added). As a result, "considerations of comity direct that tribal remedies be exhausted" before a challenge to tribal court jurisdiction "is addressed by the District Court." *Id*. "Promotion of tribal self-government and self-determination require[] that the Tribal Court have 'the first opportunity to evaluate the factual and legal bases for the challenge' to its jurisdiction." *Id*. at 15-16 (quoting *Nat'l Farmers*, 471 U.S. at 856). "[P]roper respect for tribal legal institutions requires that they be given a 'full opportunity' to consider the issues before them and "to rectify any errors." *Id*. (quoting *Nat'l Farmers*, 471 U.S. 857).

Although a tribal court's determination on jurisdiction is "ultimately subject to review" in federal court, this is only after all "available tribal remedies"—including tribal court appellate remedies—have been exhausted. *LaPlante*, 480 U.S. at 19.

Here, the Tribal Court issued a non-final order denying Plaintiff's motion to dismiss. Plaintiff disagreed with the rationale in the Tribal Court's decision and chose to appeal the interlocutory order. However, Plaintiff does not dispute that the Tribal Code does not provide for appeals of non-final orders in civil cases, *see* D.E. 15 at 19-21, and thus, Tribal Appellate Court rejected the appeal because it had no jurisdiction to entertain same. As a result, the underlying dispute remains pending in Tribal Court and Plaintiff has not exhausted its Tribal Court remedies until the Tribal Appellate Court resolves a properly taken appeal of a final order.

C. The *Montana* Exceptions Provides for Jurisdiction in Tribal Court.

Next, Great American repeats its false statement of the law that "defendants cannot satisfy their burden of overcoming the presumption against tribal jurisdiction over nonmembers" because the *Montana* exceptions do not apply. *See* D.E. 15 at 14-15. Again, Great American misstates the law as jurisdiction is presumed in the Tribal Court, and it is Great American's burden to demonstrate otherwise. Moreover, Great American omits material portions of the *Montana* exceptions to support its flawed position, discussed further below.

In examining the boundaries of tribal jurisdiction, the Supreme Court in *Montana* articulated general limits to tribal exercises of power, such as those powers "necessary to protect tribal self-government or to control internal relations" that are consistent "with the dependent status of the tribes" in the absence of "express congressional delegation." *Montana v. U. S.*, 450 U.S. 544, 564 (1981). The Supreme Court wrote, "**To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their**

reservations, even on non-Indian fee lands." *Id*. at 565 (emphasis added).

Furthermore, the Supreme Court identified two principles where tribal sovereigns retain authority over matters involving non-members and non-tribal fee land:

> 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**.
>
> **A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation** when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Id. at 566 (citations omitted) (emphasis added).

In its Motion, Great American omitted the bolded language when it "quoted" *Montana* to this Court. *See* D.E. 15 at 15. Thus, Great American conceals from this Court critical components of the *Montana* exceptions, including the express provision for exercising authority over nonmembers who enter into commercial or contractual relations with the Tribe.

i. The First *Montana* Exception Applies.

Here, the first *Montana* exception applies. *See e.g., Lexington Ins. Co. v. Smith*, 94 F.4th 870 (9th Cir. 2024). Great American engaged in a consensual relationship with the Tribe through commercial dealings and contracts in the form of insurance coverage policies. Great American's insurance policies do not contain a waiver of sovereign immunity or a forum selection clause.

Lexington is instructive. There, as here, an insurance company and tribe litigated a coverage dispute arising on tribal land. The Ninth Circuit held, "The Tribal Court has subject-matter jurisdiction over this matter under the Tribe's sovereign authority over 'consensual relationships,' as recognized under *Montana*'s first exception." *Id*. 94. F.4th at 876. In support of its holding, the Ninth Circuit reasoned that

> Lexington's insurance contract with the Tribe **squarely satisfies** *Montana*'s consensual-relationship exception. The insurance policy establishes a contract between Lexington as the insurer and the Tribe, Port Madison, and subsidiary entities as beneficiaries. In exchange for coverage, Lexington received premiums from the Tribe and Port Madison, and Lexington renewed the policies many

> times over the course of several years. . .There is no dispute that the relationship was mutual and consensual.

Id. 883–84 (emphasis added).

The Ninth Circuit continued, "The nexus between Lexington's consensual relationship with the Tribe and the conduct that the Tribe seeks to regulate is no mystery. The consensual relationship is embodied in an insurance contract involving tribal lands, and the Tribe seeks to regulate the scope of insurance coverage that Lexington was bound to provide under that contract." *Id*. at 884. Further, "[i]t should have been no surprise to Lexington that its contract with the Tribe would trigger tribal authority. The transaction had tribe and tribal lands written all over it." *Id*. "As a sophisticated commercial actor conducting business with tribes, Lexington could not have ignored tribes' status as sovereigns that retain jurisdiction over nonmembers in certain circumstances. Nor could Lexington have disregarded the fact that tribal courts have long adjudicated suits involving nonmembers." *Lexington*, 94 F.4th at 884.

Here, Great American's insurance contract establishes a contract between Great American and the Tribe. In exchange for coverage, Great American received premiums from the Tribe, and Great American renewed the policies many times over the course of several years. There is no dispute that the relationship was mutual and consensual. The nexus between Great American's consensual relationship with the Tribe and the conduct that the Tribe seeks to regulate is embodied in an insurance contract involving the Tribe's land, and the Tribe seeks to regulate the scope of insurance coverage that Great American was bound to provide under that contract. It should come as no surprise to Great American that its contract with the Tribe would trigger tribal authority. The transaction has the Tribe and its lands written all over it. Great American is a sophisticated commercial actor conducting business with the Tribe, so it could not have ignored the Tribe's status as a sovereign that retains jurisdiction over nonmembers in certain circumstances. Nor could Great American have disregarded the fact that tribal courts have long adjudicated suits involving nonmembers.

ii. The Second *Montana* Exception

To the extent necessary, the second *Montana* exception applies with equal force as the first and clarifies that the Tribe retains jurisdiction over this civil dispute. Here, the subject matter of the Tribal Action concerns a dispute arising on the Tribe's fee lands that threatens and has a direct effect on the political integrity, economic security, health, and welfare of the Tribe.

Indeed, the complaint in the Tribal Action alleges, *inter alia*, that the loss arose at the Tribe' gaming facility, *see* Exhibit A, Materi Aff. Ex. 5 at ¶34, and the insurance policies providing coverage for the loss "are meant to protect the interests of the [the Tribe's] members and ensure funds for governmental services which help the elderly, the infirmed and the children of [the Tribe's] community." *See Id.* at ¶6.

Notably, the Tribe's authority to regulate gaming is expressly permitted and promoted by Congress in the Indian Gaming Regulatory Act of 1988 ("IGRA"). *See* 25 U.S.C. § 2701, *et seq*. In fact, section 2710 expressly authorizes tribal regulation of gaming through tribal ordinances. *See* 25 U.S.C. §2710 ("Tribal gaming ordinances").

In the IGRA, Congress recognized that "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government" and "Indian tribes have the exclusive right to regulate gaming activity on Indian lands. . . ." *See* 25 U.S.C. § 2701(4) & (5).

Moreover, there can be no doubt that the subject matter of the underlying Tribal Action threatens or has a direct effect on the Tribe because Congress recognized that gaming provides tribes with "a means of promoting tribal economic development, self-sufficiency, and strong tribal governments" and "the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation." 25 U.S.C. § 2702(1) & (2); *see also Seminole Tribe of Fla. v. State of Fla.*, 1993 WL 475999, at *4 (S.D. Fla. Sept. 22, 1993).

In other words, Congress's express declarations in the IRGA acknowledge that gaming, and the Tribe's ability to regulate gaming, are essential to the Tribe's political integrity, economic security, self-sufficiency, health, welfare, and sovereignty. Indeed, the Tribe's gaming revenues provide a critical component of the financial support of its members, maintaining political integrity, economic security, and promoting the health welfare of the Tribe at large by funding critical departments that provide the Tribe with economic security, political and social cohesion, and the well-being of its members. As a result, it follows that the Tribe retains its inherent power over the conduct of non-members on the Tribe's fee land within its reservation, especially in relation to its gaming facility.

Furthermore, the Supreme Court has also stated that "[t]ribal courts play a vital role in tribal self-government," and "[t]ribal authority over the activities of non-Indians on reservation

lands is an important part of tribal sovereignty" *LaPlante*, 480 U.S. at 14, 18. "The Supreme Court has continuously acknowledged tribal courts' inherent power to exercise civil jurisdiction over non-Indians in conflicts affecting the interests of Indians on Indian lands." *Tamiami Partners*, 999 F.2d at 508 n.11 (citing *Montana* 450 U.S. 544 (1981)); *see also Attorney's Process and Invest. v. SAC & Fox Tribe*, 609 F.3d 927, 936 (8th Cir. 2010) ("in accordance with that right tribes 'may regulate nonmember behavior that implicates tribal governance and internal relations.'" (quoting *Plains Commerce*, 554 U.S. at 335)).

The *Montana* exceptions are "rooted" in the tribes' inherent power to regulate nonmember behavior that implicates these sovereign interests. *Attorney's Process and Invest. v. SAC & Fox Tribe*, 609 F.3d 927, 936 (8th Cir. 2010); (citing *Plains Commerce*, 554 U.S. 316, 335 (2008)). Thus, under the second *Montana* exception, a tribe can regulate nonmember conduct 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.

Here, the Tribe's complaint alleges severe damage that, if found to be true, directly compromises the political integrity, economic security, health and welfare of the Tribe and its members. The damages alleged are in excess of $5 million, funds critical to supporting the safety and well-being of the entire Tribe. Moreover, the manipulation of the Tribe's gaming operation features centrally in this dispute. The Tribe's gaming operations are the Tribe's primary means overall well-being, attracting commerce that finances the Tribe's general operations.

In sum, Great American engaged in consensual relations with the Tribe through commercial dealings and contractual agreement, and the subject matter of the underlying Tribal Action threatens and directly effects the political integrity, economic security, health, and welfare of the Tribe. Accordingly, under either *Montana* exception, jurisdiction lies with the Tribal Court.

D. The Forum Selection Clause is Inapposite.

As set forth above, the Tribal Court has jurisdiction over the breach of contract claim, preventing jurisdiction in this Court until tribal remedies are exhausted. The forum selection clause is inapposite because parties cannot confer federal jurisdiction by agreement where a federal court lacks jurisdiction. *See Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida*, 999 F.2d 503, 508 (11th Cir. 1993) (collecting cases).

"[I]t is well established that subject matter jurisdiction cannot be waived or conferred on

a court by consent of the parties." *Eagerton v. Valuations, Inc.*, 698 F.2d 1115, 1118 (11th Cir. 1983) (citations omitted). *See also United States v. Camacho*, 2023 WL 3404900, at *4 (11th Cir. May 12, 2023) (same, quoting *Eagerton*); *Farah v. Guardian Ins. & Annuity Co., Inc.*, 2017 WL 3261604, at *8 (S.D. Fla. Aug. 1, 2017), *report and recommendation adopted*, 2017 WL 7794278 (S.D. Fla. Aug. 15, 2017) ("parties cannot consent to subject matter jurisdiction in the first place.) Rather, "federal jurisdiction may be created only by congressional grant." *Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1373 (11th Cir. 1998). Consequently, federal courts are "obligated to inquire into subject-matter jurisdiction sua sponte whenever it may be lacking." *Chacon-Botero v. U.S. Atty. Gen.*, 427 F.3d 954, 956 (11th Cir. 2005) (quoting *Cadet v. Bulger,* 377 F.3d 1173, 1179 (11th Cir.2004)).

In *Tamiami Partners*, relied on by Great American, the Eleventh Circuit held that a District Court lacked subject matter jurisdiction where, unlike here, the Tribe had expressly waived sovereign immunity. 999 F. 2d at 505 n.6. There, non-members entered into an agreement with the Tribe to operate certain gaming enterprises on the Tribe's land; the non-members later acquired land that became part of the Tribe's reservation. *Id*. at 504. The non-members and the Tribe later had disputes over the gaming operation. *Id*. As a result, the Tribe sent notice of its intent to terminate the parties' agreement. *Id*. The non-members disputed the termination, and invoked an arbitration provision in the parties' agreement that contained an express waiver of the Tribe's sovereign immunity. *Id*. at 505-06 and 506 n. 6. Nevertheless, the Tribe filed a statement of claim in Tribal Court. *Id*. at 504. The non-members commenced an action in federal District Court, seeking *inter alia* injunctive relief to compel arbitration. *Id*. at 505. Ultimately, the District Court held that the Tribal Court exceeded its authority. *Id*. at 506.

The Eleventh Circuit held, "The district court did not have jurisdiction, however, because although the evidence was present, neither the complaint nor the supplemental complaint had sufficient allegations to meet the standard for district court jurisdiction." *Id*. at 508.

As pertinent here, the Eleventh Circuit reasoned that, "Even though the parties' agreement contains a limited waiver of the Tribe's sovereign immunity, this waiver cannot grant federal court jurisdiction where it otherwise would not exist—that is, this state law breach of contract claim is not appropriate for federal court jurisdiction." *Id.* at 508. Thereafter, the Eleventh Circuit cited to multiple cases, including *Weeks Construction, Inc. v. Oglala Sioux Housing Authority,* 797 F.2d 668, 671 (8th Cir.1986) for the proposition that "[m]ere consent to

be sued, even consent to be sued in a particular court, does not alone confer jurisdiction upon that court to hear a case if that court would not otherwise have jurisdiction over the suit[.]" *Id*.

Here, the Tribe expressly reserved and did not waive its sovereign immunity. *See* Tolling Agreement at ¶15. Moreover, the forum selection does not confer federal subject matter jurisdiction. The tolling agreement contains several pertinent provisions, none of which transfer the subject matter of the underlying Tribal Action into a federal question. The parties expressly agreed that any privilege that existed will be preserved. *Id.* at ¶3, not to use the agreement in any litigation as evidence of the parties' rights, duties, or obligations, that the tolling agreement would not affect the parties' rights with respect to the claims, *id*. at ¶5, and that the agreement would not result in a waiver of any existing rights, which were expressly reserved. *Id*. at ¶7. As a result, the forum selection clause is entirely inapposite to the ultimate question of whether this Court has jurisdiction over the underlying Tribal Action.

E. The Complaint in the Tribal Action is Clear that the Underlying Claim Arose from Acts Committed Inside the Tribe's Reservation.

Great American makes the frivolous argument that there exists a "majority rule" that "tribal court jurisdiction extends only to claims that arise from on-reservation conduct committed by the nonmember." *See* Dkt at 16. Great American further argues that the "dispute between the Tribe and Great American does not arise from on-reservation conduct." *Id*.

First, the Seventh and Tenth Circuit cases relied upon by Great American are not binding. Therefore, these cases are none the more persuasive than the holding in *Lexington Ins. Co. v. Smith*, 94 F.4th 870 (9th Cir. 2024) that Great American seeks to avoid.

Second, two cases from the Seventh Circuit and a Tenth Circuit opinion hardly constitute a "majority rule" to the extent that, as Great American claims, *Lexington* conflicts with them.

Third, a review of the so-called "majority rule" cases does not support Great American's misrepresentation of those cases. Rather, in each case, the courts recognized that the Supreme Court stated that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *See e.g.*, *Jackson*, 764 F.3d at 782 (quoting *Montana*, 450 U.S. at 565); *Stifel*, 807 F.3d at 206 (same); *McArthur*, 497 F.3d at 1071 (same).

Fourth, an extended examination of the record of each case reveals that the unique facts are inapplicable to the disposition of this matter.

In *Jackson*, plaintiffs brought a putative class action against several legal entities organized under the laws of the State of South Dakota, albeit, the owner of the entities was a member of the Cheyenne River Sioux Tribe of South Dakota, except for one California entity engaged in business with the tribe member's entities. *Jackson*, 764 F.3d at 772. Thus, subject matter jurisdiction lay in federal court pursuant to 28 U.S.C. 1332. *Id*. at 771.

The loan agreements contained an arbitration clause designating the Cheyenne River Sioux Tribal Nation as the forum for arbitration, governed under its arbitration rules. *Id*. at 776. However, "Cheyenne River Sioux Tribe 'does not authorize Arbitration,' it 'does not involve itself in the hiring of ... arbitrator[s],' and it does not have consumer dispute rules.'" *Id*. at 776. Thus, the arbitration clause was illusory. *Id*. Furthermore, the putative class action plaintiffs did not engage in any activities inside the reservation because they were consumers applying for payday loans from remote locations. *Id*. at 782. As such, *Jackson* is inapplicable in the present matter.

In *Stifel*, a corporation chartered under tribal law, and wholly owned by a tribe in Wisconsin, issued $50 million in bonds to refinance debt related to a gaming development in Mississippi. *Stifel*, 807 F.3d at 188-89. When the development failed, newly installed leadership of the tribe repudiated the bonds and refused to repay more than $46 million in principal or interest. *Id*. at 189. Controlling documents "contain[ed] (1) waivers of sovereign immunity on behalf of the Tribal Entities; (2) forum selection clauses designating the [US] District Court for the Western District of Wisconsin . . . as the exclusive forum for disputes concerning the bond transaction; and (3) choice-of-law clauses designating the law of Wisconsin . . . ." *Id*. Thus, the bond documents contained express and valid waivers of sovereign immunity. *Id*. at 202.

The Seventh Circuit also held that the dispute did not concern on-reservation conduct because the tribe sought to invalidate bonds related to an off-reservation development that did bear any nexus to the tribe's reservation. *Id.* at 207-08. "Because the tribal court action does not seek redress for any of [the bond purchaser's] consensual activities on tribal land, it does not fall within *Montana*'s first exception." *Id*. at 208.

In *McArthur*, the jurisdictional issue concerned "the regulatory authority of the Navajo Nation over the activities of a nonmember of the tribe when the regulated entity is another independent sovereign acting in its governmental capacity." *MacArthur*, 497 F.3d at 1060. There, one nonmember and two members of the tribe sought enforcement of preliminary

injunction orders issued by the tribe's court against a Utah County's municipal health services department, SJHSD, tasked with providing health care services to the citizens of San Juan County, Utah. *Id*. at 1060-61.

The nonmember and members all served in SJHSD's clinic within the tribe's reservation, but *on non-Indian fee land owned by the state of Utah*. *Id*. at 1061-62. SJHSD investigated the nonmember and one member for timecard fraud, resulting in disciplinary action, and the other nonmember, hired as a temporary clerk, failed to obtain permanent employment. *Id*. As a result, the nonmember and members filed complaints with the Office of Navajo Labor Relations (ONLR) seeking relief, such as reinstatement of employment in SJHSD's clinic and full backpay. *Id*.

The three plaintiffs obtained injunctive relief against SJHSD and its employees in tribal court, requiring SJHSD to reinstate the plaintiffs with full back-pay, and other relief. *Id*. at 1062. The Tenth Circuit did not hold – despite Great American's representation to this Court – that tribal court jurisdiction only extends to claims that arise from on-reservation conduct committed by a nonmember. *See* D.E. 15 at 16. Rather, the Tenth Circuit held that "the Navajo Nation did not possess regulatory authority over any of Defendants' activities" because the Defendant was a State of Utah health services agency operating on non-Indian fee land with a tribe's territory. *Id*. at 1076.

Regarding the nonmember, the Tenth Circuit reasoned that there was no claim "that any of the Defendants in this case entered into a consensual relationship with the Navajo Nation itself" and since she was not a member of the tribe, there was "no possibility that Defendants' actions with respect to Ms. Singer could have resulted in a consensual relationship with a member of the Navajo Nation. Moreover, Defendants' employment-related activities in regard to another nonmember on non-Indian land in no way affects the Navajo Nation's right to govern itself." *Id*. at 1070.

Regarding the two members, the Tenth Circuit wrote, "It would simply strain credulity to hold that the Navajo Nation may exercise regulatory authority over any employer in the United States so long as the individual or entity employs an enrolled member of the tribe. Therefore, we hold that a tribe only attains regulatory authority based on the existence of a consensual employment relationship when the relationship exists between a member of the tribe and a

nonmember individual or entity employing the member within the physical confines of the reservation." *Id*. at 1071–72.

Here, Great American provided the Tribe with $5 million in insurance coverage to protect the Tribe's gaming facilities, including expressly agreeing to provide coverage for theft "inside the premises" of the Tribe's gaming facility. Even more, Great American sent an investigator to the Tribe's reservation to investigate the Tribe's claim of loss. In contrast to *Stifel*, Great American's insurance policy bears a direct nexus to the Tribe's reservation, to wit, Great American agreed to provide insurance coverage over the Tribe's gaming facilities on the Tribe's reservation.

In contrast to *Jackson*, Great American is not a random consumer applying for a payday loan service from entities organized under State law from a remote location.

In contrast to *Stifel*, Great American's insurance policy bears a direct nexus to the Tribe's reservation and gaming activities thereon.

In contrast to *McArthur*, there is no claim that Great American employed an individual, who incidentally is a member of the Tribe, resulting in the Tribe asserting regulatory authority over Great American's employment practices. Moreover, *MacArthur* is limited to claims of wrongful termination and workplace discrimination involving a dispute between employees of a State health clinic. Here,

> Here, the underlying claim at issue arose from acts committed inside the Tribe's reservation. The allegations here are similar to those in *Lexington,* where "the nonmember consensually joined an insurance pool explicitly marketed to tribal entities; the nonmember then entered into an insurance contract with a tribe; the contract exclusively covered property located on tribal lands; and the tribe's cause of action against the nonmember arose directly out of the contract." *Lexington Ins. Co*., 94 F.4th at 886.

F. Great American Does Not Have a Private Right of Action under the ICRA and Has Not Been Deprived of Due Process.

Finally, Great American claims, in direct contradiction to established Eleventh Circuit precedent, that it has a private right of action under the Indian Civil Rights Action and "defendants have violated Great American's due process rights and will continue to do so unless enjoined." *See* D.E. 15 at 20.

i. Great American does not have a private right of action under the ICRA.

In support of its claim of a private right of action under the ICRA, Great American claims that *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), limits its holding in that "the ICRA[1] does not create a private right of action in cases arising from intratribal disputes unless the plaintiff seeks *habeas corpus* relief." *See* D.E. 15 at 18. This is squarely contradicted by *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Florida*, 692 F.3d 1200 (11th Cir. 2012).

Contradictorily, Great American claims that it "does not need to bring a direct action under the ICRA because federal common law also restricts the Tribe's authority over non-Indians", *see* D.E. 15 at 18, and yet, in paragraph 83 of Great American's Complaint, Great American alleges a violation of the ICRA.

Moreover, Great American cites to *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), *see* D.E. 15 at 18, which the Supreme Court overturned in *United States v. Lara*, 541 U.S. 193, 207 (2004), writing in pertinent part, "*Oliphant* . . . [is] not determinative because Congress has enacted a new statute, **relaxing restrictions on the bounds of the inherent tribal authority that the United States recognizes**. And that fact makes all the difference." *Id*. at 207 (emphasis added). Again, Great American's representations about the limits of the Tribe's authority are contradicted by the authorities it cites.

In another contradictory citation, Great American claims that *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Florida*, 692 F.3d 1200, 1208 (11th Cir. 2012) supports its claim that "courts" recognize an exception to *Santa Clara Pueblo* that authorizes a private right of action under the ICRA. *See* D.E. 15 at 19. Yet, the Eleventh Circuit wrote in *Contour* that a Plaintiff's claim for alleged due process violations under ICRA "is foreclosed by Supreme Court precedent establishing that the Tribe is immune from just such a suit." *Contour*, 692 F.3d at 1208 (citing *Santa Clara*, 436 U.S. 49).

In *Contour*, the Eleventh Circuit noted that one Tenth Circuit opinion, *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes,* 623 F.2d 682, 685 (10th Cir.1980), held that the ICRA created an implied cause of action where certain narrow criteria are met. *Contour*, 692 F.3d at 1209. In *Contour*, a nonmember tenant and the tribe executed a lease containing a forum

[1] The "ICRA" is the Indian Civil Rights Act. *See* 25 U.S.C. 1301, *et seq.* It restrains tribes from exercising powers of self-government that infringe on various enumerated Constitutional rights. *See* 25 U.S.C. 1302.

selection clause in the Southern District of Florida and the Seventeen Judicial Circuit Court. *Contour*, 623 F.3d at 1202 n.1. The nonmember tenant filed suit against the tribe after the tribe permanently closed the tenant's business operation and repossessed the premises. *Id*. as 1203. The District Court dismissed the action for lack of subject matter jurisdiction on account of the tribe's sovereign immunity. *Id*. at 1201. Seeking a reversal of the dismissal order, the nonmember tenant argued that the ICRA created an implied private right of action. *Id*. at 1208. The Eleventh Circuit squarely rejected this same argument now asserted by Great American: "The trouble with this argument is that it is foreclosed by Supreme Court precedent establishing that the Tribe is immune from just such a suit." *Id*. at 1208-09 (Citing *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978)). The Eleventh Circuit continued by quoting *Santa Clara*, "It is settled that a [congressional] waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.' Nothing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief." *Id*. at 1209 (quoting *Santa Clara*, 436 U.S. at 58-59).

Further, the Eleventh Circuit held that the District Court needlessly engaged in an analysis of whether the ICRA created an implied private right of action: "Although the district court in this case examined whether Contour met the factors enumerated by the Tenth Circuit in *Dry Creek* before declining to find an implied cause of action, **it need not have gone that far.** [2] As we see it, the Tenth Circuit's framework is unnecessary when tribal immunity is at issue. The law is crystal clear that tribal immunity applies unless there has been congressional abrogation or waiver by the tribe." *Id*. at 1209 (emphasis added).

Here, there is no need for this Court to engage in an analysis as to whether Great American has a private right of action under the ICRA. The Tribe has sovereign immunity. Great American does not claim that the Tribe waived its sovereign immunity. Moreover, the Tribe expressly reserved and did not waive its sovereign rights and immunity in the tolling agreement

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[2] Even the district court's analysis of *Dry Creek* provides no support for Plaintiff's position. Specifically, the district court noted that "courts have chosen to narrow" the *Dry Creek* exception and "**the Eleventh Circuit has never adopted the reasoning of *Dry Creek***." *Miccosukee Tribe of Indians of Florida v. Kraus-Anderson Constr. Co.*, No. 04-22774-CIV, 2005 WL 8155935, at *3 (S.D. Fla. Feb. 10, 2005) (emphasis added) (citations omitted). The district court ultimately found that the *Dry Creek* exception could not apply because, like here, the movant failed to allege the non-existence of a tribal remedy nor could it where, as here, the movant was "provided with and pursued a remedy in the Tribal Court." *Id*.

referenced in Great American's motion. The policies at issue in the underlying Tribal Action do not contain an express waiver of the Tribe's sovereign immunity. Therefore, Great American cannot bring an action in this Court to deprive the Tribal Court of jurisdiction.

ii. Great American has not been deprived of due process.

Next, Great American complains that the "Tribe cannot provide an impartial forum" and the "defendants have clearly violated Great American's due process rights and will continue to do so unless enjoined." *See* D.E. 15 at 20. This claim is demonstrably false.

In support of this claim, Great American argues that (1) the Business Council has an acute conflict of interest and (2) a key witness is related to a presiding judicial officer. *See* D.E. 15 at 20-21. Yet, Great American fails to mention that under the Miccosukee Tribe Code of Criminal and Civil Procedure, Great American has the right to seek recusal of any judicial officer who has an interest, is a material witness, or is related to any party by blood or marriage. *See* Code at Tit. I, §12. In a clear demonstration of both the sham nature of Great American's claim and its failure to exhaust its remedies under the tribal exhaustion rule, Great American has never sought recusal of any judicial officer.

The Tribal Court has been in effect since at least 1978, and Great American does not claim that the Tribal Court is an illusory forum. *Compare Jackson v. Payday Fin., LLC*, 764 F.3d 765, 776 (7th Cir. 2014).

Moreover, there exists an entire Code of civil procedures that guide the administration of Tribal Court's process to fair and just outcomes, which Great American wholly ignores. Great American has remedies available to it under the Tribal's Code that guaranty of due process rights afforded under traditional notions of fairness and the Constitution.

II. PLAINTIFF CANNOT ESTABLISH IRREPARABLE HARM.

According to Plaintiff, they are entitled to the extraordinary remedy of a preliminary injunction because, without such relief, it will be "forced to litigate in a forum that lacks jurisdiction despite a mandatory forum selection clause requiring the dispute to be litigated elsewhere." (Mot., § 2, at 19.) Specifically, Plaintiff claims that litigating in Tribal Court causes irreparable harm in the two ways: (1) Plaintiff will incur substantial and purportedly unrecoverable costs; and (2) Plaintiff will suffer "ongoing violations" of its "fundamental due process rights . . . ." (*Id.*) However, binding Supreme Court and Eleventh Circuit precedent is clear that these alleged injuries cannot support a finding of irreparable harm which, standing

alone, requires denial of the Motion.

At the outset, the law in this Circuit is clear that a "showing of irreparable injury is 'the *sine qua non* of injunctive relief'" and "**the absence of a substantial likelihood of irreparable injury would, standing alone, make preliminary injunctive relief improper**." *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (emphasis added) (citing *Northeastern Fla. Chapter of the Ass'n of Gen. Contractors v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir.1990) and *Snook v. Trust Co. of Georgia Bank of Savannah, N.A.*, 909 F.2d 480, 486 (11th Cir.1990)) (emphasis added)). Accordingly, irreparable harm must be established "even if [the movant] establish[es] a likelihood of success on the merits . . . ." *Id*. (citing *Snook*, 909 F.2d at 486). Thus, unlike in *Halcon Operating Co*. and *Wilkinson*, Plaintiff does not enjoy a presumption of irreparable harm even if it could establish a likelihood of success on the merits, which it cannot.

Indeed, the Supreme Court has held that "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Bd. v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 24 (1974). Courts in this Circuit routinely apply *Renegotiation Bd.* to reject the same position Plaintiff advances here. For example, in *Triangle Const. & Maint. Corp. v. Our Virgin Islands Labor Union*, 425 F.3d 938, 947 (11th Cir. 2005), the Eleventh Circuit reaffirmed *Renegotiation Bd.* in its reversal of an order granting a preliminary injunction based on the same alleged irreparable harm.

Likewise, several district courts have relied on *Renegotiation Bd.* to deny a motion for preliminary injunction for lack of irreparable harm. *See Claughton v. Donner*, 771 F. Supp. 1200, 1204 (S.D. Fla. 1991) (citing *Renegotiation Bd.*, 415 U.S. at 24 and *Parma v. Levi*, 536 F.2d 133, 135 (6th Cir. 1976)) (emphasis added) ("**Substantial litigation costs which cannot be recouped are not irreparable injuries.**"); *Allstate Ins. Co. v. Preston*, 842 F. Supp. 1441, 1445 (S.D. Fla. 1992) **(**citing *Claughton*, 771 F. Supp. at 1204) (quotations and citations omitted) (emphasis added) (**[T]he only irreparable injury plaintiff has alleged is the litigation costs it will incur** in defending the state court action. However, . . . **substantial litigation costs which cannot be recouped are not irreparable injuries**. Similarly, **plaintiff's alleged harm—which is in terms of money and time expended in the absence of an injunction—does not constitute irreparable injury**."); *Arnold v. Commodity Futures Trading Com'n*, 987 F. Supp. 1463, 1468 (S.D. Fla. 1997) (citing *Renegotiation Bd.*, 415 U.S. at 24)

(denying motion for preliminary injunction because movants' argument that they "will be irreparably harmed by having to invest considerable resources to defend this action" in another tribunal "must fail"); *Alpert v. Taylor*, No. 8:09-CV-1026-T-27TBM, 2009 WL 10670882, at *2 (M.D. Fla. Sept. 22, 2009) (collecting cases) (emphasis added) ("Plaintiff contends that **Defendants' claims compel Plaintiff to expend time and effort and that Plaintiff cannot defend his rights in a state court lacking jurisdiction** . . . . However, . . . **the expense of litigation does not ordinarily constitute irreparable harm**, and Plaintiff fails to show that he can neither effectively assert his rights in state court nor obtain an adequate compensatory remedy.").

Notwithstanding the authorities above, Plaintiff relies on two unpublished, non-binding decisions from the District of North Dakota[3] for the proposition that "'engag[ing] in expensive and time-consuming litigation in a forum for which it did not bargain' is sufficient, standing alone, to establish irreparable harm." (Mot. at 19) (quoting *Halcon Operating Co., Inc. v. Rez Rock N Water, LLC*, No. 1:17-CV-202, 2018 WL 40920528 (D.N.D. July 9, 2018).) Plaintiff's argument mischaracterizes the holdings in these cases, both of which are irreconcilable with binding precedent in this Circuit. The irreparable harm findings in *Halcon Operating Co.* and *Wilkinson* rely on an Eighth Circuit decision, *Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc.*, 815 F.2d 500, 503 (8th Cir. 1987), which provides that a movant is entitled to a presumption of irreparable harm if it demonstrates a likelihood of success on the merits. *See Halcon Operating Co., Inc.*, No. 1:17-CV-202, 2018 WL 4092052, at *8 (citing *Calvin Klein Cosmetics Corp.*, 815 F.2d at 503) ("The Eighth Circuit has explained that a district court can presume irreparable harm if the movant is likely to succeed on the merits."); *Wilkinson*, 2016 WL 8737869, at *2 (citing *Calvin Klein Cosmetics Corp.*, 815 F.2d at 503) (same).

However, the presumption of irreparable harm that carried the day in *Halcon* and *Wilkinson* does not exist in this Circuit. *See Siegel*, 234 F.3d 1163, 1176 ("**[T]he absence of a substantial likelihood of irreparable injury would, standing alone, make preliminary injunctive relief improper**."). Absent such a presumption, the law is clear that the financial costs associated with litigating in Tribal Court cannot establish irreparable harm sufficient for this Court properly to grant the extraordinary remedy of injunctive relief. *See Renegotiation*

[3] *Halcon Operating Co., Inc. v. Rez Rock N Water, LLC*, No. 1:17-CV-202, 2018 WL 40920528 (D.N.D. July 9, 2018) and *Enerplus Res. (USA) Corp. v. Wilkinson*, No. 1:16-CV-103, 2016 WL 8737869 (D.N.D. Aug. 30, 2016), *aff'd*, 865 F.3d 1094 (8th Cir. 2017).

Bd., 415 U.S. at 24; *Siegel*, 234 F.3d at 1176; *Claughton*, 771 F. Supp. at 1204; *Preston*, 842 F. Supp. at 1445; *Arnold*, 987 F. Supp. at 1468; *Alpert*, 2009 WL 10670882, at *2. This is especially true considering that the injunction Plaintiff requests would operate to divest the Tribal Court of jurisdiction over disputes involving non-members that either occurred on or have a substantial nexus with Tribal lands. (*See infra* §H: Balancing of Harms).

Plaintiff's alleged "ongoing" violations of "fundamental due process rights" similarly fails to establish irreparable harm. For one, Plaintiff's argument is entirely conclusory; the Motion dedicates one sentence to Plaintiff's argument with no explanation of how its rights are violated or even the source of same. (Mot. at 19). Further, the only support Plaintiff cites for its position, *Gayle v. Meade*, 614 F. Supp. 3d 1175 (S.D. Fla. 2020), is wholly inapposite. In *Gayle*, the motion for preliminary injunction was filed with the plaintiffs' petition for writ of *habeas corpus*, both of which alleged that certain South Florida federal facilities were violating detainees' Fifth and Eighth Amendment rights by failing to adequately protect against the spread of COVID-19. *Id*. at 1184 (S.D. Fla. 2020). In this context, the court found that the plaintiffs "establish[ed] irreparable harm by alleging a deprivation of constitutional rights" because an "alleged violation of a constitutional right . . . triggers a finding of irreparable harm." *Id*. at 1205 (citing *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996)).

Gayle does not apply here because Plaintiff has not, and cannot, allege that Defendants are depriving it of constitutional due process rights. For over a century, constitutional jurisprudence has recognized that federally recognized tribes *are not bound by the Bill of Rights or any other guarantees of individual rights in the United States Constitution*. *See e.g. Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (citing *Talton v. Mayes*, 163 U.S. 376 (1896)) ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."); *United States v. Doherty*, 126 F.3d 769, 777 (6th Cir. 1997) (abrogated on other grounds) (citing *Talton*, 163 U.S. 376) ("Neither the Sixth Amendment nor any of the other guarantees of individual rights in the United States Constitution apply of their own force to Indian tribes."); *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 880–81 (2d Cir. 1996) (collecting cases) (emphasis in original) ("Following *Talton*, courts concluded that other provisions of the Bill of Rights as well as the Fourteenth Amendment do not constrain the powers of self-government enjoyed by Indian tribes."). To the extent Plaintiff claims its

purported rights under the ICRA are at issue, Defendants have already established that the ICRA does not provide a private right of action. (*See supra* §F.i.); (*See also* D.E. 23, § IV.) Accordingly, Plaintiff has not and cannot establish irreparable harm in the form of due process violations.

G. The Balancing of Harms Weighs in Favor of Denial.

As to the third element, Plaintiff must establish that "the threatened injury to [Plaintiff] outweighs whatever damage the proposed injunction may cause to the [Tribe]." *Siegel*, 234 F.3d at 1176. Here, Plaintiff claims that the balance of harms "weighs heavily" in its favor because Defendants "are sued in their official capacities only" and the requested injunction "simply preserve[s] the status quo . . . ." (Mot. at 19.) This is a gross understatement of the potential harm to Defendants and the Tribe should the Motion be granted.

Specifically, Plaintiff asks this Court to "permanently enjoin and restrain Defendants from enforcing the tribal court's adjudicative power over the dispute between [Plaintiff] and the Tribe . . . ." (D.E. 1, ¶ 106). If the motion is granted, Plaintiff would avoid its obligation to exhaust Tribal Court remedies and the costs associated with same, while Defendants would be presumptively deprived of Tribal Court jurisdiction and, in turn, the Tribe's sovereignty would be abrogated by judicial decree. If the motion is denied, Plaintiff would incur the costs necessary to satisfy its obligation to exhaust Tribal Court remedies. Thus, Plaintiff fails to establish that the balance of harm weighs in his favor. *Poarch Band of Creek Indians v. Hildreth*, No. 1:15–0277–CG–C, 2015 WL 4469479, at *7 (S.D. Ala. 2015) (granting tribe's motion for preliminary injunction to enjoin county tax assessor from levying taxes on tribal trust land because, *inter alia*, "the harm to the Tribe's sovereignty and well-being caused by permitting the county tax assessor to exercise jurisdiction over a tribe's trust property is substantial").

H. The Public Interest Is Served by Denial.

The Supreme Court has repeatedly recognized the importance of deferring to Tribal courts as a matter of public policy. "Our cases have often recognized that **Congress is committed to a policy of supporting tribal self-government and self-determination**." *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985). This longstanding federal policy serves to provide "the [tribal court] whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge" which,

in turn, promotes judicial economy "by allowing a full record to be developed in the Tribal Court." *Id*. Federal courts routinely reaffirm these strong policy interests. *See e.g. DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d 877, 883 (8th Cir. 2013) (citing *Nat'l Farmers Union Ins. Cos.*, 471 U.S. at 856-57) ("One of the policy rationales favoring exhaustion is that it enables tribal courts to clarify the factual and legal issues relevant to evaluating any jurisdictional question.").

The Motion asks this Court to ignore the well-established public policies above because, according to Plaintiff, "tribal autonomy and self-government could not possibly be implicated since the Tribe agreed to a forum selection clause." (Mot. at 20.) As discussed, the forum selection clause does not govern the parties' underlying dispute that is pending in Tribal Court and nothing in the Agreement containing same could be construed as a clear and unmistakable waiver of sovereign rights or immunity to otherwise divest the Tribal Court of jurisdiction. (*See e.g., supra* at §D). Further, Plaintiff claims that the injunction would serve public policies favoring "enforcement of negotiated forum selection clauses" and "the resolution of claims before an impartial tribunal." (Mot. at 20). Enforcing one section in the Agreement's forum selection, while ignoring the rest of the Agreement, cannot serve the public interest because it does not govern the parties' underlying dispute and doing so would violate the federal policy to support Tribal self-government and preserve Tribal sovereignty. As to Tribal Court's alleged partiality, the Complaint and the Motion contain nothing more than conclusory and conspiratorial allegations that fail for the reasons explained in Section F.ii., *supra*, and the affidavit attached hereto as Exhibit 1. Consistent with the longstanding federal policy outlined above, the public interest is served by denying the Motion and preserving the Tribe's sovereignty and right to self-governance.

CONCLUSION

For the reasons stated above, Defendants respectfully request that this Court enter and order dismissing the Plaintiff's Motion for Preliminary Injunction.

Dated: July 8, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 8, 2024 a true and correct copy of the above was filed in CM/ECF filing system and was thereby furnished to counsel of record in the service list via email.

By: /s/ *Christopher Ajizian*
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