UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No._

GREAT AMERICAN INSURANCE COMPANY,

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; the 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; the Honorable WILLIAM J. OSCEOLA in his official capacity as Secretary of the Miccosukee General Council A/K/A Miccosukee Business Council; the Honorable PETTIES OSCEOLA, JR. in his official capacity as Lawmaker of the Miccosukee General Council A/K/A Miccosukee Business Council; the Honorable AMPARO LOZANO in her official capacity as Clerk of the Miccosukee Tribal Court,

Defendants.

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COMPLAINT

Plaintiff Great American Insurance Company ("Great American") brings this action for declaratory and injunctive relief against the above-named officials of the Miccosukee Tribe of Indians of Florida ("Miccosukee" or "the Tribe") to prevent the unlawful exercise of tribal court jurisdiction and the deprivation of Great American's procedural due process rights. In the absence of such relief, Great American will be forced to litigate a multi-million-dollar coverage dispute in

a tribunal that not only lacks jurisdiction but is dominated and controlled by the opposing party. In fact, the presiding judges have direct financial interests in the outcome of the case, and one of the judges is the father of a material witness, who also serves as the Chief of Staff to the business unit that seeks to recover from Great American.

PARTIES

1. Great American is an insurance company incorporated in the State of Ohio, with its principal place of business located in Cincinnati, Ohio.

2. Defendant James J. Hughes ("Defendant Hughes") is a Tribal Court Judge of the Miccosukee Tribal Court. He is sued in his official capacity only.

3. Defendant Curtis Osceola ("Defendant Curtis Osceola") is a Tribal Court Judge of the Miccosukee Tribal Court. Defendant Curtis Osceola's son, Curtis Osceola, Jr., is Chief of Staff to the Tribe. In his capacity as Chief of Staff, Curtis Osceola, Jr. reports to the Chairman of the Miccosukee General Council, who is also the Chairman of the Miccosukee Business Council. Defendant Curtis Osceola is sued in his official capacity only.

4. Defendant Talbert Cypress ("Defendant Talbert Cypress") is Chairman of the Miccosukee General Council and Chairman of the Miccosukee Business Council. He is sued in his official capacity only.

5. Defendant Lucas K. Osceola ("Defendant Lucas Osceola") is Assistant Chairman of the Miccosukee General Council and the Miccosukee Business Council. He is sued in his official capacity only.

6. Defendant Kenneth H. Cypress ("Defendant Kenneth Cypress") is Treasurer of the Miccosukee General Council and the Miccosukee Business Council. He is sued in his official capacity only.

7. Defendant William J. Osceola ("Defendant William Osceola") is Secretary of the Miccosukee General Council and the Miccosukee Business Council. He is sued in his official capacity only.

8. Defendant Petties Osceola, Jr. ("Defendant Petties Osceola") is Lawmaker of the Miccosukee General Council and the Miccosukee Business Council. He is sued in his official capacity only.

9. Defendant Amparo Lozano ("Defendant Lozano") is Clerk of the Miccosukee Tribal Court. She is sued in her official capacity only.

JURISDICTION AND VENUE

10. This Court has subject matter jurisdiction pursuant to 28 U.S.C.§ 1331 because this action raises the federal question of whether a tribal court has adjudicative jurisdiction over a dispute involving a nonmember of the tribe. *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 324 (2008).

11. An actual case or controversy exists between the parties as alleged herein. Therefore, a declaration from this Court is proper under 28 U.S.C. § 2201.

12. Venue is properly laid in this Court pursuant to 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to the claims occurred in this District.

ALLEGATIONS COMMON TO ALL COUNTS

The Miccosukee Tribe

13. The Tribe is a federally recognized Indian tribe with its headquarters located in Miami-Dade County, Florida.

14. The Tribe's written Constitution vests governing authority in the Miccosukee General Council ("the General Council"). The General Council consists of all members of the tribe

eighteen years of age or over. The General Council is led by its elected officers which consist of a Chairman, Assistant Chairman, Secretary, Treasurer, and Lawmaker.

15. Article III, Section III of the Tribe's Constitution clarifies that when the General Council is not in session, the elected officers of the General Council sit as the Miccosukee Business Council ("the Business Council"). The Business Council runs the day-to-day operations of the Tribe and possesses significant legal and financial responsibility, including disbursement of funds and the power to contract on behalf of the Tribe. Upon information and belief, the Tribe's *de-facto* power rests with the Business Council and its Chairman, Defendant Talbert Cypress.

16. Under Title I of the Miccosukee Code, the Miccosukee Tribal Court ("the Tribal Court") consists of two judges. Both judges must be members of the Tribe and are nominated by the Business Council. Section 12 of the Miccosukee Code states that a Tribal Court Judge shall be disqualified to act in any proceeding in which he has an "interest[.]" A Tribal Court Judge's compensation is determined by the Business Council.

17. The Miccosukee Court of Appeals consists of all members of the General Council with the Chairman of the General Council presiding. Under the Miccosukee Code, however, the Business Council retains the power to "disallow" any appeal.

18. The Tribe operates a casino that is owned communally by all members of the Tribe and makes significant distributions from casino revenue to all members of the Tribe on an annual basis. In 2021, the U.S. Court of Appeals for the Eleventh Circuit issued an opinion holding that the distributions are taxable income and noting that each member had received annual payments in the six-figure range: "During the years relevant to this case, each tribe member—man, woman, and child—received large payments, starting at almost $100,000 annually and climbing to nearly $160,000." *Clay v. Comm'r of Internal Revenue*, 990 F.3d 1296, 1298 (11th Cir. 2021).

Claim Investigation and Coverage Determination

19. The Tribal Court proceedings from which Great American seeks relief are centered on a coverage dispute with the Tribe concerning the alleged theft of casino revenue by certain former employees of the Tribe.

20. Great American issued three successive crime protection policies to the Miccosukee Tribe of Indians d/b/a Miccosukee Indian Gaming that were in place between October 1, 2014, to October 1, 2019.

21. The policies covered loss resulting directly from employee dishonesty, subject to certain terms and conditions, provided that the Tribe discovered the loss during the policy period.

22. On or about August 8, 2019, the Tribe notified Great American that it intended to seek coverage for a loss it claims to have sustained as a result of employee dishonesty.

23. The Tribe submitted an initial proof of loss, but the proof of loss was deficient. The form submitted by the Tribe had been modified so that, instead of listing the date on which the Tribe discovered the loss, it listed the date on which the Tribe claims it was first able to disclose the loss to Great American.

24. On or about September 10, 2019, the Tribe submitted a second proof of loss, which claimed that the Tribe discovered a loss in the amount of $5,283,637.50 on April 2, 2019.

25. 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. The Tribe claims the employees printed credit vouchers reflecting the false coin deposits and redeemed the vouchers by inserting them into automated teller machines, presenting them to cashiers on the floor of the casino, and presenting them to the casino's treasury.

26. During the claim investigation, the Tribe produced documents clearly showing that the Tribe discovered the loss on or before May 28, 2015, directly contradicting the proof of loss that listed April 2, 2019, as the date of discovery.

27. In April of 2021, Great American informed the Tribe that the claimed loss is not covered, and the Tribe cannot recover, under any of the relevant policies because, among other reasons: (1) the Tribe did not discover the loss during the policy period of the policy that was in effect when the Tribe provided notice to Great American; (2) the Tribe failed to provide timely notice of the alleged loss; (3) the Tribe failed to submit a timely proof of loss; and (4) the Tribe lost or destroyed documents that are necessary to analyze the quantum of the alleged loss at some point during the more than four-year period between the Tribe's discovery of the alleged loss and the date on which it finally notified Great American.

28. The Tribe requested that Great American reconsider its coverage determination. Great American's counsel responded to the request in a letter dated May 27, 2021, informing the Tribe that Great American had not changed its determination that the claim was not covered. The Tribe did not respond to the May 27, 2021 letter for more than a year.

The Tolling Agreement and Forum Selection Clause

29. On or around August 12, 2022, the Tribe, through its outside counsel, took the position—for the first time—that the Tribe actually discovered the alleged loss on August 17, 2017, which was nearly two years earlier than the date listed in the Tribe's sworn proof of loss.

30. The Great American polices contain contractual periods of limitations that bar any legal actions brought against Great American more than five years after the date on which the Tribe first discovered the loss.

31. If the Tribe's position that it discovered the loss on August 17, 2017, was accurate, which is in dispute, then the deadline for the Tribe to sue would have been August 17, 2022.

32. Due to the fact that the Tribe's new position on the date of discovery would have required the Tribe to sue by August 17, 2022, the Tribe's outside counsel asked Great American to enter into a tolling agreement to maintain the status quo.

33. On August 22, 2022, Great American and the Tribe entered into a tolling agreement ("the Tolling Agreement") that tolled the applicable limitations period for a defined period beginning on August 12, 2022, while preserving Great American's right to assert that any lawsuit filed on August 12, 2022, would have already been time-barred. (Tolling Agreement, Ex. 1.)

34. The only material consideration Great American requested in exchange for tolling the limitations period was a mandatory clause limiting the forums in which the Tribe could file any lawsuit arising from the alleged loss, the insurance claim, or the Tolling Agreement.

35. The Tribe, which was represented by outside counsel, agreed to Great American's request to include a mandatory forum selection clause in the Tolling Agreement. Paragraph 14 of the Tolling Agreement provides as follows:

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

(*Id.*)

Tribal Court Proceedings

36. In blatant disregard of the mandatory forum selection clause to which it agreed, the Tribe filed suit against Great American in this Court *and* in the Tribal Court on December 8, 2022.

37. The Tribe voluntarily dismissed the complaint it filed in this Court on January 12, 2023, before any substantive issues were addressed by the Court.

38. Great American filed a motion to dismiss the tribal court complaint on several grounds, including that the Tribal Court lacks jurisdiction and is an improper venue.

39. The Tribal Court denied Great American's motion to dismiss in a written order dated August 25, 2023. (8/25/2023 Tribal Court Order, Ex. 2.) The Tribal Court chose to ignore the plain language of the Tolling Agreement's mandatory forum selection clause on the grounds that the Tribe did not waive its sovereign immunity. (*Id.* at 7-10.)

40. Sovereign immunity is a defense that an Indian tribe may assert in response to a lawsuit or claim. It has no bearing on the forum in which a tribe may affirmatively file suit. Yet, the Tribal Court concluded that a standard, generic provision acknowledging the Tribe's sovereign immunity in Paragraph 15 of the Tolling Agreement invalidated the mandatory forum selection clause in the immediately preceding paragraph and transformed the Tribal Court into a permissible venue with competent jurisdiction.

41. The Tribal Court also cited the tribal exhaustion doctrine as another reason to deny Great American's motion to dismiss. (*Id.* at 11-13.) The tribal exhaustion doctrine, however, is a prudential rule of comity, like abstention, that is applied by *federal courts*. It is irrelevant to proceedings already pending in a Tribal Court.

42. Moreover, the Tribal Court and the Tribe's counsel cited no authority for the proposition that the tribal exhaustion doctrine could invalidate a binding forum selection clause to which an Indian tribe willingly agreed.

43. The Tribal Court relied on *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987), to support its assertion of jurisdiction over a non-tribal member, even commenting that

the facts are "similar." (8/25/2023 Tribal Court Order, Ex. 2 at 28.) The *Iowa Mutual* Court, however, determined only that the tribal exhaustion doctrine applied in that case; the Court did not determine that the tribal court's exercise of jurisdiction was proper. Unlike in this case, the petitioner in *Iowa Mutual* did not argue that any recognized exception to the tribal exhaustion doctrine applied. *Iowa Mutual*, 480 U.S. at 19 n. 12. *Iowa Mutual* also predated the Supreme Court's holding in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), that exhaustion is not required when tribal jurisdiction is clearly absent. *Id.*, 459 n. 14.

44. While the Tribal Court ignored the bargained-for forum selection clause in Paragraph 14 of the Tolling Agreement, it still enforced the tolling provision in Paragraph 3 of the same agreement and held that the effective date of the complaint was August 12, 2022, rendering it timely under the Tribe's theory of the date on which it discovered the alleged loss. (8/25/2023 Tribal Court Order, Ex. 2 at 23.)

45. The Order denying Great American's motion to dismiss was signed by two tribal court judges: Defendant Hughes and Defendant Curtis Osceola. (*Id.* at 6.)

46. The section of the Miccosukee Code that governs criminal procedure, Title II, contains a provision that addresses appeals of final orders in criminal cases, but it does not address appeals of interlocutory orders. The section of the Miccosukee Code that governs civil procedure, Title X, does not contain a similar provision that addresses appeals in civil cases.

47. While the Miccosukee Code is silent on appeals in civil cases, and silent on appeals of interlocutory orders generally, tribal law is sometimes derived from a variety of sources, including oral tradition and customs, so Great American's counsel contacted the Tribal Court's Legal Advisor, Jennifer Suarez, to ask if an interlocutory order in a civil case can be appealed to the Miccosukee Court of Appeals.

48. Ms. Suarez advised Great American that the Tribe's judicial system does allow for interlocutory appeals of non-final orders and that such appeals are treated the same as appeals of final orders under the Miccosukee Code and rules of appellate procedure.

49. Based on Ms. Suarez's response, Great American filed a notice of appeal with the Tribal Court on September 12, 2023, appealing the order denying the motion to dismiss.

50. On December 27, 2023, Defendant Talbert Cypress, Chairman of the General Council and Business Council, disallowed the notice of appeal on grounds that the Miccosukee Court of Appeals does not have jurisdiction over interlocutory appeals. (12/27/2023 Tribal Court Order, Ex. 3.)

51. Defendant Talbert Cypress signed the order disallowing Great American's appeal in his capacity as "Chairman, Miccosukee Business Council." (*Id.*)

52. The caption in the order disallowing Great American's appeal identified the Tribal Court as the body that issued the order. (*Id.*) The order, therefore, indicates that Defendant Talbert Cypress has the authority to issue orders on behalf of the Tribal Court despite the fact that he also serves as the presiding judge of the Miccosukee Court of Appeals and the Chairman of both the Tribe's General Council and its Business Council.

53. The fact that a single individual serves as the Chairman of the Tribe's General Council, the Chairman of the Tribe's Business Council, the presiding judge of the Miccosukee Court of Appeals, and an active judge of the Tribal Court demonstrates that: (1) there is no meaningful separation between the Tribal Court and the Miccosukee Court of Appeals; (2) there is no meaningful separation between the different branches of the Tribe's government; and (3) there is no meaningful separation between any of the Tribe's governmental institutions, including its courts, and the business operations of the Tribe, which includes the casino that allegedly

sustained the loss that the Tribe seeks to recover from Great American. In sum, the Tribal Court is dominated and controlled by Great American's opponent in the Tribal Court litigation.

Curtis Osceola Jr.'s Direct Involvement with the Underlying Claim

54. As previously noted, Defendant Curtis Osceola signed the August 25, 2023, order denying Great American's motion to dismiss the Tribe's complaint in his capacity as a judge of the Tribal Court while his son, Curtis Osceola, Jr. occupied the role of Chief of Staff to the Tribe.

55. Prior to his involvement with the Tribe's political institutions, Curtis Osceola, Jr. worked in the Tribe's casino as a video director, a position he held at the time that the Tribe first discovered the alleged loss.

56. Curtis Osceola, Jr. was actively involved in the Tribe's discovery in 2015 of the alleged theft by employees of the casino that is the subject of the insurance claim at issue.

57. According to a June 25, 2015, entry in the police report that Miccosukee produced during Great American's claim investigation, Curtis Osceola, Jr. was one of two people who initially received an anonymous email in 2015 implicating casino employees in suspicious transactions. (Police Report, Ex. 4 at 1.) The detective who investigated the alleged loss spoke with Curtis Osceola, Jr. multiple times during the investigation. (*Id.*) Curtis Osceola, Jr. is mentioned in the police report at least 16 times. (*Id.*)

58. On July 22, 2015, Curtis Osceola, Jr. met with the detective and "re-create[d] the event where someone could load credits onto a machine without inserting actual money." (*Id*. at 5.)

59. Another entry in the police report indicates that Curtis Osceola, Jr. told a technician, Jose Duran, as early as May of 2015 that "certain AGS gaming machines had a coin-in error." (*Id.* at 34.)

60. Curtis Osceola, Jr. would later take credit for uncovering a "massive internal fraud scheme" in public comments that appear to refer to the claimed loss that is the subject of the underlying coverage dispute. (Curtis Osceola Article, Ex. 5.)

61. As previously explained, the parties dispute whether the Tribe discovered the alleged loss in 2015.

62. The question of whether the Tribe discovered the loss in 2015 is a critical issue that is central to the coverage dispute at issue in the lawsuit pending in the Tribal Court because Great American denied the Tribe's insurance claim on the grounds that the Tribe discovered the loss before the relevant policy period, failed to provide notice in a timely manner after discovering the loss, failed to provide a proof of loss in a timely manner after discovering the loss, and lost or destroyed critical documents between the date of discovery and the date it provided notice. Moreover, the Tribe's complaint was untimely because the Tribe did not sue until more than five years after it discovered the loss.

63. In light of Curtis Osceola, Jr.'s direct involvement in the Tribe's investigation and discovery of the alleged fraud scheme in 2015, he is a material witness with respect to key issues that are at the heart of the lawsuit over which his father is currently presiding and in which his father has already issued a ruling on a dispositive motion as a Tribal Court Judge.

64. Defendant Curtis Osceola is not an impartial judge due to his son's role as a material witness in the case as well as the fact that both Defendant Curtis Osceola and his son, like every member of the Tribe, stand to financially benefit from a judgment in favor of the Tribe due to the fact that casino revenue is distributed to all members of the Tribe.

65. Defendant Curtis Osceola has also violated the Miccosukee Code's mandatory disqualification provision by failing to disqualify himself as an interested party since he stands to financially benefit from a judgment in favor of the Tribe.

The Tribal Court Lacks Jurisdiction

66. Indian tribes, "by virtue of their incorporation into the American republic, lost the right of governing persons within their limits except themselves." *Plains Commerce Bank v Long Family Land & Cattle Co, Inc*, 554 U.S. 316, 328 (2008) (quoting *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 209 (1978)) (cleaned up).

67. Courts presume that efforts by a tribe to regulate nonmembers, such as Great American, are invalid. *Id*. at 330.

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

69. Since tribal courts are not courts of general jurisdiction with respect to nonmembers, a forum selection clause that provides for litigation of disputes between a tribe and a nonmember elsewhere will preclude tribal courts from exercising jurisdiction. *Lexington Ins. Co. v. Smith*, 94 F.4th 870, 887 (9th Cir. 2024) ("commercial actors, such as insurers, can easily insert forum-selection clauses into their agreements with tribes and tribal members, thereby precluding the exercise of tribal court jurisdiction in such circumstances") (citing *Plains Commerce*, 554 U.S. at 346 (Ginsburg, J., concurring in part) ("a nonmember company can include 'forum selection, choice-of-law, or arbitration clauses in its agreements' with tribal members to avoid tribal court and the application of tribal law")); *see also Enerplus Resources, Corp. v. Wilkinson*, 865 F.3d

1094, 1097 (8th Cir. 2017) (affirming a preliminary injunction that precluded the exercise of tribal court jurisdiction in contravention of a forum selection clause); *Halcon Operating Co. v. Rez Rock N Water, LLC*, No. 1:17-CV-202, 2018 WL 4092052, at *5 (D.N.D. July 9, 2018).

70. Courts enforce forum selection clauses except in the most extraordinary circumstances. *Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49 (2013).

71. The Tribe agreed to a forum selection clause requiring suit to be filed in this Court or, if this Court lacks jurisdiction, in the Circuit Court for Miami-Dade County. This express agreement precluded the Tribal Court from exercising jurisdiction to entertain the dispute between the Tribe and Great American.

72. The Tribal Court also lacks jurisdiction for reasons that are independent of the forum selection clause.

73. The Supreme Court has recognized just two exceptions, commonly referred to as the "*Montana*" exceptions, to the presumption that tribal courts lack jurisdiction over disputes involving nonmembers. *Plains Commerce*, 554 U.S. at 329-30. The Tribe bears the burden of establishing that one of the *Montana* exceptions applies in this case. *Id.* at 330 (citing *Montana* v. U.S., 450 U.S. 544 (1981)).

74. The *Montana* exceptions provide that (1) "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe"; and (2) it may also exercise authority over conduct within its reservation that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566.

75. Both of the *Montana* exceptions are qualified by two important limitations.

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

77. Earlier this year, in a case arising from a dispute over coverage for COVID-19 related losses, a panel of the Ninth Circuit created a circuit split by becoming the first and only appellate court to hold that the first *Montana* exception can apply to off-reservation conduct by nonmembers. *Lexington Ins. Co.*, 94 F.4th at 887. The Ninth Circuit's minority opinion is not yet final because the insurers filed a petition for rehearing *en banc*, and the Ninth Circuit ordered the appellee Indian tribe to file a response. In any event, the opinion does not support the exercise of tribal court jurisdiction in this case because it acknowledges that "insurers" can use forum selection clauses to "preclud[e] the exercise of tribal court jurisdiction[,]" which is exactly what Great American did when it conditioned its agreement to toll the statute of limitations on the inclusion of a forum selection clause in the Tolling Agreement. *Id.*

78. Second, "[t]he *Montana* exceptions apply only to the extent they are 'necessary to protect tribal self-government or to control internal relations.'" *Kodiak Oil & Gas (USA), Inc.*, 932 F.3d 1125, 1138 (8th Cir. 2019) (quoting *Hicks*, 533 U.S. at 359) (other citations omitted); *see also Jackson*, 764 F.3d at 768 (tribal court jurisdiction does not extend to nonmembers "whose actions do not implicate the sovereignty of the tribe or the regulation of tribal lands).

79. The complaint that the Tribe filed in the Tribal Court asserts in conclusory fashion that Great American subjected itself to the Tribe's "regulation" by issuing insurance contracts to the Tribe. (Tribal Ct. Compl., Ex. 6.) It does not, however, identify any conduct that Great American engaged in, and over which the Tribe exercised regulatory authority, while Great American was physically present *inside the reservation*, let alone conduct that posed a risk to tribal self-government, internal tribal relations, or the Tribe's sovereignty.

80. Great American's employees were not present on the reservation when they issued the policy under which the Tribe has sued, when they decided to deny the insurance claim at issue in this case, or when they drafted and sent the coverage declination letter to the Tribe. While Great American's denial of the insurance claim may impact the Tribe's finances, it does not implicate the Tribe's sovereign interests or threaten its self-government or internal relations. *See Jackson,* 764 F.3d at 782.

81. Since the dispute between the Tribe and Great American does not arise from on-reservation activities that threaten the Tribe's sovereign interests, the *Montana* exceptions do not apply, and the Tribal Court lacks jurisdiction.

82. Adopting the Tribe's interpretation of the *Montana* exceptions would transform tribal courts into courts of unlimited adjudicative jurisdiction over any nonmember that contracts with an Indian tribe for any purpose and in any geographic location—beyond the review of state or federal courts of the United States. The Tribe's interpretation would therefore impermissibly "swallow the rule" against tribal court jurisdiction over nonmembers. *See Plains Commerce Bank*, 554 U.S. at 330 (internal quotation marks omitted).

The Tribal Court Has Already Violated Great American's Due Process Rights and Will Continue to Do So Unless Enjoined

83. The extent to which Indian tribes have retained the power to regulate the affairs of non-Indians is a matter of federal common law. *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985). Moreover, the Indian Civil Rights Act states that no Indian tribe may "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law[.]" 25 U.S.C. § 1302(8).

84. Due process requires an "impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc*., 446 U.S. 238, 242 (1980).

85. It is fundamental that "no judge can be a judge in his own case or be permitted to try cases where he has an interest in the outcome." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). A violation of due process occurs when a person is subject to the "judgment of a court, the judge of which has a direct personal, substantial, pecuniary interest in reaching a conclusion against him in his case." *Id. at 821-22* (quoting *Tumey v. State of Ohio*, 273 U.S. 510, 523 (1927)).

86. Due process is not only concerned with circumstances of actual judicial bias, but even where circumstances "would offer a possible temptation to the average judge to lead him not to hold the balance nice, clear and true." *Id.* at 822 (cleaned up). The fact that a judge's son is a material witness in a proceeding would, at a minimum, create a temptation for the judge to act in a biased manner. In fact, Congress acknowledged the existence of that temptation by mandating that federal judges disqualify themselves from any case in which a person "within the third degree of relationship" to them, such as a son, is a material witness. 28 U.S.C. § 455(b)(5)(iv).

87. United States courts do not enforce foreign judgments due to the lack of due process when there is "[e]vidence that the judiciary was dominated by the political branches of government or by an opposing litigant[.]" Restatement (Third) of Foreign Relations Law § 482 (1987).

88. The Tribal Court violated Great American's due process rights when Defendant Curtis Osceola ruled on Great American's motion to dismiss despite: (1) the fact that Defendant Curtis Osceola's son is a key witness in the case; (2) the fact that Defendant Curtis Osceola and his son both have personal financial interests in the outcome due to the Tribe's practice of distributing the casino's revenues to all members of the Tribe; and (3) the fact that Defendant Curtis Osceola's son is the Chief of Staff to the business entity that has sued Great American, *i.e.*, Great American's opponent in the litigation.

89. To the extent that the other Tribal Court Judge, Defendant Hughes, is also a member of the Tribe, as required to qualify as a Tribal Court Judge, his involvement in denying the motion to dismiss also violated Great American's due process rights because Defendant Hughes also has a personal financial interest in the outcome.

90. The Tribal Court violated Great American's due process rights again when Defendant Talbert Cypress disallowed Great American's appeal despite: (1) the fact that Defendant Talbert Cypress has a personal financial interest in the outcome; and (2) the fact that he is the Chairman of the business entity that has sued Great American, *i.e.*, Great American's opponent in the litigation.

91. The Tribal Court's violations of Great American's due process rights cannot be cured due to the structure of the Tribe's government and business operations. As previously explained, there is no meaningful separation between any of the Tribe's governmental institutions and the business unit that has sued Great American, and every official in the judiciary has a

personal financial interest in the outcome of the case. As such, the Tribal Court's violations of Great American's due process rights will necessarily continue unless the Tribal Court is enjoined from presiding over the dispute between the Tribe and Great American.

92. Significantly, this Court has already held in a prior case that the Business Council's role in resolving appeals in cases in which the Business Council has a financial interest violates due process. *Miccosukee Tribe of Indians of Fla. v. Kraus-Anderson Constr. Co.*, No. 04-22774-CIV, 2007 WL 9701836 (S.D. Fla. May 25, 2007), *rev'd and remanded sub nom. Miccosukee Tribe of Indians of Fla. v. Kraus-Anderson Const. Co.*, 607 F.3d 1268 (11th Cir. 2010).

93. The bottom line is that the Tribe's judiciary is dominated and controlled by Great American's opponent in the litigation, individuals who have a personal financial interest in the outcome, and the father of a key witness. Moreover, the Tribal Court could not empanel an impartial jury because membership in the Tribe is required to qualify as a juror and all jurors would therefore receive distributions from any revenue the casino receives from a judgment against Great American. Under the circumstances, it is impossible for Great American to receive a fair trial.

Exhaustion of Tribal Court Remedies is Not Required

94. Exhaustion of tribal remedies is a prudential rule of comity rather than a jurisdictional prerequisite for suit. *Strate*, 520 U.S. at 450. The tribal exhaustion requirement does not apply to this case for several reasons.

95. First, courts have found that exhaustion of tribal court remedies is not required when the parties, as in this case, agreed to a forum selection clause. *Enerplus Res. (USA) Corp.*, 865 F.3d at 1097.

96. Second, exhaustion is not required because tribal court jurisdiction is clearly absent, and exhaustion would "serve no purpose other than delay." *Strate*, 520 U.S. at 459 n.14.

97. Third, exhaustion would be futile because Great American lacks an adequate opportunity to further challenge the Tribal Court's jurisdiction in the tribal judicial system. The Tribe's entire judicial system is dominated by the Business Council. Indeed, Great American's attempt to appeal was disallowed by the Chairman of the Business Council, Defendant Talbert Cypress, via an order that purports to have been issued by the Tribal Court itself. Even if the Business Council allows an appeal in the future, the Chairman of the Business Council would preside. As such, it is a virtual certainty that the tribal judiciary system will not provide Great American with a meaningful opportunity to appeal to an impartial tribunal.

98. Fourth, the Tribe and the Tribal Court's assertion of jurisdiction is made in bad faith, and in blatant disregard of the mandatory forum selection clause to which the Tribe agreed. Great American had no expectation of being hauled into the Tribal Court after the parties agreed that suit would be filed elsewhere. The Tribe invoked the Tribal Court's jurisdiction to secure a forum that was not only more favorable to it but effectively dominated by it. The order affirming the Tribal Court's jurisdiction over Great American advanced an entirely unreasonable interpretation of the Tolling Agreement and was signed by a Tribal Court Judge whose son is a material witness to the proceedings and who has a personal financial interest in the outcome.

99. In this case, there is not even a pretense to judicial independence, and the right to procedural due process guaranteed to all litigants who appear before a tribal tribunal is seriously imperiled. *See also Fla. Airmotive, Inc. v. Perry*, No. 06-80928-CIV, 2007 WL 9701871, at *5 (S.D. Fla. Mar. 29, 2007) (recognizing that a court can refuse to enforce a tribal court judgment on grounds that the tribal court failed to afford due process).

COUNT I
DECLARATORY JUDGMENT

100. Great American incorporates by reference, as if fully stated herein, the allegations contained in paragraphs 1-99.

101. An actual controversy exists between Great American and the Defendants regarding the exercise of the Tribal Court's jurisdiction and its violation of Great American's procedural due process rights.

102. Pursuant to 28 U.S.C. § 2201, Great American seeks a judgment from this Court declaring that: (1) the Tribal Court lacks jurisdiction over the complaint filed by the Tribe against Great American, and, therefore, that the Defendants lack authority to exercise such jurisdiction; and (2) that the exercise of jurisdiction over Great American by the Defendants, or anybody else who is a member of the Tribe or the Business Council, violates Great American's rights to procedural due process under the U.S. Constitution.

COUNT II
INJUNCTIVE RELIEF

103. Great American incorporates by reference as if full stated herein, the allegations contained in paragraphs 1–102.

104. The Tribal Court lacks jurisdiction over the dispute between Great American and the Tribe, and it is unlawful for the named Defendants, as officers of the Tribe, to exercise the Tribal Court's adjudicative power over Great American. *See Ex parte Young*, 209 U.S. 123 (1908).

105. The Tribal Court, through the acts of the Defendants, has violated, and, if not enjoined, will continue to violate, Great American's constitutional rights to due process.

106. Great American asks this Court to permanently enjoin and restrain the Defendants from enforcing the tribal court's adjudicative power over the dispute between Great American and the Tribe, including:

a. enjoining and restraining Defendant Hughes and Defendant Curtis Osceola from enforcing the August 25, 2023, order and the December 27, 2023, order, and from issuing any further orders in the Tribal Court case;

b. enjoining and restraining Defendant Talbert Cypress, Defendant Lucas Osceola, Defendant Kenneth Cypress, Defendant William Osceola, and Defendant Petties Osceola, Jr., from enforcing the December 27, 2023, order, and from issuing any further orders of the Business Council in connection with the Tribal Court case; and

c. enjoining and restraining Defendant Lozano from facilitating further proceedings in the Tribal Court case.

107. Unless the Defendants are enjoined from their unlawful conduct, Great American will face irreparable harm, including, among other things:

a. being forced to spend time and money litigating in a foreign forum that does not have jurisdiction over the dispute in order to preserve its rights;

b. being forced to litigate in a forum with no judicial independence and in which the individuals who control the tribunal stand to profit from a judgment against Great American;

c. being forced to litigate before a Tribal Court Judge whose son is a material witness in the case, whose son serves as the opposing party's Chief of Staff, and who failed to disqualify himself in violation of the Miccosukee Code; and

d. being forced to litigate in a forum in which there is no meaningful opportunity for appeal and in which procedural due process has not, and will not, be afforded.

108. The injury Great American will suffer if it is forced to continue litigating in Tribal Court to preserve its rights would not be redressable through monetary damages because the Tribe's sovereign immunity would preclude Great American from suing to recover the costs of such litigation, and the Defendants to this action are similarly immune from suits for money damages.

109. The harms faced by Great American as set forth above far outweigh any harm that would be sustained by the Defendants if injunctive relief is granted. The Defendants would simply be prevented from continuing legal proceedings in the Tribal Court against a nonmember entity over whom the Tribal Court lacks jurisdiction.

110. The requested injunction would not be averse to the public interest. The importance of tribal autonomy and self-government is not implicated where an Indian tribe willingly agrees to litigate its claims elsewhere.

111. Public policy favors holding the parties to the terms of their bargain. Public policy and basic notions of fundamental fairness and due process mandate the resolution of claims before an impartial tribunal.

112. Great American will move the Court for a preliminary injunction preserving the status quo by enjoining further proceedings in the Tribal Court during the pendency of this lawsuit.

113. As set forth above, there is a substantial likelihood that Great American will prevail on the merits and that this Court will determine that the Tribal Court lacks jurisdiction over Great American.

WHEREFORE, Great American prays as follows:

1. For a declaratory judgment that the Tribal Court has no jurisdiction over the dispute between Great American Insurance Company and the Miccosukee Tribe of Indians of Florida d/b/a Miccosukee Indian Gaming.
2. For a declaratory judgment that the Tribal Court, through the Defendants, has violated Great American's procedural due process rights.
3. For a preliminary injunction enjoining proceedings in the Miccosukee Tribal Court, Case No. CV-22-59-A, and restraining Defendants from any exercise of Tribal Court jurisdiction over the dispute until further order of this Court.
4. For a permanent injunction forever enjoining proceedings in the Miccosukee Tribal Court, Case No. CV-22-59-A, and forever restraining Defendants from any exercise of Tribal Court jurisdiction over the dispute.

DATED: April 26, 2024.

GREAT AMERICAN INSURANCE COMPANY

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