DOCKET NO. 13-12665-FF

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Appellant,

v.

MORGAN STANLEY SMITH BARNEY, ET AL.,

Appellee

---

On Appeal from the United States District Court
for the Southern District of Florida
(Case No.: 12-cv-22439-MGC)

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# APPELLEE'S ANSWER BRIEF

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*Miccosukee Tribe of Indians v. Morgan Stanley Smith Barney*
Docket No.: 13-12665-FF

**CERTIFICATE OF INTERESTED PERSONS**
**AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to 11th Cir. R. 26.1-1, the undersigned counsel for Appellee hereby certifies that the following is a list of persons and entities who may have an interest in the outcome of this case:

**INTERESTED PERSONS**

1. Avila, Manuel
2. Bruce S. Rogow, P.A.
3. Calli, Paul
4. Campion, Tara
5. Carlton Fields
6. Cooke, The Honorable Marcia G.
7. Cypress, Billy
8. Goldsmith, Steven
9. Hernandez, Miguel
10. Koltune & Lazar
11. Lazar, Scott Alan
12. Lehtinen, Dexter
13. Lewis, Guy

*Miccosukee Tribe of Indians v. Morgan Stanley Smith Barney*
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14. Lewis Tein P.L.

15. Mauel A. Avila, Esq. & Associates, P.A.

16. Martinez, Julio

17. McAliley, United States Magistrate Judge Chris

18. Miccosukee Tribe of Indians of Florida

19. Morgan Stanley Smith Barney, LLC

20. Pino, Yinet

21. Rey, Yesenia

22. Rogow, Bruce

23. Roman, Bernardo

24. Saunooke Law Firm

25. Saunooke, Robert O.

26. Short, Charles

27. Strader, Yolanda

28. Tein, Michael

29. Tew Cardenas

30. West, Bryan T.

*Miccosukee Tribe of Indians v. Morgan Stanley Smith Barney*
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## CORPORATE DISCLOSURE

Morgan Stanley Smith Barney Holdings, LLC is the 100% owner of Morgan Stanley Smith Barney LLC (MS).

## STATEMENT REGARDING ORAL ARGUMENT

The Appellee respectfully suggests that oral argument is unnecessary. The Plaintiff's pleading established that its Chairman had authority to enter into an arbitration agreement. The agreement itself is undisputed. There are no facts to be determined and the law is clear. Oral argument would be superfluous.

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## STATEMENT OF JURISDICTION

Appellant, the Miccosukee Tribe of Indians of Florida, filed a Second Amended Complaint[1] against Billy Cypress, Julio Martinez, Miguel Hernandez, Guy Lewis, Esquire, Michael Tein, Esquire, Lewis Tein, P.L., Dexter Wayne Lehtinen, Esquire, and (Appellee) Morgan Stanley Smith Barney on November 9, 2012 (Doc 75), in the United States District Court for the Southern District of Florida, which had subject matter jurisdiction pursuant to 28 U.S.C. § 1331, involving allegations under 18 U.S.C. §§ 1964(a) and (c).

This Court has appellate jurisdiction to hear this appeal because the case below was dismissed as to Appellee Morgan Stanley Smith Barney, making the May 17, 2013 Order a final order immediately appealable pursuant to 28 U.S.C. § 1291. *See Montero v. Carnival Corp.*, 523 Fed. Appx. 623, 625 (11th Cir. 2013)("A district court order directing that arbitration proceed and dismissing a plaintiff's claim, … is a final decision with respect to an arbitration that is immediately appealable.") (internal citation omitted).

[1] The Tribe filed its initial Complaint on July 1, 2012, and their Amended Complaint on July 30, 2012. Morgan Stanley filed the underlying Motion to Compel Arbitration on September 24, 2012. The Tribe subsequently filed their Second Amended Complaint (hereinafter sometimes referred to simply as "Complaint) on November 9, 2012. The subsequent Complaint had no effect on the arbitration issue between the Tribe and Morgan Stanley.

This Court has jurisdiction over this appeal. The underlying Complaint continued as to the other defendants but the district court's order dismissing the Appellee did not affect the lawsuit as to the remaining defendants. *See generally Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992); *Cancanon v. Smith Barney, et al.*, 805 F.2d 998 (11th Cir. 1986). The case against the remaining defendants was dismissed on September 30, 2013 (Doc 282), and a Motion for Reconsideration filed on October 10, 2013 (Doc 283), is pending.

## STATEMENT OF THE ISSUES

1. Whether the district court correctly determined that Chairman Cypress had the requisite authority to bind the Tribe to arbitrate its claims against Morgan Stanley Smith Barney when he signed the Account and Client Agreements which contained valid arbitration clauses.

2. Whether the district court correctly entered the order compelling arbitration and dismissing the suit as to Morgan Stanley Smith Barney.

3. Whether the district court, relying on the Motion, Response, Reply, Record, and the relevant legal authorities, correctly granted Morgan Stanley's Motion to Compel Arbitration and Dismiss.

## STATEMENT OF THE CASE

Appellee Morgan Stanley Smith Barney is satisfied with the Appellant Tribe's statement of the case. One addition to the Statement is the subsequent dismissal by the district court of the case against the remaining defendants. (Doc 282). A Motion for Reconsideration is pending. (Doc 283).

## STATEMENT OF THE FACTS

The Second Amended Complaint alleged:

> 6. Defendant CYPRESS was the elected Chairman of the MICCOSUKEE TRIBE during the relevant period of time, which is 2005 thorough and including January 2010. In this capacity, Defendant CYPRESS oversaw, controlled, supervised and had unrestricted access and control over all the financial funds and records of the MICCOSUKEE TRIBE which are the subject of this lawsuit.

(Doc 75 – Pg 4, ¶ 6).

Morgan Stanley Smith Barney,[2] formerly Salomon Smith Barney, is a financial services company that provides consumer banking and investment services to its customers. The Miccosukee Tribe maintains several accounts with Morgan Stanley.

In connection with the opening and maintenance of these accounts, Chairman Cypress executed various account documents on behalf of the Miccosukee Tribe, including several Account Applications. Each of the Plaintiff's

[2] The various agreements, which were attached to Morgan Stanley's Motion to Compel Arbitration (as Exhibits to the Rae Ann Stabler Declaration), are with Salomon Smith Barney, Smith Barney Citigroup, and Citi Smith Barney. (Doc 39-2 *et seq*). On June 1, 2009, Morgan Stanley and Citigroup contributed the Global Wealth Management Group of Morgan Stanley & Co. Incorporated and the Smith Barney Division of Citigroup Global Markets, Inc., respectively, into Morgan Stanley Smith Barney Holdings, LLC, a new joint venture. The joint venture owns Morgan Stanley Smith Barney LLC ("MSSB"), which is a newly formed registered investment advisor and broker-dealer. *Id*. Under the joint venture, Morgan Stanley Smith Barney is a party to the arbitration agreements. *Id*.

Account Applications contained Client Agreements, the terms of which are contained in standardized account agreements, and contain unambiguous arbitration agreement clauses. For example, the "Account Application, Client Agreement and Substitute Form W-9 Request for Taxpayer Identification Number" executed by Chairman Cypress on June 9, 2008, provides in relevant part:

> **6. Arbitration**
>
> **This agreement contains a pre-dispute arbitration clause. By signing an arbitration agreement the parties agree as follows:**
>
> - **All parties to this agreement are giving up the right to sue each other in court, including the right to a trial by jury, except as provided by the rules of the arbitration forum in which a claim is filed.**
>
> *******
>
> - **I agree that all claims or controversies, whether such claims or controversies arose prior, on or subsequent to the date hereof, between me and SB and/or any of its present or former officers, directors, or employees concerning or arising from (i) any account maintained by me with SB individually or jointly with others in any capacity; (ii) any transaction involving SB or any predecessor firms by merger, acquisition or other business combination and me, whether or not such transaction occurred in such account or accounts; or (iii) the construction, performance or breach of this or any other agreement between us, any duty arising from the business of SB or otherwise, shall be determined by arbitration before, and only before, any self-regulatory organization or exchange of which SB is a member. . . .**

(Doc 39-4 – Pg 6, ¶ 6) (emphasis in original).

Chairman Cypress' signed June 9, 2008 Account Application acknowledged the arbitration agreement: "I acknowledge that I have received a copy of the Client Agreement which contains a pre-dispute arbitration clause on page 6 of 7, section 6." He further attested that "I acknowledge that I have read, understand and agree to the terms of the attached Client Agreement in Sections 1 through 12 [and] … that I have read, understand and agree to the terms of the attached Client Agreement contained in sections 13 through 15. (Doc 39-3 - Pg 4; Doc 39 - 4 – Pg 4; and Doc 39-5 – Pg 2: acknowledging receipt of the Client Agreement containing the pre-dispute arbitration clause).

The Tribe does not deny Chairman Cypress' assent to, and signature on, the Account Agreements (Doc 61 - Pg 4). Nor does the Tribe deny that the Federal Arbitration Act "controls the enforcement of arbitration agreements." (*Id*. at 5). That Chairman Cypress had the authority to bind the Plaintiff to these agreements is beyond peradventure because the Plaintiff's Second Amended Complaint states:

> 6. Defendant CYPRESS was the elected Chairman of the MICCOSUKEE TRIBE during the relevant period of time, which is 2005 through and including January 2010. In this capacity, Defendant Cypress oversaw, controlled, supervised and had unrestricted access and control over all the financial funds and records of the MICCOSUKEE TRIBE which are the subject of this lawsuit.

(Doc 75 – Pg 4, ¶ 6).

Those are the undisputed facts that are relevant to this case.

## STANDARD OF REVIEW

The standard of review for motions to compel arbitration agreements is *de novo*. *See, Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1213 (11th Cir. 2011) ("Determinations of arbitrability, like the interpretation of any contractual provision, are subject to *de novo* review.") (citing *Wheat, First Sec., Inc. v. Green*, 993 F.2d 814, 817 (11th Cir. 1993)).

## SUMMARY OF THE ARGUMENT

The district court's order should be affirmed on three grounds. First, the district court properly found that at the time he entered into the Client Agreements, Chairman Cypress possessed the requisite legal authority to contractually bind the Miccosukee Tribe to arbitrate any issues contained within the broad arbitration clauses.

Second, the district court correctly found that Chairman Cypress executed Account Applications and Client Agreements with Morgan Stanley Smith Barney and that those contracts contained valid arbitration agreements.

Third, no evidentiary hearing was ever requested by the Tribe, nor would it have been error to deny such a request had one been made, because the Complaint and the Agreements left no doubt that there were arbitration clauses and that Chairman Cypress had the authority to enter into those arbitration agreements.

The district court's order compelling arbitration and dismissing Morgan Stanley Smith Barney should therefore be affirmed.

## INTRODUCTION

In their Initial Brief, the Tribe correctly notes that the Account Applications and Client Agreements, which are the subjects of the underlying lawsuit, are governed by the laws of the State of New York. "There is no discernable difference between federal common law principles of agency and New York agency law. The [c]ourt may thus rely on both sources." *Meisel v. Grunberg*, 651 F.Supp.2d 98, 110 (S.D.N.Y. 2009) (internal citations omitted). The cases cited in the proceedings below are consistent with the common law principles and New York law.

The Tribe's apparent unhappiness with Chairman Cypress is not relevant to the issues presented here. The Tribe's allegations of fraud and other improper conduct in the handling of the accounts are for the arbitrators to decide. *See, e.g., Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444-449 (2006) (allegations of fraudulent inducement or illegality of the underlying contract are for the arbitrators to decide) and *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404 (1967) (allegations of fraudulent inducement in connection with an agreement containing an arbitration clause are for the arbitrators to decide).

## ARGUMENT

### I. THE DISTRICT COURT CORRECTLY DETERMINED THAT CHAIRMAN CYPRESS HAD AUTHORITY TO BIND THE TRIBE WHEN HE SIGNED AND ENTERED INTO THE ACCOUNT APPLICATIONS AND CLIENT AGREEMENTS CONTAINING ARBITRATION CLAUSES

#### A. The Principles of Agency Law

For resolution of this appeal, one need look no further than the principles of common law agency. The Restatement (Third) Agency § 1.01 defines agency as "the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, the agent manifests assent or otherwise consents so to act."

An agent's actual authority can be either express or implied. *Granoff v. Clarendon Nat'l Ins. Co.*, 2007 WL 646973, at *4 (S.D. Fla. 2007); *Shahawy v. Lee*, 1996 WL 33663633, at *8 n.14 (M.D. Fla., 1996). Although "[e]xpress actual authority is that authority which in fact is conferred upon the agent by the principal … implied actual authority … is the authority to do what is reasonably necessary to accomplish the purpose of the express authority delegated to" the agent. *Id.* at *8 n. 14 (citations omitted).

New York agency law additionally recognizes inherent or incidental authority. "Inherent or incidental authority is a species of actual authority and

means that the position or status of a particular agent normally carries with it certain powers to bind the principal." *Gumpert v. Bon Ami Company*, 251 F.2d 735, 738 (2nd Cir. 1958). Those principles unequivocally apply here, and the Tribe subscribed to them in its Complaint.

### B. Chairman Cypress Had Actual Authority

Chairman Cypress had actual authority to bind the Miccosukee Tribe to the Account Application and Client Agreements at issue, making arbitration the appropriate forum for resolution of the underlying Complaint. The district court found that Chairman "Cypress, at the time he entered into the Client Agreements, had apparent, *if not actual*, authority to contractually bind the Miccosukee Tribe" (Doc 227 - Pg 6) (emphasis supplied) and specifically noted that: "[p]laintiff effectively admits to Defendant Cypress' actual authority when it avers that during the time period from 2005 – 2009, 'Defendant Cypress oversaw, controlled, supervised and had unrestricted access and control over all the financial funds and records of the Miccosukee Tribe subject to this lawsuit.'" *Id.* at 7 (citing Plaintiffs' Second Amended Complaint).

As this Court has stated, "[t]he determination whether a signatory … had the authority to bind a non-signatory … to arbitrate turns on the specific facts of each case." *Bd. Of Trustees of City of Delray Beach Police & Firefighters Ret. Sys.*, 622 F.3d 1335, 1342 (11th Cir. 2010) (quoting *World Rentals & Sales, LLC v. Volvo*

*Const. Equip. Rents. Inc.*, 517 F.3d 1240, 1248 (11th Cir. 2008)) (internal citations omitted).

In the *Delray Beach* case, the Trustees sought to avoid the consequences of the fact that William Adams, the Chairman of the Board "had bound the Board to arbitrate any dispute with Citigroup when he signed several account agreements … [which] required arbitration of disputes. . . . " 622 F.3d at 1337. The Board "argued that Adams had no authority to bind the Board" and Citigroup argued that "Adams had both actual authority and apparent authority to bind the Board." *Id.*

The *Delray Beach* Court, reversing the district court's denial of Citigroup's motion to compel arbitration, held that Adams had "implied actual authority to bind the Board to arbitrate" and remanded with instructions to compel arbitration. *Id*. On the facts in *Delray* the Court held that "Adams had implied authority to execute the account agreements." 622 F.3d at 1335. Here, the Tribe itself attested to Cypress' authority.

The actual authority facts *vis a vis* Chairman Cypress are not disputed:

> - Defendant Cypress was elected Chairman of the Miccosukee Tribe during the relevant period of time, which is 2005 thorough and including January 2010. In this capacity, Defendant Cypress *oversaw, controlled, supervised and had unrestricted access and control over all the financial funds and records of the Miccosukee Tribe which are the subject of this lawsuit*.

(Doc 75 - Pg 4, ¶ 6, Second Amended Complaint (emphasis supplied)).

> - Billy Cypress … *signed an arbitration agreement* which purports to deny the Miccosukee Tribe's access to court.

(Doc 61 - Pg 2, ¶ 3, Response in Opposition to Defendant's Motion to Compel Arbitration).

Courts have specifically held that an agent's express authority with respect to investments gave implied actual authority to enter into ancillary contracts, including contracts with arbitration clauses, binding the principal to arbitrate any claims against the investment firm. *99 Commercial Street, Inc. v. Goldberg*, 811 F. Supp. 900, 907 (S.D.N.Y. 1993) (party bound by arbitration clause in customer agreement executed by its escrow agent in association with authorized investments). Writing for the court, then-Judge Sotomayor noted that "[i]t is … undisputed that … Plaintiffs were aware that the monies would be placed at Bear Stearns for investment in the Funds recommended by Defendants." *Id*. The disputed customer agreements were executed by the escrow agent "[a]s part of the investment process." *Id*.

The court concluded that "[t]he agent's acts in executing the Customer Agreement were eminently reasonable and fully within the scope of the duties which they were entrusted to execute." *Id*. The Tribe's commitment of authority to Chairman Cypress is admitted and cannot be disputed. He was entrusted to

"oversee, control[], supervise[] and had unrestricted access and control over all the financial funds and records of the Miccosukee Tribe which are the subject of this lawsuit." (Doc 75 – Pg 4, ¶ 6).

### C. Chairman Cypress Had Apparent Authority

The arbitration provisions at issue should also be enforced based on apparent authority principles. Apparent authority exists when the principal creates the appearance of an agency relationship. *Bank of America, N.A. v. Terra Nova Ins. Co. Ltd.*, 2005 WL 1560577, at 5 (S.D.N.Y. 2005). Apparent authority "arises when a principal places an agent in a position where it appears that the agent has certain powers that the agent may or may not possess. If a third person holds the reasonable belief that the agent was acting within the scope of his authority and changes position in reliance on the agent's act, the principal is estopped to deny that the agent's act was not authorized." *Cohen v. Utica First Ins. Co*., 436 F.Supp. 2d 517, 529 (E.D.N.Y. 2006).

The appearance of an agency relationship can be created when the principal knowingly permits the agent to act as if the agent is authorized, or "by silently acting in a manner which creates a reasonable appearance of an agent's authority." *Whetstone Candy Co., Inc. v. Kraft Foods, Inc.*, 351 F.3d 1067, 1078 (11th Cir. 2003) (citations omitted).

When an entity deals with another entity's agent, it may lawfully assume that individuals vested with authority by that entity are acting in accordance with that authority. *O'Halloran v. First Union Nat'l Bank of Fla.*, 350 F.3d 1197, 1205 (11th Cir. 2003) ("a bank can only really complete transactions with natural persons and has the right to assume that individuals who have the legal authority to handle the entity's accounts do not misuse the entity's funds").

Applying New York law, *Minskoff v. American Exp. Travel Related Services Co., Inc.*, 98 F.3d 703, 708 (2d Cir. 1996), explains that a principal may be estopped from denying apparent authority if the principal's intentional or negligent acts, including acts of omission, created an appearance of authority in the agent. Here the Tribe's intentional grant of complete authority to Cypress belies any attempt to avoid the consequences of that authority.

Arbitration agreements, like any other contractual arrangements, may be executed by one to whom an entity has given the authority to execute agreements on its behalf. *Delray Beach*, 622 F.3d at 1343 (*citing Eassa Properties v. Shearson Lehman Bros.*, 851 F.2d 1301 (11th Cir. 1988)). "[W]here an agent signs a contract requiring arbitration, the principal is bound by the arbitration requirement." *The Rice Co. (Suisse), S.A. v. Precious Flowers Ltd.*, 523 F.3d 528, 538 (5th Cir. 2008) (footnote omitted). "Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the

principal's manifestations of consent to him." *Fletcher v. Atex, Inc*., 68 F.3d 1451, 1461 (2d Cir. 1995) ("an agent has actual authority if the principal has granted the agent the power to enter into contracts on the principal's behalf, subject to whatever limitations the principal places on this power, either explicitly or implicitly" *Highland Capital Management LP v. Schneider*, 607 F.3d 322, 327 (2d Cir. 2010)).

**D. The Tribe's "Anti-Apparent Authority" Cases**

In arguing against apparent authority, the Tribe misstates the issues, misapplies the law, and the cases they rely upon do not carry the weight assigned to them.

The Tribe asserts that *American Lease Plans, Inc. v. Silver Sand Co. of Leesburg, Inc*., 637 F.2d 311, 314 (5th Cir. 1981), which stands for the proposition that "apparent authority generally applies," does not apply because Morgan Stanley is not an innocent party." Appellant's Brief at 14-15. The Tribe misunderstands the rhythms of an agreement to arbitrate. Whether a party has agreed to arbitrate is the threshold issue, not whether there is "guilt" or "innocence." Indeed, *American Lease* speaks the language that supports Morgan Stanley:

> Applying this law to the undisputed facts before us, it is clear that [principal] had clothed [agent] with the appearance of authority to enter into these guarantee transactions on the company's behalf. [Principal] had let the business world know that [agent] was the chief operating officer and manager of [Principal].

> ***
>
> On the face of the events, [agent] had acted consistently with the appearance of authority he possessed by virtue of his agency relationship with [Principal].
>
> ***
>
> Public policy dictates that such reasonable undertakings by an agent clothed with the authority to act be sufficient to bind a principal.

637 F.2d at 315.

The Tribe also offers *United States v. E.A. Gregory*, 730 F.2d 692 (11th Cir. 1984), for the proposition that "an agent may not authorize a fraud upon the principal." Appellant's Brief at 15. *Gregory* is not applicable to this case because it was a criminal appeal from convictions for conspiracy to misapply bank funds, making false statements to banks and committing wire fraud. The defendants, at all times relevant thereto, were either owners, possessors of controlling interests, members of the Board of Directors, Chairman of the Board of Directors and/or Vice-President of a bank. Their crimes involved "various transactions between the Bank and the Gregorys, their corporations, and their friends and associates during the time the Gregorys owned a controlling interest in the Bank." 730 F.2d at 700.

The actual quote the Tribe appears to be paraphrasing states "[w]hile the valid consent of the Board of Directors is a defense to misapplication, the Board cannot validate a fraud on the bank." *Id*. at 701. That response was to the defendants' claim that "because the participations, correspondent accounts,

expense payments and loans were approved by the Board of Directors, there was no misapplication of bank funds. . . .” *Id*. *E.A. Gregory* has no application to whether a person has been authorized to sign an arbitration agreement.

The Tribe’s offer of *United States v. Hamaker*, 455 F.3d 1316 (11th Cir. 2006), in which criminal defendants sought a jury instruction on “apparent authority,” is similarly inapposite. Appellant’s Brief at 10. The *Hamaker* trial court issued a “good faith” instruction. *Hamaker, supra* at 1325. This Court affirmed, stating “[a]lthough the requested charge was an accurate statement of agency law as applied to civil contract disputes, the instruction would have been misleading to the jury in the criminal case charging bank fraud.” *Id*. at 1326. So, if *Hamaker* has any relevance here, it is that the “accurate” apparent authority instruction offered by the *Hamaker* defendant posed the statement of agency law which supports Cypress’ authority in this case. *Hamaker* helps, not hurts, Morgan Stanley.

The issue of apparent authority for the purposes of this appeal is as Judge Cooke stated it, whether “the Miccosukee Tribe allowed Defendant Cypress, without objection, to oversee, control, supervise and have unrestricted access to all financial funds and records of the Tribe.” (Doc 227 – Pg 10). The answer is “Yes.” The district court saw it right: “With this unfettered control and access, the Miccosukee Tribe permitted Morgan Stanley Smith Barney to believe that

Defendant Cypress had the authority to establish accounts and execute contracts attendant to the establishment of the financial accounts." *Id.*

It follows then that the Tribe is bound by the apparent authority placed in Chairman Cypress and reasonably relied upon by Morgan Stanley Smith Barney.

## II. THE DISTRICT COURT CORRECTLY GRANTED THE MOTION TO COMPEL ARBITRATION AND PROPERLY DISMISSED MORGAN STANLEY FROM THE LAWSUIT

A court faced with an arbitration motion plays a limited role, and should make no inquiry into the merits of the case. *AT&T Technologies, Inc. v. Communications Workers of Am., et al*., 475 U.S. 643 (1986). The only matters for a court to decide are (i) whether there is a valid written arbitration agreement between the parties and (ii) whether the dispute falls within the scope of the arbitration agreement. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). If these conditions are met, the court must compel arbitration. 9 U.S.C. § 3; *Doe v. Royal Carribean Cruises, Ltd.*, 364 F.Supp. 2d 1259, 1262 (S.D. Fla. 2005), *aff'd*, 108 Fed. Appx. 893, (11th Cir. 2006).

The Federal Arbitration Act controls enforcement of arbitration agreements between parties. The FAA provides that:

> A written provision in any … contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof … shall be valid, irrevocable, and

> enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

The FAA establishes a public policy that strongly favors the arbitration of disputes and requires courts to enforce arbitration agreements. *See KPMG LLP v. Cocchi*, 132 S.Ct. 23, 25 (2011) ("The Federal Arbitration Act reflects an "emphatic federal policy in favor of arbitral dispute resolution.") (citations omitted); *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1745 (2011).

The Client Agreements at issue in this case are considered to be "broad" arbitration clauses because they extend beyond simple contract interpretation and apply to:

> **…all claims or controversies, whether such claims or controversies arose prior, on or subsequent to the date hereof, between me and SB and/or any of its present or former officers, directors, or employees concerning or arising from (i) any account maintained by me with SB individually or jointly with others in any capacity; (ii) any transaction involving SB or any predecessor firms by merger, acquisition or other business combination and me, whether or not such transaction occurred in such account or accounts; or (iii) the construction, performance or breach of this or any other agreement between us, any duty arising from the business of SB or otherwise…**

Doc 39-3 - Pg 4; Doc 39-4 – Pg 4; and Doc 39-5 – Pg 2 (emphasis in original).

When a broad arbitration clause is at issue, the strong presumption in favor of arbitrability applies with even greater force. *See*, *AT&T Technologies*, 475 U.S. at 650. And although Section 3 of the FAA provides for a stay of any lawsuit until arbitration has been completed, "the rule 'was not intended to limit dismissal of a case in the proper circumstances.'" *Kozma v. Hunter Scott Fin., L.L.C.*, 2010 WL 724498, *2 (S.D. Fla. 2010) (quoting *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992)).

If all claims raised before the district court are arbitrable, dismissal pursuant to Rule 12(h)(3), rather than just a stay, is the appropriate remedy. *Id.* (citing *Fedmet Corp. v. M/V BUYALYK*, 194 F.3d 674, 678 (5th Cir. 1999). As the Fifth Circuit explained: "Given our ruling that all issues raised in this action are arbitrable and must be submitted to arbitration, retaining jurisdiction and staying the action will serve no purpose." *Alford*, 975 F.2d at 1164 (internal marks and citation omitted). This Court has affirmed orders compelling arbitration and dismissing the underlying case. *See*, *e.g.*, *Samadi v. MBNA Am. Bank, N.A.*, 178 Fed. Appx. 863 (11th Cir. 2006); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005); *Jackson v. Cintas Corp.*, 425 F.3d 1313 (11th Cir. 2005).

Because all aspects of this litigation arise from the Tribe's accounts with Morgan Stanley Smith Barney, and because the Tribe has no claims against Morgan Stanley not subject to arbitration, the order granting the motion to compel arbitration and dismissal of Morgan Stanley was proper.

## III. AN EVIDENTIARY HEARING WAS NOT REQUESTED NOR NECESSARY

"Evidentiary hearings" and "oral arguments" are not synonymous nor interchangeable. An "evidentiary hearing" is one at which evidence is presented as opposed to a "hearing" at which only legal argument is presented. *Black's Law Dictionary* (9th ed. 2009). An "oral argument" is an advocate's spoken presentation before a court, supporting or opposing the relief at issue. *Id*.

The Tribe mistakenly suggests in its Appellate Brief that Morgan Stanley sought an "evidentiary hearing" and that:

> [t]he court's decision to rule on the motion to dismiss without an evidentiary hearing is reviewed for abuse of discretion. *The Miccosukee Tribe did not request a hearing in this matter, however, Morgan Stanley did*. Morgan Stanley filed a Motion to Set Oral Argument on the Motion to Compel Arbitration and to Dismiss on May 15, 2013. D.E. No. 226.

Appellate Brief at 17 (emphasis supplied)(citation omitted).

This assertion is obviously wrong. Morgan Stanley did not seek any evidentiary hearing because one was not necessary, nor was oral argument necessary. The Motion to Compel arbitration stated:

> We therefore ask the Court to set Morgan Stanley Smith Barney's Motion to Compel Arbitration and Dismiss or Stay Action Based Upon Agreement to Arbitrate for *oral argument*. *In the alternative, because the issue of arbitration has been fully briefed and the right to arbitration is patently clear, the Court could resolve the September 24, 2012 Motion filed by Morgan Stanley Smith Barney without oral argument*. (emphasis supplied).

(Doc 39 - Pg 2).

The court below properly decided the issue without an oral argument.

In a proceeding to compel arbitration, an evidentiary hearing is not necessary to establish the validity of the arbitration agreement where the evidence is undisputed. *Best v. Education Affiliates, Inc*., 82 So. 3d 143 (Fla. 4th DCA 2012); *see also Variblend Dual Dispensing Systems, LLC v. Seidel GMBH & Co*., --- F.Supp.2d ---, 2013 WL 4528902 (S.D.N.Y. 2013), noting a district court's finding of an arbitration agreement, without an evidentiary hearing, where the parties had already made an extensive evidentiary record. The fact that parties differed "over the meaning" of the telex and facsimile communications, did not require trial. *Id*. at *5.

The district court's order compelling arbitration was *not* based solely on "believing that Morgan Stanley had a good faith basis to believe Defendant Cypress had the authority to bind the Miccosukee Tribe." Appellant's Brief at 17-18. Rather, the district court found that Chairman Cypress had *actual* and apparent authority to bind the Tribe to the arbitration agreements, based on undisputed facts in the record. (Doc 227 - Pg 6).

Whether Billy Cypress had bound his principal to arbitration when he opened accounts with Morgan Stanley, after being elected Chairman of the Miccosukee Tribe, was not factually disputed because the Tribe had pled his authority in its Complaint. Thus the Tribe is wrong to suggest that (a) Morgan Stanley sought an evidentiary hearing and (b) that one was necessary. And given the fact that the Tribe acknowledges that it never sought such a hearing, the "hearing issue" is patently frivolous.

## CONCLUSION

Because the Tribe does not contest (indeed asserts), that "Defendant Cypress oversaw, controlled, supervised and had unrestricted access and control over all financial funds and records of the Miccosukee Tribe subject to this lawsuit" (Doc 75 – Pg 4, ¶ 6), it cannot now claim that Chairman Cypress had no authority to enter into the Account Agreements with Morgan Stanley Smith Barney.

"Under normal circumstances, an arbitration provision within a contract admittedly signed by the contractual parties is sufficient to require the district court to send any controversies to arbitration." *Dedon GmbH v. Janus et Cie*, 2010 WL 4227309 (S.D.N.Y. 2010). This is a "normal circumstance" case.

The Order Granting Defendant's Motion to Compel Arbitration and Dismiss or Stay Action Based Upon Agreement to Arbitrate was properly granted. For the aforementioned reasons, we respectfully request this Court affirm the decision below.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations set forth in FRAP 32(a)(7)(B) because this brief contains 4,731 words, excluding the parts of the brief exempted by FRCP 32(a)(7)(B)(iii).

I certify that this brief complies with the typeface requirements of FRAP 32(a)(5) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 font and Times New Roman.

## CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2014, I served the foregoing Appellee's Answer Brief on all counsel provided on the Service List below, via the United States Postal Service.

Respectfully submitted,

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January 9, 2014

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11th Circuit Court of Appeals

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