SUPREME COURT OF FLORIDA

CAROLE FRANCES HOUGHTALING,

Petitioner,

vs.

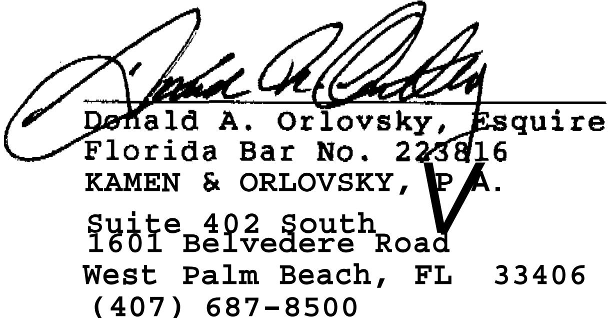
SEMINOLE TRIBE OF FLORIDA,

Respondent.

CASE NO.: 79,177

DISTRICT COURT OF APPEAL, 2ND DISTRICT NO. 91-01508

RESPONDENT'S BRIEF ON THE MERITS



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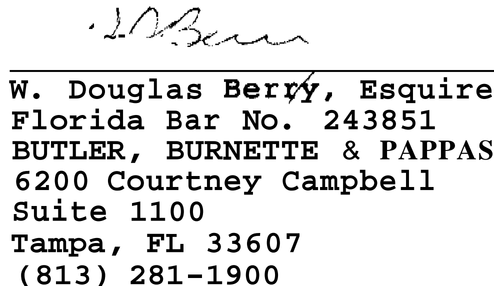

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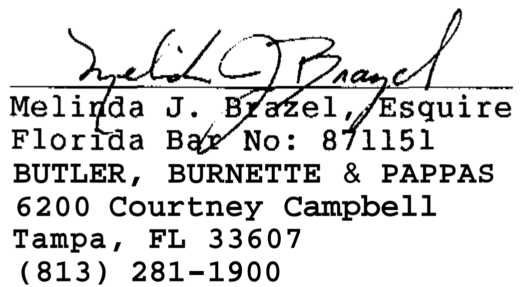

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TABLE OF CONTENTS

Page No.

	Authorities Cited	iii - v
I.	Statement of the Case	1
II.	Issue and Jurisdictional statement	1
III.	Summary of Argument	3
IV.	Preliminary Statement	5
V.	Argument	7
	A. FLORIDA COURTS LACK JURISDICTION TO RESOLVE CIVIL SUITS BROUGHT AGAINST THE SEMINOLE TRIBE.	7
	1. Tribal Sovereign Immunity Can Only Be Waived by an Act of the Congress of the United States or by the Tribe Itself.	7
	2. A Waiver of Tribal Sovereisn Immunity Must be Unequivocally Expressed.	14
	3. Section 285.16 Florida Statutes does not contain an express waiver of tribal sovereign immunity,	16
	B. THE PETITIONER IS NOT WITHOUT A REMEDY DESPITE HER ASSERTIONS TO THE CONTRARY.	29
VI.	Conclusion	30
VII.	Certificate of Service	32

AUTHORITIES CITED

Page No.

I. UNITED STATES SUPREME COURT DECISIONS

Bryan v. Itasca County Minnesota, 426 U.S. 373, 388-389; 96 S.Ct. 2102, 2111; 48 L.Ed.2d 710, 720-721 (1976) — 2,20,22, 28

California v. Cabazon Band of Mission Indians, 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987) — 12,27

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) — 7

Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, ___ U.S. ___, 111 S.Ct. 905, 112 L.Ed.2d 1112, (1991) — 2,12

Rice v. Rehner, 463 U.S. 713, 103 S.Ct. 3291, 77 L.Ed.2d 961 (1983) — 27

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) — 2,7,9,14, 15

United States v. Kagama, alias Pactah Billy, an Indian, 118 U.S. 375, 384-385 (1886) — 8

United States v. Sandoval, 231 U.S. 28 (1913) — 8

United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339, 354 (1941) — 28

11. OTHER FEDERAL DECISIONS

Chemehuevi Indian Tribe v. California State Board of Equalization, 757 F.2d 1047 (9th Cir. Cal. 1985) — 2,15,18

Cogo v. Central Council of the Tlingit & Haida Indians, 465 F. Supp. 1286, 1288 (D. Alaska 1979) — 29

Maryland Casualty Company v. Citizens National Bank of West Hollywood, 361 F.2d 517, 520 (5th Cir. 1966) — 2,7,9, 16

Namekagon Development Company v. Bois Forte Reservation Housing Authority, 517 F.2d 508 (8th Cir. 1975) 14

Parker Drilling Co. v. Metlakatla Indian Community, 451 F. Supp. 1127, 1138-39 (D. Alaska 1978) 2,20

Ramey Construction Company, Inc. v. Apache Tribe of Mescalero Reservation, 673 F.2d 315 (10th Cir. 1982) 15

Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (5th Cir. 1981) 2,17

United States v. Truckee-Carson Irrigation Dist., 649 F.2d 1286 (9th Cir. 1981) 28

III. FLORIDA DECISIONS

Askew v. Seminole Tribe of Florida, Inc., 474 So. 2d 877 (Fla. 4th DCA 1985) 3,15,17, 28

Everard v. State of Florida, 559 So. 2d 427 (Fla. App. 4th DCA 1990) 2

Seminole Police Department v. Casadella, 478 So. 2d 470 (Fla. App. 4th DCA 1985) 16

Seminole Tribe v. Houghtaling, 16 F.L.W. 2581 (Fla. 2d DCA December 4, 1991) 16

Williams v. State, 492 So.2d 1051 (Fla. 1986) 28

IV. OTHER STATE DECISIONS

Atkinson v. Haldane, 569 P.2d 151 (Alaska 1977) 2,11,21, 24,25

Long v. Chemehuevi Indian Reservation, 171 Cal. Rptr. 733, 734 (Cal. Dist. Ct. App. 1981) 21,25

Southwest Forest Industries v. Hupa (Hoopa) Timber Corp., 198 Cal.Rptr. 690, 151 Cal. App. 3d 239 (Cal. App. 1984) 26

V. FEDERAL LEGISLATION

Public Law No. 280, 67 Stat. 588 (Aug. 15, 1953) — 3-5,9-11 14,16,17, 20-22,24, 26,28,30, 31

25 U.S.C. §476 (Indian Reservation Act of 1934) — 5,6,30

25 U.S.C. §479 — 18

25 U.S.C. §1322 — 10

25 U.S.C. §1360 — 20,21, 24-26

5 U.S.C. §3371 (Indian Self-Determination and Education Assistance Act) — 19

VI. FLORIDA LEGISLATION

Section 285.16, Florida Statutes (1989) — 1,3-5, 11,14,16, 17,20,23, 27-31

VII. OTHER AUTHORITY

W. Canby, American Indian Law in a Nutshell, 12-17 (West 1988) — 6

In Defense of Tribal Sovereign Immunity, 95 Harv. L. Rev., 1058 — 29,30

Indian Reorganization Act of 1934, 25 USC §476 — 6

F. Cohen, Handbook of Federal Indian Law, 78-92 (1982) Edition) — 6,19

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RESPONDENT'S BRIEF ON THE MERIT$

COMES NOWS the Respondent, SEMINOLE TRIBE OF FLORIDA, (hereinafter referred to as "SEMINOLE TRIBE"), and files this its Answer Brief pursuant to Florida Rule of Appellate Procedure 9.210(c).

I. STATEMENT OF THE CASE

SEMINOLE TRIBE adopts the statement of the case and facts presented in Petitioner's Initial Brief.

II. ISSUE AND JURISDICTIONAL STATEMENT

The Second District Court of Appeal has certified the following question as one of great public importance:

> DOES §285.16, FLORIDA STATUTES (1989), PROVIDE FLORIDA COURTS WITH JURISDICTION TO RESOLVE CIVIL SUITS BROUGHT AGAINST THE SEMINOLE TRIBE?

Although the Second District Court of Appeal has certified the question to this Honorable Court, pursuant to Florida Rules of Appellate Procedure, Rule 9.030(a)(2)(4)(v), this Court has

the discretion to refuse jurisdiction. This Court should not accept jurisdiction because the certified question does not present **a** matter af great public importance. Nothing in the record indicates that "the interpretation of the statute involves such complex or difficult issues, or that the case has such widespread ramifications **so** as to **make** the case of **'great** public importance.'" **(See Everard** v. **State** of Florida, **559** So. 2d **427** (Fla. **App.** 4th DCA 1990).

Although the certified question may initially **appear** to be a matter of public importance, the issue is no longer in contest **as** it has been decided many times by the Supreme Court of the United States, the most recent instance being less than one year **ago.** Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, ___ **U.S.** ___, **111** S.Ct. **905, 112 L.Ed.2d 1112, (1991).** Other courts, including the Fourth and Second District Courts of **Appeal** of Florida, have **also** addressed the issue and **have** followed the well-settled law. **(See** Bryan v. Itasca County Minnesota, **426** U.S. **373, 388-389; 96 S.Ct. 2102, 2111; 48 L.Ed.2d 710, 720-721 (1976);** **Santa** Clara Pueblo v. Martinez, **436** U.S. **49, 98** S.Ct. 1670, 56 L.Ed.2d 106 (1978); Maryland Casualty Company v. Citizens National Bank of West Hollywood, 361 F.2d 517, 520 (5th Cir. 1966); Atkinson v. Haldane, **569** P.2d 151 (Alaska 1977); Parker Drilling Co. v. Metlakatla Indian Community, 451 F. **Supp.** 1127, 1138-39 (D. Alaska 1978); Seminole Tribe of **Florida** v. Butterworth, 658 F.2d **310** (5th Cir. **1981);** Chemehuevi Indian Tribe **v.** California State **Board** of Equalization, 757 F.2d 1047

(9th Cir. Cal. 1985); ~~Askew v. Seminole Tribe of Florida. Inc.~~, **474** ***So.*** 2d 877 (Fla. 4th DCA 1985)). Thus, the law is clear and this Honorable Court should not accept jurisdiction because **a** question of great public importance has not been presented.

III. SUMMARY OF ARGUMENT

Florida Courts lack jurisdiction to resolve civil suits brought against the SEMINOLE TRIBE. While Section 285.16, Florida Statutes (1989), provides a measure of jurisdiction over "Indians and other persons,'' it does not provide Florida state courts with jurisdiction over Indian tribes.

Absent an unequivocally expressed waiver, a sovereign Indian tribe, such as the SEMINOLE TRIBE, is not subject to suit in state or federal court. It is well-settled that tribal sovereign immunity can only be waived by the tribe itself or by the unequivocal consent of the Congress of the United States. There is no allegation in this case that the SEMINOLE TRIBE, itself, has waived its sovereign immunity. Rather, the Petitioner argues the SEMINOLE TRIBE'S sovereign immunity was waived by Congress in Public Law 280 and Florida Statute §285.16 (1989), which was enacted pursuant to Public Law 280.

Public Law 280 is only relevant insofar as it gave states the option to exercise jurisdiction over individual Indians. In response to Public Law 280, the Florida Legislature passed Florida Statute §285.16 (1989) which reads as follows:

> Civil and Criminal Jurisdiction; Indian Reservations
>
> (1) The State of Florida hereby assumes jurisdiction **over** criminal offenses committed by or against Indians or other persons within Indian reservations **and** over civil causes of action between Indians or other persons or to which Indians or other persons are parties rising within Indian reservations. (emphasis added)
>
> **(2)** The civil and criminal laws of Florida shall obtain on all Indian reservations in this state and shall be enforced in the same manner as elsewhere throughout the state.

Any waiver of tribal sovereign immunity must be unequivocally expressed, **and a** court may not infer a waiver of tribal sovereign immunity. **A** waiver of tribal sovereign immunity is not **present** in Public Law 280, or in Florida Statute $285.16 (1989). If Congress had intended for Public Law 280 or state statutes enacted pursuant to Public **Law *280*** to confer jurisdiction over Indian tribes, it would **have** been required to **say so** in unequivocal terms.

Although Florida Statute $285.16 (1989) grants Florida courts **a** measure of jurisdiction over "Indians or other persons," there is notably absent any grant of jurisdiction over Indian tribes. The Petitioner's focus on the second part of the statute regarding uniform application of the law is misplaced. **A** lack of jurisdiction over Indian tribes will not result in nonuniform application of the law.

Contrary to Petitioner's assertion that there is no distinction between Indians and Indian tribes, the United States Congress as well as the Supreme Court of the United States have recognized such a distinction without dissent or equivocation. Furthermore, also contrary to the Petitioner's assertion, the Petitioner is not left without a remedy. The Tribal Council of the SEMINOLE TRIBE has been recognized as the Tribe's independent, governing body in Florida Statute §285.18 and 25 U.S.C. §476. The Tribal Council will consider any grievance which may be filed by private parties against the SEMINOLE TRIBE.

The Petitioner fails to point to an unequivocal, express waiver of tribal sovereign immunity in Public Law 280 or in Florida Statute S285.16 (1989). As the Second District Court of Appeal below and the Fourth District Court of Appeal have both recognized, a state cannot waive or limit an Indian tribe's immunity, and there is no express waiver of tribal sovereign immunity in Florida Statute §285.16 (1989).

WHEREFORE, this Honorable Court should uphold the decision of the Second District Court of Appeal.

IV. PRELIMINARY STATEMENT

It is important to recognize the history of the SEMINOLE TRIBE in order to understand the sovereign immunity which it has enjoyed throughout the centuries of its tribal existence.

The SEMINOLE TRIBE, whose ancestral heritage predates colonial America, formally organized for the common welfare of its tribal members in 1957 in accordance with the provisions of Section 16 of the Indian Rearuanization Act of 1934, 25 USC §476, and has since been recognized and designated as an organized Indian tribe under federal and Florida Law. At the time of its formal organization, the SEMINOLE TRIBE adopted a Constitution and a set of By-laws which were ratified by the tribal community and approved by the U.S. Secretary of the Interior in full compliance with the Act.

Historically, the present members of the SEMINOLE TRIBE are descendants of a small number of Seminole Indians, who approximately 150 years ago sought refuge in the Florida swamps rather than be forcibly removed by the U.S. Cavalry along what has come to be known as the "Trail of Tears" over which the tribal members of the Five Civilized Tribes (Cherokee, Choctaw, Creek, Chickasaw and Seminole) were marched on foot from their ancestral land to an area called Indian Territory which is now a part of the State of Oklahoma. (See generally, F. Cohen, Handbook of Federal Indian Law, 78-92 (1982 Edition); W. Canby, American Indian Law in a Nutshell, 12-17 (West 1988)).

Even today, as a sovereign Indian nation, the SEMINOLE TRIBE is culturally, politically, and economically separate from the rest of society. At present, the SEMINOLE TRIBE consists of approximately 1,800 enrolled Native American members, the majority of whom reside in Indian country on three reservations located in Broward, Hendry and Glades counties.

The SEMINOLE TRIBE continues to be recognized **as** a dependent political sovereign nation with sovereign immunity from the jurisdiction of state and **federal** courts.

V. ARGUMENT

A. FLORIDA COURTS LACK JURISDICTION TO RESOLVE CIVIL SUITS BROUGHT AGAINST THE SEMINOLE TRIBE.

1. Tribal Sovereign Immunity Can Only Be Waived by an Act of the Congress of the United States or by the Tribe Itself.

Contrary to Petitioner's assertion that sovereign immunity can be waived in "many ways," it is well **settled** an Indian tribe is not subject to the jurisdiction of state or federal courts absent its express consent or the express consent of the Congress of the United States. Santa Clara Pueblo v. Martinez, **436** U.S. **49, 98** S.Ct. **1670,** 56 L.Ed. 2d **106** (1978); Maryland Casualty Company v. Citizens National Bank of West Hollywood, 361 F.2d 517 (5th Cir. **1966).**

The federally recognized tribal sovereignty of Indian nations lies at the heart of the special and unique relationship which exists between the United States and Indian Tribes: that of **a** conquering sovereign to **a** conquered sovereign. This relationship has been defined **as** most akin to that of a guardian to its **ward,** as stated by Chief Justice John Marshall in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 **(1831):**

> Meanwhile, they are in a state of pupilage; their relationship to the United States resembles that of a ward to his guardian.

Fifty years later, the United States Supreme Court redefined the relationship between the United States and Indian Tribes in the same vein when it stated:

> These Indian tribes are the wards of the nation. They are communities dependent on the United States, -- dependent largely for their daily food; dependent for their political rights. They owe no allegiance to **the** states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, **so** largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises **the** duty of protection, and with it the power. This has always been recognized by the executive, **and** by congress, and by this court, whenever the question has arisen.

United States v. Kagama, alias Pactah Billy, an Indian, 118 U.S. 375, **384-385** (1886); See also, United States **v.** Sandoval, 231 U.S. ***28*** (1913).

It is firmly established that Indian nations or tribes are **regarded** by the United States **as** dependent political nations which possess all aspects and attributes of sovereignty except where they have been taken away by Congressional action. **As** an aspect of their sovereignty, Indian nations such **as** the SEMINOLE TRIBE are immune from suit, either in federal

or state courts, without their consent or express and unequivocal Congressional authorization. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58; 98 S.Ct. 1670, 1677; 56 L.Ed.2d 106 (1978); Maryland Casualty Company v. Citizens National Bank of West Hollywood, 361 F.2d 517, 520 (5th Cir. 1966).

The Petitioner in this case does not argue that the SEMINOLE TRIBE, itself, has waived its sovereign immunity. Rather, the Petitioner argues the SEMINOLE TRIBE'S immunity from suit in the State of Florida has been waived by Public Law No. 280, 67 Stat. 588 (Aug. 15, 1953) (hereinafter referred to as "Public Law 280"). This case calls into question the extent to which a state court may exercise jurisdiction over a civil dispute involving a sovereign Indian tribe in the absence of an express and unequivocal Congressional or tribal waiver of sovereign immunity.

Through Public Law 280, Congress did allow states to assume a limited measure of jurisdiction over Indians. Relevant provisions of Public Law 280 read as follows:

> (a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State.

State of	Indian country affected
Alaska	All Indian country within the State
California	All Indian country within the State
Minnesota . . . . . , ,	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within **the** State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within **the** State

Florida, which was **not** one of the six "mandatory" states, assumed **a** measure of civil jurisdiction over Indians in Indian Country pursuant to another part of Public Law 280 which, like the foregoing section, refers only to individual Indians and not to tribes. The current statutory provision is contained in ***25*** U.S.C. §1322 which reads, in pertinent part, **as** follows:

> The consent of the United States is hereby given to any **State** not having jurisdiction over civil causes ***of*** action between Indians or to which **Indians** are **parties which arise in the areas** of Indian Country situated within such **State** to assume, **with the** consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, **such** measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or **private**

> property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State. (emphasis added).

Florida Statute §285.16 (1989), enacted pursuant to Public Law 280, also limits jurisdiction of Florida state courts to "Indians and other persons."

In the absence of an express, unequivocal waiver of tribal sovereign immunity within Florida Statute 5285.16 and the enabling legislation of Public Law 280, there is no basis for this Court to find jurisdiction of the state courts over the SEMINOLE TRIBE.

In Atkinson v. Haldane, 569 P.2d 151 (Alaska 1977), the court reiterated the long established doctrine of sovereign immunity of Indian tribes and upheld the tribal sovereign immunity long recognized by the United States Supreme Court:

> Because of the supremacy of Federal law, we are bound to recognize the doctrine of tribal sovereign immunity, even if we were to find valid public policy reasons to hold it inapplicable in this case. (emphasis added)

Id. at page 163.

In Atkinson, the underlying lawsuit involved a tort action against the Metlakatla Indian community for wrongful death which occurred in an automobile accident on the Indian reservation. The decedent's representatives filed suit against the Metlakatla Indian tribe. The Court correctly held,

"Whether or not a [tort] action should be allowed [against Indian tribes] is not a question for [courts] to decide..." Id. at p. 163.

The most recent United States Supreme Court case considering the issue of tribal sovereign immunity is Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, ___ U.S. ___, 111 S.Ct. 905, 112 L.Ed.2d 1112, (1991). (The Petitioner incorrectly cites California v. Cabazon Band of Mission Indians, 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987) as the most recent United State Supreme Court decision on the issue.). In Potawatomi, supra, the United States Supreme Court reiterated:

> Indian tribes are "domestic dependent nations," which exercise inherent sovereign authority over their members and territories. (citation omitted). Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation. (citation omitted).

111 S.Ct. 905, at 909.

The Potawatomi Court was confronted with the opportunity to narrow or eliminate the doctrine of tribal sovereign immunity. As the Court noted:

> Oklahoma offers an alternative, and more far-reaching, basis for reversing the court of appeals' dismissal of its counterclaims. It urges this Court to construe more narrowly, or abandon entirely, the doctrine of tribal sovereign immunity.

In reaching its decision, the Potawatomi Court stated:

> The doctrine of Indian tribal sovereign immunity **was** originally enunciated **by** this court, and has been reaffirmed in **a** number of cases. Turner v. United States, **248** U.S. **354, 358, 39 S.Ct. 109, 110, 63 L.Ed.** 291 (1919); Santa **Clara** Pueblo v. Martinez, **436** U.S., **at *58*, *98*** S.Ct., **at** 1677, Congress has **always** been **at** liberty to dispense with **such** tribal **immunity or to limit** it. Although Congress has occasionally authorized limited classes of **suits** against Indian tribes, it has never authorized suits to enforce tax assessments. Instead, Congress has consistantly reiterated its approval of the immunity doctrine. **See**, e.g., Indian Financing **Act** of 1974, **88** Stat. 77, **25** U.S.C. **§1451 et. seq.,** and the Indian Self-Determination and Education Assistance Act, 88 Stat. **2203, 25** U.S.C. **§450 et. sea.** These Acts reflect Congress' desire to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency **and** economic development." California v. Cabazon Band of Mission Indians, **480** U.S. **202,** 216, 107 S.Ct. 1083, **1092, 94 L.Ed. 244 (1987).** Under **these** circumstances, **we** are not disposed **to** modify the long-established principle of tribal sovereign immunity.

Thus, in a unanimous decision dated **less** than one year before the filing of this brief, the United States Supreme Court reiterated without qualification the continued viability of the doctrine of tribal sovereign immunity.

In her brief, the Petitioner begs this Honorable Court to "make a policy statement in this case to protect the rights of its citizens . . ." In essence what the Petitioner is doing is asking this Honorable Court to legislate to overrule

well-settled law. Since there is notably absent any express waiver of tribal sovereign immunity within Florida Statute §285.16 or the federal enabling legislation of Public Law 280, this Honorable Court may not grant jurisdiction of the state courts over the SEMINOLE TRIBE even if it were to find public policy reasons to do so. The Petitioner correctly notes Judge Altenbernd's concern with the possible consequences of the Second District's decision. However, it must also be noted that in concurring with the opinion of the Second District Court of Appeal, Judge Altenbernd was constrained to conclude that Florida state courts are not at liberty to find jurisdiction over Indian tribes where none exists.

2. A Waiver of Tribal Sovereign Immunity Must Be Unequivocally Expressed.

Indian tribes have always been considered to have an immunity from suit similar to that enjoyed by the Federal Government. Namekagon Development Company v. Bois Forte Reservation Housing Authority, 517 F.2d 508 (8th Cir. 1975). Moreover, since an Indian tribe's sovereign immunity is co-extensive with that of the United States, a party may not maintain a claim against an Indian tribe or any of its subordinate economic units absent a firm showing of an effective waiver which is unequivocally expressed. Santa Clara

Pueblo v. Martinez, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978); Ramev Construction Company, Inc. v. Apache Tribe of Mescalero Reservation, 673 F.2d 315 (10th Cir. 1982); Chemehuevi Indian Tribe v. California State Board of Equalization, 757 F.2d 1047 (9th Cir. Cal. 1985); Askew v. Seminole Tribe of Florida, Inc., 474 So. 2d 877 (Fla. 4th DCA 1985). A waiver of tribal sovereign immunity may never arise by implication. Santa Clara Pueblo v. Martinez, 436 U.S. 49, at 58-59.

In Askew, supra, the Fourth District Court of Appeal of Florida, quoting the United States Supreme Court in Martinez, supra, acknowledged the following governing principles with regard to the entitlement of Indian tribes to sovereign immunity absent an express waiver:

> Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. . . . This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But "without congressional authorization," the "Indian Nations are exempt from suit." . . . It is settled that a waiver of sovereign immunity "'cannot be implied but must be unequivocally expressed.'" (citations omitted).

474 So. 2d at 879.

The Petitioner fails to point to an unequivocal, express waiver of sovereign immunity which would allow Florida state courts to exercise jurisdiction over the SEMINOLE TRIBE.

Instead, the Petitioner asserts various reasons why Florida Statute §285.16 (1989) should be interpreted to grant jurisdiction over the SEMINOLE TRIBE, As stated, this Court cannot interpret or infer that the statute waives tribal sovereign immunity. The waiver, if it exists, must be absolutely and unequivocably expressed. It is not.

3. Section 285.16 Florida Statutes Does Not Contain an Express Waiver of Tribal Sovereign Immunity.

The Petitioner asks this Court to disregard the plain language of Florida Statute 5285.16 limiting exercise of Florida courts' jurisdiction over "Indians and other persons," and to expand $285.16 to be a general jurisdictional grant over civil disputes involving Indian tribes as well as Indians and other persons.

The Fourth District Court of Appeal in Seminole Police Department v. Casadella, 478 So. 2d 470 (Fla. 4th DCA 1985) and the Second District Court of Appeal below in Seminole Tribe v. Houghtaling, 16 F.L.W. 2581 (Fla. 2d DCA December 4, 1991) have both held that Public Law 280 and Florida Statute §285.16 (1989) do not confer civil jurisdiction over Indian tribes. Furthermore, the applicability of the doctrine of sovereign immunity to the SEMINOLE TRIBE has been explicitly recognized by at least three other court decisions: Maryland Casualty Company v. Citizens National Bank of West Hollywood, 361 F.2d

517, 520 (5th Cir. 1966); Askew v. Seminole Tribe of Florida, Inc., 474 So. 2d 877 (Fla. 4th DCA 1985) and Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (5th Cir. 1981) cert. denied, 455 U.S. 1020, 102 S.Ct 1717, 72 L.Ed. 138. No appellate court has ever held that Florida Statute §285.16 (1989) confers jurisdiction of state courts over Indian tribes.

The Petitioner's argument of Florida's alleged assumption of jurisdiction was specifically considered and rejected in Casadella, supra. Writing for a unanimous court, Justice Barkett, in Casadella, wrote:

> We cannot agree that this constitutes a waiver of sovereign immunity. Immunity of the Seminole Tribe and its subordinate economic units can only be waived by the Tribe itself and/or the United States Government. A state cannot waive or limit an Indian Tribe's immunity. (emphasis added).

478 So. 2d 470, at 471.

Florida Statute 5285.16 (1989), like its federal enabling statute, Public Law 280, clearly applies only to "Indians or other persons." It does not apply to Indian tribes. The use of "other persons" as a suitable alternative to "Indians" in the statute indicates the obvious legislative intent to limit the statute's applicability to "persons," Indian or otherwise. To create a waiver of tribal immunity from the foregoing would be, in effect, to rewrite the plain language of the statute.

The Petitioner asserts it would be **"illogical" to** make **a** distinction between Indians and Indian tribes.[1] This is not true. **As** a matter of common usage, the term "person" as used in the statute does not include sovereigns. (See, Chemehuevi v. California State Board of Equalization, *757* F.2d 1047 (9th Cir. Cal. 1985)). The terms "Indian" **and** "Indian Tribe" **are** not synonymous. In 25 U.S.C. §479, Congress specifically defined the terms "Indian" **and** Indian "tribe." **The** definitions are not the same, and the term **"Indian"** does **not** include an Indian tribe:

> The term "Indian" . . . shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of said sections, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. . . . (emphasis added.)

In the very same passage, Congress defined **a** "tribe" **as:**

> . . . any Indian tribe, organized band, pueblo, or the Indians residing on one reservation.

1/ In its Amicus Curiae Brief, the Academy of Florida Trial Lawyers states, ". . . the distinction drawn by the Respondent between the tribe itself and individual members of the tribe is nonsensical."

The intent of the Congress to distinguish between individual Indians and organized tribes such as the Seminole Tribe of Florida is readily apparent.

Furthermore, in a recent congressional enunciation of policy toward the Indian tribes, the Indian Self-Determination and Education Assistance Act, Congress recognized the sovereign immunity of Indian tribes when it specified the Act is not to be construed as "affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe." (emphasis added.) (Pub, L. No. **93-638, 88 Stat. 2203 (1975) (codified at 5 U.S.C. §3371** (1976)). Obviously, an individual Indian is not the same as, nor interchangeable with, an Indian tribe.

Finally, the Petitioner in her own brief cites F. Cohen, Hankbook of Federal Indian Law, (1982 Edition) "for a thorough discussion of Indian Law." Ironically, however, Professor Cohen also recognized the distinction between an "Indian" and an "Indian Tribe."2/

2/ At the most general level, an INDIAN TRIBE is a group of Indians that is recognized as constituting a distinct and historically continuous political entity for at least some governmental purposes. It is the fundamental unit of Indian Law and in its absence, there appears to be no occasion for Indian Law to operate. An INDIAN, on the other hand, is an individual person meeting two qualifications: (a) that some of the individual's ancestors lived in what is now the United States before its discovery by Europeans, and (b) that the individual is recognized as an Indian by his or her tribe of community. See, F. Cohen, Handbook of Federal Indian Law, 3-20 (1982 Edition).

In passing Public **Law** 280, Congress could have easily expressed an intention to permit states to assume jurisdiction over their resident Indian tribes in civil disputes. The language of the statute makes it clear that Congress did not **do so.** Accordingly, its failure to **so** act must be read **as** a purposeful decision to reserve to the federal government jurisdiction over the tribes themselves.

It is clear as **a** matter of statutory construction that **had** Congress intended Public Law 280 to constitute **a** waiver of tribal sovereign immunity, it would have been required to **say so** in unequivocal **terms.** Likewise, if the **Florida** Legislature intended Florida Statute 5285.16 (1989) to apply to Indian tribes (assuming that it was permitted to do ***so)*** rather than to individual Indians, it, too, was required to **say so** in unequivocal terms. Simply stated, the terms "Indian" **and** "Indian Tribe" are not synonymous.

Asking this Court to imply a waiver of tribal sovereign immunity, the Petitioner directs this Court's attention to Section 4(a) of Public Law 280 which became codified at **28** U.S.C. §1360(a). However, it has been affirmatively held that Public **Law** 280 does not confer state court jurisdiction over civil disputes involving Indian tribes. **See,** Bryan v. Itasca County Minnesota**, 426** U.S. **373,** 388-389; **96 S.Ct.** 2102, 2111; **48** L.Ed 2d 710, 720-721 (1976); Parker Drilling Co. v. Metlakatla Indian Community, 451 F. Supp. 1127, 1138-39 (D. Alaska 1978);

Long v. Chemehuevi Indian Reservation, 171 Cal. Rptr. 733, 734 (Cal. Dist. Ct. App. 1981); Atkinson v. Haldane, 569 P.2d 151, 167 (Alaska 1977).

In Bryan v. Itasca County, supra, the United States Supreme Court noted (and the Second District Court of Appeal below reiterated), the legislative history of Public Law 280 reveals its general purpose was to grant jurisdiction over criminal matters to control the "lawlessness" on reservations to which individual Indians were parties. "In marked contrast in the legislative history is the virtual absence of expression of congressional policy or intent respecting Section 4's grant of civil jurisdiction to the states:' 426 U.S. 373, at 381.

Moreover, the Bryan court also stated:

> Piecing together as best we can the sparce legislative history of §4, subsection (a) seems to have been primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens. (emphasis added.)

Id. at 383.

Finally, the Bryan court was very specific in stating:

> . . . There is notably absent any conferral of state jurisdiction over the tribes themselves, and Section 4(c), 28 U.S.C. §1360(c), providing for the "full force and effect" of any tribal ordinances or customs "heretofor or hereafter adopted by an Indian tribe . . . if not inconsistent with any applicable civil law of the state," contemplates the continuing validity of tribal government. (emphasis added.)

Id. at 389.

The **Bryan** court clearly notes the distinction between "Indians" and Indian "tribes" and the terms are not used interchangeably. Its use of "other private citizens" in the disjunctive with "Indians" further demonstrates the point that "Indians" are not "tribes."

Bryan v. Itasca County specifically held that Public Law 280, implementing mandatory jurisdiction of the State of Minnesota over civil causes of action between individual Indians or to which individual Indians are parties, did not permit the State of Minnesota to impose a personal property tax on an individual Indian's mobile home located on land held in trust for members of his tribe. Nothing in the Bryan case even remotely suggests that Public Law 280 intended to give states jurisdiction over Indian tribes, and the private/civil regulatory distinction sought to be made by the Petitioner is not relevant in the case now before this Court. Through the conclusion reached in **Bryan**, the United States Supreme Court makes the unassailable point that Public Law 280 does **not** apply to create jurisdiction over Indian tribes where none otherwise exists.

The Petitioner incorrectly interprets the Bryan holding (that state courts cannot exercise jurisdiction over regulatory matters) to mean that state courts are free to exercise jurisdiction over **any** civil matters involving Indians. On

page 14 of the Petitioner's Initial Brief, she quotes from the **Bryan** opinion, but fails to **note the** Court's **clear** emphasis that **jurisdiction** of **state courts** over civil matters such **as** contract, tort, etc., will only **apply** to "private persons or private property." Since the Petitioner mistakenly focuses on the regulatory/civil distinction, she misses the point that Indian tribes are not **subject** to state court jurisdiction, regardless of whether an action is regulatory or civil in nature, absent an unequivocal, express waiver.

The Petitioner also argues that the language in Florida Statute 5285.16 providing the criminal laws of Florida "shall obtain on all Indian reservations in this **state** and shall be enforced in the same manner **as** elsewhere throughout the state," should be inferred by this Court to grant jurisdiction over Indian **tribes** despite the statute's plain language to the contrary. Again, this Honorable Court may not infer a waiver of tribal sovereign immunity. Nevertheless, the Petitioner, after asking this Court to do **so**, appears to argue that the lack of state court jurisdiction over the SEMINOLE TRIBE would provide for a nonuniform application of the law. The Petitioner mistakenly confuses application of the law with jurisdiction. If **the** state courts **did** have jurisdiction over the Indian tribes, they would certainly **apply** the law to the SEMINOLE TRIBE in the same **manner** the law would be applied in **other cases.** However, state courts clearly do not have jurisdiction over the SEMINOLE TRIBE **and** cannot apply the law in any manner to the tribe absent its consent or the unequivocal consent of Congress.

In Atkinson v. Haldane, 569 P.2d 151 (Alaska 1977) an action was brought against the Metlakatla Indian Community for the wrongful death of two Indian residents killed in an automobile accident that occurred on the reservation. In holding that the Metlakatla Indian Community was entitled to sovereign immunity, the Alaska Supreme Court, in an opinion thoroughly reviewing the entire subject of tribal sovereign immunity, held that Public Law 280 did not intend to confer a waiver of sovereign immunity as to Indian tribes. In Atkinson, the court rejected the same analysis urged by the Petitioner in this case as follows:

> . . . [T]he issue is one of the sovereign immunity of the tribe and the determination to be made is whether Congress intended 28 U.S.C. §1360(a) as a waiver of tribal sovereign immunity. Pursuant to the analysis employed by the Supreme Court in Bryan v. Itasca County, . . ., we hold that the sovereign immunity of the Metlakatla Indian community was waived only if it is clear from the unambiguous language of 28 U.S.C. §1360(a) and its legislative history that congress intended such a waiver. AS previously noted, the legislataive history does not specifically mention any waiver of tribal sovereign immunity . . . Our study of the question has convinced us that 28 U.S.C. §1360(a) is ambiguous and that the legislative history offers little guidance in resolving that ambiguity. Of controlling significance is the absence of any clear waiver of sovereisn immunity in the statutes. Since tribal sovereign immunity is a long recognized principle founded on a strong public policy, we conclude that without an express congressional waiver of immunity we should not imply one. We therefore hold that Congress, by virtue of its enactment of 28 U.S.C. §1360(a), did not waive the

> sovereign immunity of the Indian tribes and thus the Metlakatla Indian Community **has** sovereign immunity with respect to the subject wrongful death actions. (emphasis added).

Id. at 167.

As the Atkinson Court held in considering facts almost **identical** to **those before** this **Honorable Court, Congress has** not **effected a waiver of tribal sovereign immunity.**

In Long v. Chemehuevi Indian Reservation, supra, a California court considered similar statutory language in 28 U.S.C. §1360 which gave California jurisdiction over "civil causes of action between Indians or to which Indians are parties arising in Indian country to the same extent that such courts have jurisdiction over other civil **causes** of action." The Long case involved a wrongful death action against the Chemehuevi Indian Tribe. The relevant facts were strikingly similar to those in the instant **case.** An Indian tribe operated a marina for profit. **A** private citizen was killed in a boating accident at the marina, and the survivors filed suit against the Indian tribe. The tribe contested jurisdiction. **The** Long Court held, reminiscent of the Bryan holding:

> No case has been cited to us, and we have found none, which concludes or even suggests, that 28 U.S.C. $1360 conferred . . . jurisdiction over the Indian tribes, as contrasted with individual Indian members of the tribes.

> In the absence of a clear waiver, we must recognize the sovereign immunity of the Chemehuevi Tribe. (citation omitted). Congress, in passing 28 U.S.C. §1360 could have easily expressed its intent to grant the listed states complete jurisdiction over its resident tribes. Congress' failure to so act must be read as a purposeful decision to reserve to the federal government jurisdiction over the tribes themselves. (citations omitted).

Id. at 736.

There is no reported case which has expressly held that an Indian tribe may be sued absent an express waiver of sovereign immunity.[3/]

3/ The Petitioner in Footnote 8 on Page 12 of her brief cites Southwest Forest Industries v. Hupa (Hoopa) Timber Corp., 198 Cal.Rptr. 690, 151 Cal.App.3d 239 (Cal.App. 1984) as conflicting with Long and holding Public Law 280 applies to Indian tribes. The Petitioner cites this case despite the fact the opinion was withdrawn and is not authoritative. Furthermore, the opinion as it was initially published specifically distinguished the Long case and limited its own holding stating, "we are concerned here only with the question whether, under the circumstances of this case, an Indian tribe is lawfully obliged to honor its commercial contract to sell logs." (emphasis added). Id. at 696.

The Southwest Court also noted the difference between its holding and the holding in Long, supra. Namely, in Southwest, the Defendant was a proprietary corporation chartered by an Indian tribe, not a tribe itself. Additionally, the Southwest case involved a written contract in which, by the term of the contract, the corporation was found to have waived its immunity.

The Petitioner cites Rice v. Rehner, 463 U.S. 713, 103 S.Ct. 3291, 77 L.Ed.2d 961 (1983) and California v. Cabazon Band of Mission Indians, supra to demonstrate a "trend" away from the idea of inherent tribal sovereign immunity. The Rice case, which arose out of Arizona, is easily distinguishable from the instant case as it dealt with a criminal action against an individual Indian, not an action against an Indian tribe. The Cabazon Court supported tribal sovereign immunity and recognized the "traditional notions of Indian sovereignty in the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self sufficiency and economic development. (citations omitted). Id. at 1092. In fact, the Cabazon Court found no state interest which would justify state regulation of the tribal bingo enterprises in light of the compelling federal and tribal interests supporting them. The law is clear. Tribal sovereign immunity cannot be waived absent an express waiver of sovereign immunity, and an express waiver of sovereign immunity does not exist in Florida Statute §285.16 (1989).

Even if this Court were to hold Florida Statute §285.16 (1989) is ambiguous, and, despite the requirement for an express waiver, undertake to interpret the statute, this Honorable Court must interpret the statute in favor of the Indians. It is well-settled as a canon of statutory construction that any ambiguities or doubtful expressions in statutes regarding Indian tribes are to be liberally construed

and resolved in favor of the **tribes.** (See, United States v. Santa Fe Pacific Railroad Co., 314 **U.S.** 339, **354 (1941);** United States v. Truckee-Carson Irrigation Dist., **649** F.2d **1286** (9th Cir. 1981); Askew v. Seminole Tribe of Florida, Inc., **474** So. 2d 877, **880** (Fla. 4th **DCA** 1985) quoting from Bryan v. Itasca County, **426** U.S. 373 (1976)). **As** the Askew Court stated:

> Finally, in construing this "admittedly ambiguous" statute [Public Law 280], Board of Comm'rs v. Seber, 318 U.S. **[705]** at **713, 87 L.Ed. 1094, 63** S.Ct. **920** [at **9241,** we must be guided by that "eminently sound and vital canon,'' Northern Cheyenne Tribe v. Hollowbreast, **425** U.S. **649, 655** n. **7, 48 L.Ed.2d 274, 96** S.Ct. **1793 [1797** n. **71 (1976),** that "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." Alaska Pacific Fisheries v. United States, **248** U.S. **78, 89, 63 L.Ed. 138, 39** S.Ct. **40 [42]** (1918); Antoine v. Washington, **420** U.S. **194, 199-200, 43 L.Ed.2d 129, 95 S.Ct. 944 [948-949] (1975).**

Askew, supra, at *880* citing Bryan, **supra, at 392.**

Petitioner's reliance on Williams v. **State, 492 So.2d 1051** (Fla. **1986) for** the proposition that, assuming, arguendo, Florida Statute §285.16 (1989) is ambiguous, it should be interpreted against tribal sovereign immunity, is completely misplaced and contrary to well-settled law. It also goes against **the** long-established public policy to protect the sovereignty of Indian tribes and resolve any ambiguous statutes in favor of the tribes.

Furthermore, if this Court were tempted to disregard the requirement of an unequivocal, express waiver of sovereign immunity and look beyond the clear terms of Florida Statute 5285.16 (1989) to public policy, the Respondent respectfully suggests that this Honorable Court should recognize the policy considerations underlying the sovereign immunity of Indian tribes.

The Indian tribes' long standing entitlement to sovereign immunity has been protected and preserved so that they could continue working toward their goals of Indian self-government, self-sufficiency and economic development. One reason the courts have continued to respect tribal sovereign immunity is the recognition that an Indian tribe's fragile economic stability could be devastated, and Congressional efforts to provide Indian tribes with economic and political autonomy frustrated, if tribal assets are subject to dissipation through litigation, Coao v. Central Council of the Tlinait & Haida Indians, 465 F. Supp. 1286, 1288 (D. Alaska 1979). (See also, In Defense of Tribal Sovereign Immunity, 95 Harv. L. Rev., 1058)).

B. THE PETITIONER IS NOT WITHOUT A REMEDY DESPITE HER ASSERTION$ TO THE CONTRARY

The Petitioner, as well as the Academy of Florida Trial Lawyers in their Amicus Curiae Brief, urge this Court to find a waiver of tribal sovereign immunity because, absent such a

waiver, the Petitioner would be without **a** remedy. Notwithstanding **this** Court's inability to imply **a** waiver of sovereign immunity even if it meant the Petitioner would have no forum for redress, it must be noted the Petitioner is not without a remedy in this case.

Indian tribes were specifically granted sovereign immunity based in part upon the fact that they had their own governing bodies. (**See** 95 Harv. L. Rev. 1058, supra at 1059.) The SEMINOLE TRIBE is no exception. The United States and the State of Florida have specifically recognized the Tribal Council as the governing body of the SEMINOLE TRIBE. (See Florida Statute 5285.18 and 25 U.S.C. §476.) **The SEMINOLE** TRIBE Tribal Council stands ready to address any and all allegations which may be asserted by private parties against **the** SEMINOLE TRIBE. This is a proper **and** adequate forum **in** which the Petitioner may bring her grievance.

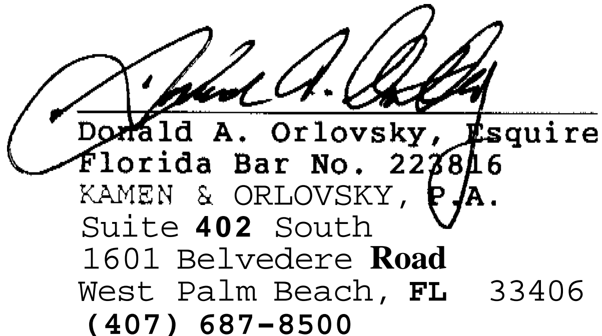
VI. CONCLUSION

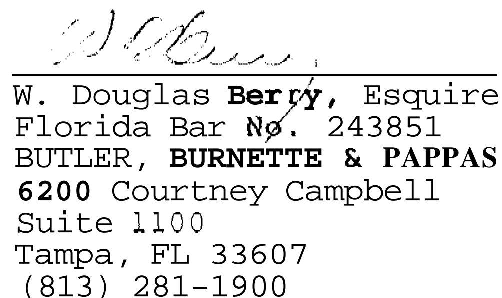
Florida courts lack jurisdiction to resolve civil suits brought against the Seminole Tribe. Tribal sovereign immunity can only be waived by Congress or by the SEMINOLE TRIBE itself. Such **a** waiver must be clearly and unequivocally expressed. This Honorable Court may not imply **a** waiver of sovereign immunity. Neither Public Law ***280*** nor Florida Statute $285.16 (1989) expressly waives **the** sovereign immunity of the SEMINOLE TRIBE. Thus, the Florida state courts do not have

jurisdiction over the **SEMINOLE TRIBE.** The Petitioner, however, is not left without a remedy as the Tribal Council of the SEMINOLE TRIBE provides an adequate forum for redress.

WHEREFORE, for the reasons stated herein, the SEMINOLE TRIBE respectfully requests this Court to uphold the decision of the Second District Court of Appeal below and hold that Public Law 280 and §285.16, Florida Statutes (1989), do not confer civil jurisdiction over Indian tribes.

Respectfully submitted,





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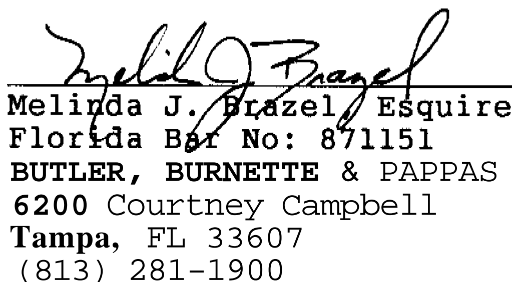

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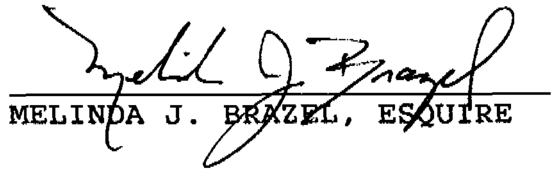
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States Mail this 24th day of February, 1992, to H. Irene Higginbotham, Esq., 100 Second Avenue South, Suite 901, St. Petersburg, FL 33701.

BUTLER, BURNETTE & PAPPAS



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