No. 02-491

IN THE

Supreme Court of the United States

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Petitioner,

v.

TAMIAMI PARTNERS, LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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Tamiami Partners, Ltd. ("TPL") cannot dispute that most circuits have held "the Federal Arbitration Act does not supply an independent basis for federal jurisdiction, nor does the federal nature of the underlying [arbitral] claims." *Smith Barney, Inc. v. Sarver*, 108 F.3d 92, 94 (6th Cir. 1997). Nor can TPL dispute that *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 817 (1986) held that

> a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim "arising under the Constitution, laws or treaties of the United States."

Finally, TPL cannot dispute that this Court's precedents: 1) recognize the authority of Tribes to regulate consensual commercial transactions with non-Indians on tribal lands; 2) require litigants dissatisfied with tribal court rulings to exhaust tribal remedies before challenging them in federal court; and 3) preclude relitigation of issues decided by tribal courts acting within their jurisdiction. Instead, the Response tries to camouflage the important conflicts with these principles presented by the Petition. This Reply demonstrates that certiorari should be granted to resolve the important federal questions that have been thoroughly developed below.

I. THE RESPONSE MISREPRESENTS OR IGNORES THE CONFLICTS IN THE CIRCUITS ON THE JURISDICTIONAL ISSUES.

A. TPL argues that the Tribe's jurisdictional challenge should not be reviewed because it applies to "a *footnote* in *Tamiami III*" Opp. 19, and that the "footnote is dictum" *id.*, because a federal question appears on the face of the Second Amended Complaint ("Complaint"). Nothing could be further from the truth. *Tamiami III* "looked through" the arbitration request to the underlying arbitral contract claim and found jurisdiction because the Management Agreement between the

Tribe and TPL purportedly "implicated" the Indian Gaming Regulatory Act ("IGRA"). As the opinion makes clear, there is no other basis for federal jurisdiction over TPL's claims:

> The *Tamiami II* panel concluded that these claims arose under federal law because the Agreement incorporated – by operation of law if not by reference – the provisions of IGRA and its associated regulations regarding licensing procedures. Because federal law is equally implicated when these claims are presented in the arbitration context, we must follow the *Tamiami II* panel's conclusion here. We hold, therefore, that the first three counts of Tamiami's complaint state a federal question insofar as they relate to the Tribe's rejection of gaming license applications.

Tamiami III, Pet. App. 94a (citations and footnotes omitted). The footnote which TPL argues is dicta is a necessary part of the holding:

> The Federal Arbitration Act empowers a district court to issue an order compelling arbitration if the court, "save for [the arbitration] agreement, would have jurisdiction under title 28, in a civil action . . . of the subject matter of a suit arising out of the controversy between the parties." 9 U.S.C. § 4 (1994). Thus, it is appropriate for us to "look through" Tamiami's arbitration request at the underlying licensing dispute in order to determine whether Tamiami's complaint states a federal question.

Tamiami III, Pet. App. 94a n.11. In fact, in granting summary judgment, the district court relied on this holding in *Tamiami III*, Pet. App. 30a-33a, and *Tamiami IV* adopted it. Pet. App. 3a.

Tamiami III summarizes the claims in TPL's Complaint, none of which state a federal claim: Counts one (a), two, and three sought respectively: a declaration that the disputes over

the Agreement are arbitrable, a judgment to enforce the arbitration "award" and a judgment compelling further arbitration. Pet. App. 98a-99a. Counts one (b), four and six, dismissed by *Tamiami III* on sovereign immunity grounds, sought a declaration that frozen funds belong to TPL, an injunction compelling the return of these funds and an accounting and constructive trust. No federal claim was asserted on the face of the Complaint. The only references to IGRA were in the factual background and refer only to IGRA's requirements for management agreements generally. Complaint ¶¶ 15, 16, 17 and 22. None of the claims in the Complaint required an interpretation of the provisions of IGRA or any other federal statute. Instead, the Eleventh Circuit found federal jurisdiction by reaching through the arbitration request to the underlying arbitral contract claim which purportedly implicated IGRA – a statute which provides no private right of action.

Footnote 11 is part of the holding and adds to the conflict which exists among the circuits over the language in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 25 n.32 (1983), which has been used by some courts to support the proposition that one can look to the underlying claim in arbitration to establish federal question jurisdiction. Respondent does not address *Moses H. Cone*, hoping perhaps that this important issue will be overlooked when this Court considers whether to grant certiorari.

The conflict in the circuits is squarely presented by the Eleventh Circuit's decisions in *Tamiami* and by the Fourth Circuit in *Gibraltar, P.R., Inc. v. Otoki Group, Inc.*, 104 F.3d 616 (4th Cir. 1997) (considering the underlying claim but finding that it did not present a federal question) on one hand, and every other circuit which has decided the question, on the other. Pet. at 11-15 (collecting cases). Both the Eleventh and Fourth Circuits have squarely held that a court can look to the underlying arbitral claim to find federal jurisdiction. These holdings impermissibly expand the jurisdiction of federal courts by allowing courts to look beyond the face of plaintiff's

well-pleaded complaint to the underlying claim in arbitration, and therefore present this Court with an important issue of federal law to resolve. One district court has already relied on the holding in *Tamiami III* and specifically the language in footnote 11. *See Household Bank v. JFS Group*, 191 F. Supp.2d 1292, 1300 and n.3 (M.D. Ala. 2002). This issue is ripe for review and the Court should grant certiorari to resolve the conflict in the circuits.[1]

B. TPL argues this Court should deny the Tribe's Petition because the "first" petition (the one filed by the Tribe after the Eleventh Circuit's interlocutory opinion in *Tamiami III*) involved the same issues as the present Petition and because that "first" petition was denied. Opp. 21-22. TPL's argument is wrong. The "first" petition did not present all the issues presented in this Petition, nor was there a requirement to do so. More importantly, as TPL was quick to point out in its "first" response, interlocutory appeals are seldom if ever reviewed. Pet. App. 285a. This Court can review all interlocutory decisions in a case, even those where certiorari was previously denied. Pet. at 7 n.3. The fact that this Court previously denied the Tribe's petition from an interlocutory appeal is, therefore, irrelevant and simply another distraction by TPL.

C. TPL ignores *Merrell Dow*'s express holding that there is no federal question jurisdiction over a state law claim incorporating a federal statute which provides no private right of action, *Merrell Dow*, 478 U.S. at 817, and instead cites subsequent lower court decisions opining that *Merrell Dow* does not create a bright line rule. Opp. 22 and 22 n.7. But these decisions merely illustrate the conflict in the circuits regarding

1. TPL incorrectly argues that the issue has not been "fully aired" by the Tribe. The Tribe's appellate brief as well as the Tribe's Petition for Rehearing and Rehearing En Banc fully presented this issue. Neither document presented it in only one paragraph, as TPL incorrectly states. More importantly, the Eleventh Circuit's decision in *Tamiami III* clearly sets forth its holding on this point and presents this Court with a clear opinion on which to address the issue.

the import of *Merrell Dow*. As one commentator has recently explained:

> In light of [*Merrell Dow*'s] conflicting language and the Court's subsequent silence, the circuits have split nearly evenly, and sometimes within themselves, on the status and scope of *Merrell Dow*'s private right of action requirement. The crux of the disagreement is whether the presence of a private right of action is the only road to [] jurisdiction after *Merrell Dow* or whether [] jurisdiction remains open for state law claims that present federal issues that a federal court should decide. As a result of the nearly even split among the appellate courts, litigants will find it difficult to predict whether a court will take jurisdiction over their [] claims in the absence of a federal cause of action.

Note, *Mr. Smith Goes to Federal Court: Federal Question Jurisdiction Over State Law Claims Post-Merrell Dow*, 115 Harv. L. Rev. 2272, 2281-82 (June 2002); *id.* n.51 (collecting circuit decisions).[2] This Court should grant certiorari to resolve

2. *Compare Zubi v. AT&T Corp.*, 219 F.3d 220, 223 n.5 (3d Cir. 2000) (finding that a private cause of action is required), and *Ayres v. Gen. Motors Corp.*, 234 F.3d 514, 519 n.8 (11th Cir. 2000) (same), and *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 622 n.2 (6th Cir. 2000) (same), and *Sparta Surgical Corp. v. Nat'l Ass'n of Sec.*, 159 F.3d 1209, 1212 (9th Cir. 1998) (same), and *PCS 2000 LP v. Romulus Telecomms., Inc.*, 148 F.3d 32, 35 (1st Cir. 1998) (same), and *Seinfeld v. Austen*, 39 F.3d 761, 764 (7th Cir. 1994) (same), and *Willy v. Coastal Corp.*, 855 F.2d 1160, 1167-69 (5th Cir. 1988) (same), and *Rogers v. Platt*, 814 F.2d 683 (D.C. Cir. 1987) (same), with *Long v. Bando Mfg. of Am., Inc.*, 201 F.3d 754, 759 (6th Cir. 2000) (finding lack of private right of action not to be dispositive), and *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997) (same), and *Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799, 806 (4th Cir. 1996) (same), and *City of Huntsville v. City of Madison*, 24 F.3d 169, 174 (11th Cir. 1994) (same), and *W. 14th St. Commercial Corp. v. 5 W. 14th Owners Corp.*, 815 F.2d 188, 196 (2d Cir. 1987) (same).

the split in the circuits regarding whether *Merrell Dow* establishes a bright line rule that Congress' decision to provide no private remedy in a statute "is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction." *Merrell Dow*, 478 U.S. at 814.

TPL misleadingly relies on decisions which involve direct claims under IGRA. For example, the Response cites *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1557 (10th Cir. 1997) and *Cabazon Band of Mission Indians*, 124 F.3d at 1055-56, both involving interpretations of IGRA's tribal-state compact provisions. The *Tamiami* decisions clearly did not interpret IGRA. The Complaint seeks to enforce an arbitration "award" and to compel further arbitration. There is no claim under IGRA, or even a state claim that requires interpretation of IGRA. The Eleventh Circuit's determination that TPL's claims "implicated" IGRA, Pet. App. 94a, conflicts with the holding in *Merrell Dow* because IGRA does not provide TPL with a private right of action.

TPL sought to compel arbitration and to enforce an arbitral award. *Tamiami IV* upheld the district court's summary judgment on the state law arbitration claim. Pet. App. 2a-6a. There is no federal claim on the face of the Complaint. The district court's decision granting summary judgment also does not resolve any federal claim, much less a substantial one. Pet. App. 34a-41a. The district court simply adopts *Tamiami III*'s incorrect *holding* that it could "look through Tamiami's arbitration request" to determine federal question jurisdiction. Pet. App. 33a. The confusion, apparent from the cases cited in TPL's Response, presents a compelling reason to grant certiorari to resolve the conflict with *Merrell Dow* and to dispel the confusion that exists in the circuits on the issue of whether *Merrell Dow* establishes a bright line rule.

II. THE TRIBAL COURT ISSUES WERE SQUARELY PRESENTED BELOW.

A. TPL's argument that the Tribe's "challenges to the confirmation of the arbitral award were either not raised below or not presented in the case," Opp. 24, is wrong. The Tribe has consistently taken the position that the dispute between TPL and the Tribe should have been resolved by the Tribal Court.[3] Deference to tribal courts requires exhaustion of tribal remedies. Nor is Respondent's argument that the Tribe did not "cite once below" to *National Farmers Union Insurance Co. v. Crow Tribe*, 471 U.S. 845 (1985) either accurate or important. The Tribe did cite *National Farmers* in its Petition for Rehearing. In its brief, the Tribe relied on other cases including *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), which stand for the same proposition as *National Farmers* – that tribal courts are entitled to deference.

The Tribe's Petition also relied on a very recent case, *Bank One v. Shumake*, 281 F.3d 507, 514-15 (5th Cir. 2002), *cert. denied*, No. 01-1732, 2002 WL 1173484 (Oct. 7, 2002), which holds that the tribal exhaustion doctrine applies to suits to compel arbitration under the Federal Arbitration Act. *Shumake* is in direct conflict with the *Tamiami* decisions.[4]

3. In its Answer and Affirmative Defenses, the Tribe asserted that "jurisdiction to enforce or otherwise dispose of the so-called arbitration award is vested in the Miccosukee Tribal Court, which ordered and supervised the arbitration proceedings and can only be enforced and/or reviewed by that court." Tribe's Thirtieth Affirmative Defense to the Second Amended Complaint. Doc. 294 at 22. The Tribe "pressed" that position in numerous pleadings below, Doc. 214 at 9-10; Doc. 302 at 8-12; Doc. 304 at 5-8; Doc. 316 at 6, and has always maintained that position on appeal. Tribe's Brief in *Tamiami III* at 43-46; Tribe's Brief in *Tamiami IV* at 24-29.

4. Contrary to the Response Opp. at 24-25, the Tribe has not abandoned its argument that Florida law permitted the Tribe to stay the arbitration. The issue was not pressed in the Petition because a federal court's erroneous construction of state law is not one of the primary

B. TPL ignores the Tribe's contention that the Eleventh Circuit improperly reviewed the merits of the Tribal Court orders staying the arbitration and then vacating the award. Opp. 24-28. TPL concedes by its silence that the decision is in direct conflict with *Iowa Mutual*'s command that unless the federal court determines that the tribal court lacked jurisdiction, the federal court must defer to the tribal court and cannot allow relitigation of issues resolved by it. *See Iowa Mut.*, 480 U.S. at 19. Certiorari should be granted to resolve this square conflict.

C. TPL also asserts that the question of tribal court jurisdiction over nonmembers is not presented in this case because the Tribal Court suit against TPL was dismissed in October 1993. Opp. 27. This is nonsense. The Tribal Court suit was dismissed only after the Tribal Court stayed the arbitration and then vacated the award. The validity of these Tribal Court rulings depends on whether the Tribal Court had jurisdiction at the time it rendered them. *See Iowa Mutual*, 480 U.S. at 19. The Tribe consistently argued below that the Tribal Court had jurisdiction to enter the arbitration orders because the suit arose out of TPL's consensual commercial dealings with the Tribe. *See, e.g., Montana v. United States*, 450 U.S. 544, 565 (1981) ("A tribe may regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members."). Thus, whether the Tribal Court had jurisdiction over TPL is an issue properly presented by the Petition.

(Cont'd)

bases for certiorari review. Furthermore, the fact that an arbitrator's authority may derive from the contract obviously does not mean a court has no authority to stay an arbitration or vacate an award. *See* Fla. Stat. §§ 682.03 & 682.13; 9 U.S.C. § 10.

III. REPLY TO RESPONDENT'S INTRODUCTION AND COUNTERSTATEMENT.

In its Response, TPL presents a misleading statement of facts portraying itself as a victim of the Tribe who, according to TPL, "attempted to purchase TPL's interest . . . ." Opp. 2. TPL's version omits the relevant facts that led to the deterioration of the relationship between the Tribe and TPL.[5] TPL's violations of the Agreement – its refusal to honor Indian hiring preferences, its failure to obtain required gaming licenses and its disregard of the Tribe's concern with organized crime influences in Tribal enterprises – led to the Tribe's notice to TPL that the terms of the Agreement had been breached. The refusal by TPL to comply with the request of the Miccosukee Tribal Chairman to stop purchasing bingo paper from Nannicola Paper Co., a company that is linked to organized crime by the Pennsylvania Crime Commission's Report, was only one of many breaches by TPL of the Agreement. *See Mandel v. Miccosukee Tribal Gaming Agency*, 22 Indian L. Rptr. 6148, 6149 (Mic. Tr. Ct. 1994) (finding that TPL's decision to continue purchasing bingo paper from a company connected to organized crime was a sufficient basis to deny gaming licenses to TPL principals). The Tribe did not "attempt to purchase" TPL's interest in the Bingo hall. Rather, there were some discussions to try to settle the contract disputes.

The tortured history of this case cannot be laid at the door of the Tribe. TPL ignored Tribal Court orders and generally

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5. Despite TPL's attempts to portray the Tribal Court in a negative light, it was the Tribal Court that ordered the arbitration which resulted in the "award" that has been the subject of this litigation. The Tribe obeyed the Tribal Court's order and participated in all preliminary proceedings in the arbitration. It was only when TPL filed a lawsuit, which was inconsistent with arbitration, that the Tribe obtained a stay of the arbitration from the Tribal Court. The Tribal Court granted the stay pending resolution of TPL's challenge to its jurisdiction and later vacated the "award," which was issued by only two arbitrators, ex-parte, in violation of Florida law.

displayed a lack of respect for the Tribe, its institutions and its Courts. TPL repudiated arbitration by filing no less than five different complaints and then obtained a final summary judgment confirming an ex-parte arbitration convened in defiance of the orders at the Tribal Court. This dispute should be put to rest, but not before affording the Tribe the opportunity to present these important issues to this Court by granting the Tribe's Petition for a Writ of Certiorari.

Respectfully submitted,

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