IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

INGLISH INTERESTS, LLC, a
Texas limited liability corporation,

Plaintiff,

v. CASE NO. 2:10-cv-367 FTM-29DNF

SEMINOLE TRIBE OF FLORIDA, INC. a
corporation authorized under the Indian
Reorganization Act,
Defendant.
_____/

DEFENDANT, SEMINOLE TRIBE OF FLORIDA INC.'S, REPLY MEMORANDUM OF LAW TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION, FAILURE TO STATE A CLAIM, AND FAILURE TO JOIN AN INDISPENSIBLE PARTY

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PRELIMINARY STATEMENT

As explained in the Defendant's Motion for Leave to File a Reply, the Plaintiff, without amending or seeking to amend its Complaint, has materially changed the basis upon which it contends that the subject matter jurisdiction of this Court depends. The Complaint, as presently framed, purports to rest subject matter jurisdiction on an express waiver of tribal sovereign immunity contained in the consent to suit clause in Defendant's federal corporate charter that was deleted by an amendment that became effective in 1996 - nearly 15 years ago - following an election conducted under the auspices of the Secretary of the Interior. (Compl. at ¶4, Exhibit A; Art. VI, Sec. 9). Implicit in this allegation is Plaintiff's acknowledgement that tribal sovereign immunity had been afforded to the Defendant, but was voluntarily waived in accordance with the Charter provision prior to its repeal. Upon learning that the Charter had long been amended (Motion to Dismiss, Exhibit 1), the Plaintiff, abandoning the Complaint's jurisdictional allegation, announced in its Response in Opposition to the Motion to Dismiss ("Response"), the novel "rule" that federally chartered tribal corporations are *a fortiori* divested of tribal sovereign immunity (Response pp.4-14). In so doing, the Plaintiff denounces decades of settled law, and the clear intent of Congress. Moreover, were the position asserted by Plaintiff well grounded, the result would likely alter the economics of Indian Country by millions, if not billions of dollars, and would place at financial risk the viability of hundreds of federally chartered tribal corporations formed by Indian tribes throughout the United States pursuant to Section 17 of the *Indian Reorganization Act of 1934*, as amended, 25 U.S.C. § 477. Plaintiff's position on jurisdiction is utterly void of merit in the face of well settled law and cannot prevail.

ARGUMENT

Congress has made it clear that tribal sovereign immunity is inviolate subject only to express tribal waiver or act of Congress. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998); *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*,

498 U.S. 505, 509, 111 S.Ct. 905, 909, 112 L.Ed.2d 1112 (1991) (*citing Cherokee Nation v. Georgia,*5 Pet. 1, 17, 8 L.Ed. 25 (1831) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978). The doctrine of tribal sovereign immunity applies to federally recognized Indian tribes, federally chartered tribal corporations and other tribal organizations, as well as all tribal officials and employees and individuals and entities acting as tribal agents, whether or not they are engaged in governmental or commercial activity and irrespective of whether the conduct in question occurs on or off of reservation land. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* 523 US 751 (1998); *Sanderlin v. Seminole Tribe of Florida,* 243 F.3d 1282 (11th Cir. 2001). It is likewise clear from federal law that no congressional legislation exists which abrogates tribal sovereign immunity in connection with any claim that is arguably related to this matter. Had Congress intended to abrogate tribal sovereign immunity relative to the types of claims asserted by Plaintiff, it would have been required to say so in clear and unmistakable terms. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978).

When an Indian tribe opts to organize as a federal corporation pursuant to 25 U.S.C. §477(a so-called Section 17 corporation), it is governed by and operates in a manner consistent with its Charter. The Congressional intent in providing for the corporate entity as contrasted with the governmental tribal entity was to allow for Indian tribes to do commercial business through a separate "arm" of the tribe[1] by providing it with a Charter that clearly identifies its powers to do business, but without necessarily waiving its sovereign immunity. *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917 (C.A.6 (Tenn.), 2009). In addition, courts have refused to distinguish whether the Tribe is engaged in a commercial enterprise or governmental function and whether the activity is on or off the reservation. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 761 (1998); *Maryland*

[1] As cited in the main brief, Tribal ordinance C-01-95 provides umbrella coverage for the Tribe's subordinate economic units, and voids any inconsistency with its mandate pertaining to a lack of tribal sovereign immunity derived from the Corporate Charter or otherwise. Cf. Art. VI, Section 1 of the Charter.

Casualty Company v. Citizens National Bank of West Hollywood, 361 F. 2d 517, 520-521 (5th Cir. 1966).

In *Memphis Biofuels,* the Court met head on the issue raised by this Plaintiff, *sub judice*, namely, "Whether incorporating under Section 17 automatically waives tribal sovereign immunity." Id. p. 920. *Memphis Biofuels* acknowledged that 25 U.S.C. §477"was silent" regarding the issue of tribal sovereign immunity, but the Court nevertheless reaffirmed the time honored rule relating to the application of waiver to Indian tribes, namely that an abrogation of tribal sovereign immunity must be clear, may not be implied (citing 498 U. S. 505 and *Santa Clara Pueblo (*supra)), and "...statutes are to be liberally construed in favor of Indians or [tribes] with ambiguous provisions being interpreted to their benefit." (citing *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S. Ct. 2399, 85 L.Ed.2d 753 (1985)). Id. pp. 920-921. Accord, *American Vantage Companies v. Table Mountain Rancheria,* 292 F.3d 1091 (9th Cir. 2002). *American Vantage Companies,* cited by *Memphis Biofuels,* held that the election of an Indian tribe to create a tribal corporation does not automatically waive its tribal sovereign immunity. Rather the issue is one to be decided by the corporate charter or by contract. The Court emphasized that the circumstances under which a waiver occurs will apply equally to both to the tribal corporation as well as to the tribe itself. *American Vantage Companies* at p.1099. *See also Parker Drilling Co. v. Metlakatla Indian Cmty.*, 451 F.Supp. 1127, 1137 (D.Alaska 1978).

The sole federal case cited by Plaintiff in support of its position (criticized by *Memphis Biofuels)* is, *GNS, Inc. v. Winnebago Tribe of Nebraska,* 866 F. Supp. 1185 (N.D. Iowa 1994).[2] *GNS, Inc.*, however is distinguishable. It dealt with a tribe's (as contrasted with the Section 17 corporation) tribal sovereign immunity in the context of whether a contract to arbitrate a claim was tantamount to a waiver of tribal sovereign immunity. In deciding the issue (in favor of the

[2] The Plaintiff also cites to an Alaskan state case, *Hydaburg Cooperative Ass'n v. Hydaburg Fisheries,* 826 P.2d 751, (Alaska 1992) in which the Court equivocally rejected tribal sovereign immunity to a Section 17 Corporation, but alternatively held if, for the sake of argument, the entity was entitled to tribal sovereign immunity, it was waived.

tribe) the Court, *in dictum*, stated "...[an Indian tribe] may incorporate as a federal corporation governed by the terms of its charter pursuant to 25 U.S.C. § 477 (a so-called Section 17 Corporation." (emphasis added) Id. 1188. The Court apparently recognized that since tribal corporations are governed by their Charter, it is that document which determines whether or not sovereign immunity is waived as opposed to an unqualified divestiture. This latter conclusion is firmly supported by *GNS, Inc.'s* citation to *Maryland Cas. Co. v. Citizens Nat'l Bank*, 361 F.2d 517 (5th Cir.), *cert. denied,* 385 U.S. 918, 87 S. Ct. 227, 17 L.Ed.2d 143 (1966) Id. p. 1189. [3]

Maryland Casualty determined that this same defendant, Seminole Tribe of Florida, Inc., could not be sued in a garnishment proceeding based upon the doctrine of tribal sovereign immunity. In *Maryland Casualty*, the defendant, a Section 17 Corporation, was operating under the pre-amended version of the corporate Charter – coincidentally the identical document that is cited in, and attached to, the Plaintiff's Complaint. As did the Plaintiff here initially, the plaintiff in *Maryland Casualty*, alleged that the "sue and be sued" clause operated as a waiver of tribal sovereign immunity. The *Maryland Casualty* Court recognized that, although the Charter provision under certain circumstances could operate as a limited waiver, tribal sovereign immunity is an attribute of a Section 17corporation.[4] *Accord*, *Native American Distributing v. Seneca-Cayuga Tobacco, Co.*, 491 F.Supp.2d 1056 (N.D.Okla., 2007).[5]

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[3] Ironically, the Plaintiff rejects the reasoning of *Maryland Casualty*. Response pp. 13-14.

[4] The Court ultimately ruled out the imposition of a garnishment judgment against the tribal corporation because the property sought to be garnished was not especially "assigned or pledged" by the tribal corporation as required by the exception carved into that Charter provision. We respectfully remind the Court that the "sue and be sued" clause has now been abrogated in the Defendant's Charter by way of amendment; a fact which has been conceded by the Plaintiff. Further, the Plaintiff has expressly abandoned its reliance on either the initial or amended Charter as the basis for a claim of waiver of tribal sovereign immunity, Response pp.3-4.

[5] The Plaintiff tries to rationalize that the Section 17 Corporation is not entitled to the same protection as the tribe since the latter is a governing body and the former commercial. Response p.13. This issue was addressed in *Maryland Casualty*, "The distinction to be made is not between commercial and governmental functions in order to determine the availability of the defense of tribal sovereign immunity." p. 1382. The constitutional organization of a tribe is capable of operating a commercial venture, just like a tribal corporation. *Native American Distributing* at p. 1067.

Clearly, not only does *GNS*'s reliance on *Maryland Casualty* clarify the former's observations regarding a Tribal Corporation's right to assert tribal sovereign immunity, but it also casts doubt on the Plaintiff's contention that the issue is one of first impression in this Circuit. We note in this regard that the 1966 *Maryland Casualty* decision derives from the 5th Circuit Court of Appeal prior to September 30, 1981, and by rule its decision is binding in this Circuit. *Bonner v. Pritchard,* 661 F.2d 1206, 1207 (11th Cir.1981) (*en banc*).

Finally, the Plaintiff's citation to the Florida Supreme Court case *Houghtaling v.Seminole Tribe of Florida,* 611 So.2d 1235 (Fla. 1993) does not aid the Plaintiff. The Court held, *inter alia* that the Seminole Tribe was immune from suit unless it could be shown that the gaming facility where the claim arose was owned by a section 17 corporate entity whose corporate charter allows it to be sued. (Emphasis added). Id. at 1239.

CONCLUSION

Defendant, Seminole Tribe of Florida, Inc., respectfully requests that the Plaintiff's Complaint be dismissed, with prejudice, for the foregoing reasons cited herein and in its initial brief.

Attorneys for Defendant

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UNITED STATES DISTRICT COURT
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of September, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified below in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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