IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 10-24524-CV-Seitz/O'Sullivan

JOHN V. FURRY, as Personal Representative of the Estate and Survivors of TATIANA H. FURRY,

Plaintiff,

vs.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA; MICCOSUKEE TRIBE OF INDIANS OF FLORIDA d/b/a MICCOSUKEE RESORT & GAMING; MICCOSUKEE CORPORATION; MICCOSUKEE INDIAN BINGO; MICCOSUKEE INDIAN BINGO & GAMING; MICCOSUKEE RESORT & GAMING; MICCOSUKEE ENTERPRISES; and the MICCOSUKEE POLICE DEPARTMENT,

Defendants.
_____/

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Plaintiff, John V. Furry, by and through undersigned counsel, files his Response in Opposition to Defendants' Motion to Dismiss Plaintiff's Complaint (hereinafter, the "Motion").

I. Introduction

The Defendants, Miccosukee Tribe and its entities, do not have sovereign immunity for acts or omissions pertaining to their own liquor sale or distribution. Because the subject automobile accident and Tatiana Furry's death were caused by, among other things, Defendants' violations of Federal and Florida liquor laws, tribal immunity does not apply. Even if sovereignty did pertain under these facts, such

immunity was abrogated by Congress. Or, alternatively, Defendants waived the sovereign immunity defense when they voluntarily applied for and obtained Florida state liquor licenses for on-premises consumption at their facilities.

There is concurrent state and federal court jurisdiction over alcoholic beverages in Indian country, including Defendants' gaming facilities. This jurisdiction is justified by the state's unquestionable interests in liquor traffic within its borders particularly where, as here, the liquor transactions in Indian country impacted the state outside of Indian country. As a result, this case is properly before the Court and the Motion to Dismiss should be denied.

II. Facts of this Case

Tatiana Furry, Plaintiff's daughter, was tragically killed at approximately 4:00 a.m. on January 21, 2009 after Defendants furnished her with substantial amounts of alcohol at their casino. Complaint at ¶¶ 9, 23, 24. Tatiana's post-mortem blood alcohol content was measured at .32, which is **four** (4) times the Florida legal limit of .08. *Id.* at ¶ 32. The accident that took Tatiana's life occurred on Florida land, just beyond the Miccosukee Resort & Gaming facility. Specifically, this accident occurred on SR-90, U.S. 41 (Tamiami Trail) approximately five (5) miles west of Krome Avenue in Miami-Dade County. *Id.* at ¶¶ 28, 34.

It is undisputed that the Miccosukee's agreed to be bound by Florida law, as well as Federal law, when they applied for and purchased their paid for their Florida liquor licenses. Plaintiff has filed a copy of the Defendants' liquor licenses for 2009 and 2010, signature affidavit from the Miccosukee Tribe, and Florida Application for Alcoholic Beverage License, in the Court file. *See* [D.E. 24], Exhibits A and B.

Defendants applied for and obtained Florida liquor licenses prior to the events that form the basis of this lawsuit. Defendants did not; however, attempt in any respect to limit enforcement of Florida or Federal law with respect to those licenses. Nor did Defendants request the application of sovereign immunity as a condition precedent to obtaining these liquor licenses. *See* [D.E. 24].

Plaintiff has asserted claims based on 18 U.S.C. § 1161; Fla. Stat. § 768.125; and 28 U.S.C. § 2201 as well as negligence and punitive damages. Subject matter jurisdiction is entirely proper in this Court pursuant to 28 U.S.C. §1331; 28 U.S.C. §2201 et seq.; 18 U.S.C. §1161; 25 U.S.C. § 2701; 28 U.S.C. §1367; and other statutes as mentioned herein.

III. Response to Defendants' "Factual" Allegations

Before filing this case, Plaintiff filed a lawsuit (arising from the same facts) in the Circuit Court for the Eleventh Judicial Circuit in and for Miami-Dade County. However, when Plaintiff attempted to serve their State Court case on Defendants at their reservation in Miami-Dade County, Defendants' attorney informed Plaintiff's process server that the Miccosukees do not accept service of process from the State. Defendants' counsel later indicated that the Miccosukee Tribe is not subject to state service of process. Despite Plaintiff's requests, Defendants have not provided any legal authority for their position.[1]

Moreover, Plaintiff's counsel has not found any precedent to support Defendants' refusal to comply with Florida state service of process. Instead, Plaintiff has located Florida and Federal laws, which presumably encompass service of process, that clearly bind these Defendants. *See generally*, Fla. Stat. § 285.16(2), "the civil and criminal laws

[1] Plaintiff filed a detailed *Ex Parte* Motion to Appoint and Direct United States Marshal to Serve Summonses and Complaints, which describes the considerable difficulties Plaintiff has encountered thus far with service in this case. *See* [D.E. 4].

of Florida shall obtain on all Indian reservations in this state and shall be enforced in the same manner as elsewhere throughout the state." (Emphasis added). Additionally, 25 U.S.C. § 1747 indicates:

> (b)(1) Notwithstanding the conveyance of any lands by the State of Florida to the United States in trust for the Miccosukee Tribe of Indians of Florida, the assumption of jurisdiction in favor of the State of Florida contained in **section 285.16, Florida Statutes … shall continue in full force and effect on such lands …**
>
> (2) **The laws of Florida relating to alcoholic beverages …shall have the same force and effect within said transferred lands as they have elsewhere within the State and the State shall have jurisdiction over offenses committed by** or against **Indians under said laws to the same extent the State has jurisdiction over said offenses committed elsewhere within the State**.

(Emphasis supplied).

Lastly, Plaintiff did not file this lawsuit "in an attempt to undermine Tribal sovereign immunity" and vehemently objects to Defendants' improper characterization of John Furry's legitimate claims. Instead, as will be made clear herein, although Florida courts have not yet addressed this issue, sovereign immunity does not apply here, or, alternatively, Defendants waived that defense in this case.

IV. Motion to Dismiss – Standard of Review

In reviewing a motion to dismiss, all well-pled facts in the complaint and all reasonable inferences drawn from those facts must be taken as true. *Jackson v. Okaloosa County, Fla.*, 21 F.3d 1531, 1534 (11th Cir. 1994). Rule 8(a)(2) of the Federal Rules of Civil Procedure requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." Specific facts are generally not necessary; the statement need only "give the defendant fair notice of what the … claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007) (quoting

Conley v. Gibson, 335 U.S. 41, 47 (1957)). Finally, when a complaint is challenged under Rule 12(b)(6), a court will presume that all well-pleaded allegations are true and view the pleadings in the light most favorable to the plaintiff. *American United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1066 (11th Cir. 2007).

In order to invoke a federal district court's jurisdiction under 28 U.S.C. § 1331, it is not essential to base one's claim on a federal statute or a provision of the Constitution. *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985). It is; however, necessary to assert a claim "arising under" federal law. *Id.*

Defendants request that the Court dismiss this case with prejudice; however, undoubtedly there is no basis to do so. In order to convert the motion to dismiss to a motion for summary judgment, all parties must be given an opportunity to present all the material that is pertinent to the motion. *See* Fed. R. Civ. P. 12(d). Plaintiff has not been given such an opportunity and, most importantly, Plaintiff also has not yet been allowed to conduct any discovery.[2] On a motion to dismiss, a court may consider the documents referenced in the complaint, without converting the motion to one for summary judgment. *See Makro Capital of America, Inc. v. UBS AG*, 436 F. Supp. 2d 1342, 1350 (S.D. Fla. 2006) (noting that documents filed with this or other courts certainly constitute "public records.).[3]

---

[2] Plaintiff filed a Motion to Conduct Discovery Regarding Tribal Sovereign Immunity Defense [D.E. 20]. Plaintiff requests again as part of this Response, that he be allowed to conduct discovery related to the sovereign immunity defense, which will likely yield critical information that could assist Plaintiff in responding to this Motion.

[3] In an abundance of caution only, since **Plaintiff obviously does not wish to convert the subject Motion into a Motion for Summary Judgment**, Plaintiff has filed a copy of the Defendants' liquor licenses for 2009 and 2010, signature affidavit from the Miccosukee Tribe, and Florida Application for Alcoholic Beverage License, in the Court file. *See* [D.E. 24]. Defendants' liquor license is also specifically referenced in ¶¶ 19, 40 of the Complaint.

V. Memorandum of Law

A. Sovereign Immunity Does Not Apply in this Case

Before addressing why sovereign immunity does not apply here, Plaintiffs agree that there are many, many cases supporting the *general* application of sovereign immunity in certain circumstances. However, while not central to this response, it should be pointed out that numerous other decisions explain why Indian nations are not "true" sovereigns. *See e.g. Cherokee Nation v. State of Georgia,* 30 U.S. (5 Pet.) 1, 8 L. Ed. 25 (1831), which has been called the "seminal case on 'sovereignty' from which all other relevant cases flow.'"[4] *Granite Valley Hotel Ltd. Partnership v. Jackpot Junction Bingo and Casino*, 559 N.W.2d 135, 164 -165 (Minn. App. 1997). Decided in 1831, *Cherokee Nation*, provides in part:

> Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy until that right shall be extinguished by a voluntary cession to our government, yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a **ward to his guardian.**

30 U.S. (5 Pet.) at 16 (emphasis added).

Cherokee Nation sets the record straight. *Granite Valley Hotel Ltd. Partnership*, 559 N.W.2d at 164 -165. The case sets out unequivocally that Indian tribes are not true sovereign states or nations. *Id.* Instead, *Cherokee Nation* labeled the tribes as "domestic dependent nations." *Id.* (citing *Cherokee Nation*, 30 U.S. at 17).

[4] *Cherokee Nation* is also cited favorably in one of the Miccosukee Defendants' primary cases, *Holguin v. Ysleta Del Sur Pueblo*, 954 S.W.2d 843, 846 (Tex. App. El Paso 1997).

This case does not concern the general notion of tribal "sovereignty;" thus, virtually all of Defendants' cited cases are irrelevant. Rather, Plaintiff respectfully asks this Honorable Court to focus on another issue - - whether a tribal sovereign immunity defense can be used to dismiss this case, notwithstanding the far reaching impact of Defendants' violations of state and federal law by over-serving alcohol to Tatiana Furry on the night she died. Defendants' actions in this regard clearly impact Florida residents, including Plaintiff's decedent, who utilize roadways proximate to Defendants' reservation.

Pursuant to our Nation's Highest Court, sovereign immunity is irrelevant because Defendants violated Florida and Federal law by over-serving Tatiana liquor, which caused or contributed to her death. *Rice v. Rehner*, 463 U.S. 713 (1983) ("There is **no** tradition of tribal sovereign immunity or inherent self-government in favor of liquor regulation by Indians."). (Emphasis added). Because there is no tradition of sovereign immunity regarding liquor regulation and because Defendants' liquor transactions have substantial impact beyond the reservation, Courts accord little, if any, weight to an asserted tribal sovereignty interest. *See e.g., Squaxin Island Tribe v. State of Wash.*, 781 F.2d 715, 720 (9th Cir. 1986) (holding that the State had authority to regulate tribal liquor sales to non-tribal members without infringing tribal sovereignty).

One of the cases Defendants' primarily rely upon, *Holguin v. Ysleta Del Sur Pueblo*, actually agrees, holding that "a dram shop law falls within the waiver of tribal immunity **created by Congress and the federal courts** for the regulation of alcohol by the states." 954 S.W.2d at 854. (Emphasis supplied).[5]

[5] *Holguin* is first cited by Defendants in their Motion, at page 12.

Although *Rice v. Rehner* did not involve a personal injury action brought under a dram shop act, the Oklahoma Supreme Court decision in *Bittle v. Bahe*, 192 P.2d 810 (Okla. 2008) confirms *Rice*'s applicability to the subject case. Shatona Bittle filed a personal injury claim to recover damages following an accident with Valentine Bahe, who crossed the center line of Oklohama's Highway 9 and collided head-on into Plaintiff's vehicle. *Id.* at 812-13. Bittle alleged that Bahe was intoxicated and had been served excessive alcoholic beverages at the Shawnee Tribe's Thunderbird Entertainment Center. *Id.* at 813. She further alleged that the Tribe and casino have dram shop liability for her personal injury damages. *Id.*

Bittle v. Bahe's meticulous twenty-three (23) page majority opinion carefully analyzes *Rice v. Rehner*, 18 U.S.C. § 1161, and other relevant authority. Relying on *Rice v. Rehner*, the *Bittle* Court "recognized the state and federal concurrent jurisdiction over alcoholic beverages in Indian country and no tradition of tribal sovereign immunity with respect to alcoholic beverages …" *Bittle*, 192 P.2d at 818 (citing *Rice v. Rehner*, 463 U.S. at 723-725). *Rice v. Rehner* held:

> This historical tradition of **concurrent state and federal jurisdiction** over the use and distribution of alcoholic beverages in Indian country is justified by the relevant state interests involved …. **The State has an unquestionable interest in the liquor traffic that occurs within its borders …. "A state's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate State intervention.**"
>
> **There can be no doubt that Congress has divested the Indians of any inherent power to regulate in this area.** In the area of liquor regulation, we find no "congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development." **With respect to the regulation of liquor transactions … Indians cannot be said to "possess the usual accouterments of tribal self-government."**

> The court below erred in thinking that there was some single notion of tribal sovereignty that served to direct any preemption analysis involving Indians. **Because we find that there is no tradition of sovereign immunity that favors the Indians in this respect, and because we must consider that the activity in which Rehner seeks to engage potentially has a substantial impact beyond the reservation, we may accord little if any weight to any asserted interest in tribal sovereignty** …"

463 U.S. at 723-725. (Emphasis added).

The Ninth Circuit agrees with this well reasoned decision. *See Fort Belknap Indian Reservation v. Mazurek*, 43 F.3d 428, 435 (9th Cir. 1994) ("The *Rice* Court broadly found that Indian Tribes have no sovereignty interest and no self-government interest in liquor regulation."). *Mazurek* also supports Plaintiff's claim in this case that a federal question exists. *See id.* at 432 (noting, "[t]he state undoubtedly has an interest in enforcing its liquor laws, **but only if federal law gives it jurisdiction to do so** for violations that occur on an Indian reservation."). (Emphasis added).

"It is clear then that Congress viewed § 1161 as abolishing federal prohibition, and as legalizing Indian liquor transactions **as long as those transactions conformed both with tribal ordinance and state law**."[6] *Rice v. Rehner*, 463 U.S. at 727. (Emphasis added). The United States Congress obviously recognized the importance of applying Florida's liquor laws on Miccosukee land when it passed 25 U.S.C. § 1747(2), (noting that Florida liquor laws shall have the same force and effect and also confirming jurisdiction over such actions). Noticeably absent from this federal statute is any reference to alleged Miccosukee "immunity" vis-à-vis Florida and/or Federal liquor laws. What's more, although the civil and criminal laws of Florida shall obtain on all Indian reservations, including Miccosukee land, again, Florida's Congress did not mention

[6] Another important issue Plaintiffs would request an opportunity to conduct discovery on in this case is whether Defendants have any tribal ordinances and, if so, if Defendants complied with their own laws.

sovereign immunity with respect to Fla. Stat. § 285.16(2). Accordingly, the defense of sovereign immunity is inapposite regarding liquor regulation and specifically in this case.

In enacting 18 U.S.C. § 1161, Congress intended to recognize that Native Americans are not "weak and defenseless," and are capable of making personal decisions about alcohol consumption without special assistance from the Federal Government. *Bittle*, 192 P.3d at 819. Application of the state licensing scheme does not "impair a right granted or reserved by federal law." *Id.* On the contrary, such application of state law is "specifically authorized by … Congress … and [does] not interfere with federal policies concerning the reservations." *Id.*; *see also* Fla. Stat. § 285.16(2) and 25 U.S.C. § 1747.

If, as the Miccosukee Defendants improperly suggest, they were able to trade in heavily-regulated alcoholic beverages, free from all but self-imposed regulation under the doctrine of sovereign immunity, the Miccosukees would be treated as "super citizens."[7] There is; however, no authority providing that Defendants are entitled to such special treatment.

Finally, *Rice v. Rehner* held that:

> "There is no tradition of tribal sovereign immunity or inherent self-government in favor of liquor regulation by Indians. **Although in Indian matters, Congress usually acts 'upon the assumption that the States have no power to regulate the affairs of Indians on a reservation,' … that assumption is unwarranted in the narrow context of liquor regulation.** In addition to the congressional divestment of tribal self-government in this area, the States have also been permitted, and even required, to impose liquor regulations. The tradition of concurrent state and federal jurisdiction over the use and distribution of alcoholic beverages in Indian country is justified by the relevant state interests."

463 U.S. at 713. (Emphasis added).

[7] And, Congress did not intend for this to happen. *Rice v. Rehner*, 463 U.S. at 734.

Based on the foregoing authority, although *generally* the Defendants are entitled to assert sovereign immunity as a defense, there is no legitimate immunity claim here. And, although Defendants argue that this doctrine is "long-standing" and "distinctive,"[8] it is more important that the "tribes have **long ago been divested** of any inherent self-government over liquor regulation." *Van Kruiningen v. Plan B, LLC*, 485 F. Supp. 2d 92, 97-98 (D. Conn. 2007) (citing *Rice v. Rehner*, at 726) (emphasis supplied); *see also Matter of 1,750 Cases of Liquor,* 633 N.Y.S. 2d 702 (Sup. Ct. Oneida County 1995) (holding that because there is no tradition of sovereign immunity that favors the Indians in distributing alcohol, and because the activity may have a substantial impact beyond the reservation, the tribe was subjected to New York State liquor laws).

Defendants' violations of Federal and State liquor laws, particularly 18 U.S.C. 1161, which requires compliance with Florida liquor laws, caused substantial impact to Tatiana Furry and, sadly, now her family, too. The impact of Defendants' conduct occurred outside the Miccosukee reservation, on Miami-Dade County's roadways, after Tatiana was over-served at Defendants' casino. The U.S. Supreme Court, other courts, and Congress obviously contemplated accidents such as this one when they decided that sovereign immunity would not apply in this area, while also recognizing that Florida and Federal liquor laws do indeed control on Miccosukee property.

In light of *Rice v. Rehner*'s clear and undisputed finding that Congress divested the Indians of any power to regulate alcohol transactions, Defendants' efforts to distinguish *Rice* and 18 U.S.C. § 1161 fail. Simply put, it is irrelevant that § 1161 does not mention tribal immunity since *Rice* and its progeny totally eliminate sovereign immunity from this analysis.

[8] Motion at page 4.

With regards to 18 U.S.C. § 1161, a federal question does exist in this case because, for among other reasons, the "state undoubtedly has an interest in enforcing its liquor laws, but only if federal law gives it jurisdiction to do so for violations that occur on an Indian reservation." *Fort Belknap Indian Community v. Mazurek*, 43 F.3d 428, 432 (9th Cir. 1994).

B. Sovereign Immunity Does Not Apply to Casinos or Commercial Activities

Sovereign immunity does not pertain to the operation of tribal casinos or commercial activities of Indians, such as were involved in this case; thus, again immunity is not a viable defense.

In *San Manuel Indian Bingo and Casino v. NLRB*, 475 F.3d 1306, 1315 (D.C. Cir. 2007), the D.C. Circuit Court of Appeals held that the "operation of a casino is not a traditional attribute of self-government," but was "virtually identical to scores of purely commercial casinos across the country." The *NLRB* case also held that most of the casino's employees and customers were not tribal members and lived off the reservation. For those reasons, the Tribe's sovereignty was not called into question or impaired because the tribe was not simply engaged in internal governance of its territory and members.

In this case, it is too early to know what, if any, of the above factors apply to the Miccosukee Defendants. Plaintiff requests the ability to conduct reasonable discovery to determine whether the Tribe's activities were "primarily commercial," which would likely result in the total impact on the alleged tribal sovereignty in this case being "modest." *See NLRB*, 475 F.3d at 1315. Alternatively, because Plaintiff has alleged

Tatiana Furry was engaged in activities at Defendants' casino prior to her death, sovereign immunity does not apply.

Another case has noted,

> The issue decided today touches upon the rights and remedies of casino patrons and the accountability of casino operators. Indian casinos are vigorously marketed to non-Indian patrons in this and surrounding states. In an August of 2007 publication, the Cherokee Nation reported that in 1992 it had one gaming facility with 86 employees; and by 2006, those number skyrocketed to nine gaming facilities with more than two thousand employees and at least ten gaming-facility-related golf clubs, hotels and convenience stores with more than one thousand employees. **These are the numbers for only one of the more than thirty federally recognized Indian tribes in Oklahoma.**[9] The importance of this issue cannot be underestimated.

Cossey v. Cherokee Nation Enterprises, LLC, 212 P.3d 447, 466 (Okla. 2009); *see also Cano v. Cocopah Casino*, No.: CV-06-2120-PHX-JAT, 2007 WL 2164555, at *3 (D. Ariz. July 25, 2007) (the actual operations at the Casino do not appear to touch on any exclusive rights of self-governance and the Cocopah Casino appears to function simply as a business entity that happens to be run by a tribe or its members; therefore, the ADEA might apply in this case).

There is also a general reluctance to extend immunity to tribal business enterprises. *See, e.g., Parker Drilling Co. v. Metlakatla Indian Cmty.*, 451 F. Supp. 1127, 1137 (D. Alaska 1978) ("Only with the potential for imposition of tort liability are Indian corporations truly equal, regardless of the desirability of certain aspects of that status."); *Namekagon Dev. Co. v. Bois Forte Reservation Hous. Auth.*, 395 F. Supp. 23, 29 (D. Minn. 1974) ("It is repugnant to the American theory of sovereignty that an instrumentality of the sovereign shall have all the rights and advantages of a trading

[9] This is yet another reason why the *Bittle v. Bahe* should control here since Oklahoma has a significant amount of Indian litigation.

corporation, and the ability to sue, and yet be itself immune from suit ...." (quoting *Fed. Sugar Ref. Co. v. U.S. Sugar Equalization Bd.*, 268 F. 575, 587 (S.D.N.Y. 1920))). Accordingly, sovereign immunity does not apply to the events which occurred in this case at Defendants' business enterprises and casino.

C. There is a Private Right of Action for Plaintiff's Claims

While Florida has not addressed the issue of whether a private claimant may bring a dram shop action against an Indian tribe, at least two cases from other states hold in this exact situation that tribal immunity does not bar a dram shop case arising from the sale of alcohol at an Indian casino. *See Bittle v. Bahe*, 192 P.3d 810 (Okla. 2008) and *Schram v. Ohar*, 1998 WL 811393 (Conn. Super. Nov. 16, 1998). *Schram* held:

> This court holds that the statutes and cases reviewed above call for the right of a private citizen to bring an action against the tribe itself in the area of liquor distribution, as in this case. The court finds that tribal immunity is not a bar to a cause of action arising from the sale of alcohol at the casino. Accordingly, the court still denies the motion to dismiss the case against the tribe itself.

Schram, 1998 WL 811393, at *3.

Defendant cites four cases where courts in three other states (plus Connecticut where *Schram* already correctly held that a dram shop action is proper under these circumstances) did not allow a private dram shop action to proceed. However, *Bittle v. Bahe* is the only State Supreme Court opinion addressing this issue; thus, it should control. What's more, of the four cases Defendants cite, only one was decided after *Bittle*.

Defendants' *Holguin v. Ysleta Del Sur Pueblo* case indicates that tribal sovereignty was not waived for private suits under the Texas Dram Shop Act under the state's police power. 954 S.W.2d at 843, 854 (Tex. App. El Paso 1997) ("private

plaintiffs do not and cannot exercise the actual police power of the state."). However, as Plaintiff explained in detail above, the *Holguin* court is mistaken because there is no tradition of sovereign immunity regarding liquor transactions.

Holguin relied on *Eiger v. Garrity*, 246 U.S. 97 (1918). Yet, without explanation, *Holguin* agrees that *Eiger* did not "address whether a specific suit, brought by a private plaintiff, fell under the auspices of the state's police power to regulate alcohol." *Holguin*, 954 S.W.2d at 854. Defendants' reliance on *Holguin* is misplaced. The Indian Tribe in *Bittle v. Bahe* made a similar argument, which the Court accurately disposed of, stating, "[n]either the filing of a suit in court alleging dram shop liability nor the maintaining of the suit involves police power." *Bittle v. Bahe*, 192 P.3d at 823, 823 n. 15 (citing *Patterson v. State of Kentucky*, 97 U.S. 501 (1878); *Oklahoma Alcoholic Bev. Control Bd. V. Heublein Wines, Internat.*, 566 P.2d 1158, 1162, citing *California v. LaRue*, 409 U.S. 109 (1972)).

If Defendants are correct that enforcing Florida's dram shop act involved the police power, there would be no basis for private plaintiffs to bring any dram shop claims. However, Florida does allow private dram shop actions under these same facts. The Florida Supreme Court held that "[w]ith regard to a civil action against a vendor for the sale of alcoholic beverages to a habitual drunkard, the plaintiff need only show that the vendor 'knowingly,' rather than 'willfully and unlawfully' sold alcoholic beverages to a person who was a habitual drunkard." *Ellis v. N.G.N. of Tampa, Inc.*, 586 So.2d 1042 (Fla. 1991) (emphasis added). Plaintiff John Furry alleged all of these required facts and in so doing satisfied his minimal pleading requirements. *See* ¶¶ 24-25 of Plaintiff's Complaint.

Another of Defendants' cases, *Filer v. Tohono O'Odham Nation Gaming Enterprise, Inc.*, 129 P.3d 78, 84 (Ct. App. Ariz. 2006), is unreliable, noting that its conclusion is arguably "divorced from the realities of the modern world, in which on – reservation Indian gaming and alcohol sales have become commonplace." *Filer* also relies on *Rice v. Rehner*, which decided that alcohol's impact beyond the reservation is highly important. *Id.* Inconsistent with Defendants' *Holguin* case, *Filer* found that a private dram shop action "arguably does not constitute an exercise of the state's police power at all but, rather, merely a means of enforcing the statute." *Id.* at 82. (Emphasis supplied).

Filer relies in part on *Kiowa Tribe v. Mfg. Techs, Inc.*, 523 U.S. 751 (1998). *Kiowa* is itself distinguishable[10] because the subject lawsuit does not involve a contract nor does it affect the Tribe's membership or the Tribe's right to govern its members. This case also does not interfere with the Miccosukee's internal affairs or tribal government. Instead, this is a tort action, with nearly identical facts to those asserted in *Bittle v. Bahe*, where it is alleged that the "Tribe allowed excessive amounts of alcoholic beverages to be served to an intoxicated patron at the Tribe's casino and did nothing to prevent the intoxicated patron from leaving the casino, driving on the public roads and highways while intoxicated, and causing injury." *Bittle*, 192 P.3d at 821; *see also* Plaintiff's Complaint, ¶¶ 24 – 33.

Another reason supporting Plaintiff's Complaint, which *Bittle* also recognizes, is the strong federal interest in ensuring that all citizens have access to courts. *Id.* (citing *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877

[10] Notably, *Filer* acknowledges that *Kiowa* doubted "the wisdom of perpetuating the [tribal immunity] doctrine." *Filer*, 129 P.3d at 85 (citing 523 U.S. at 758).

(1986). *Three Affiliated Tribes* established that an Indian tribe may file suit in state court without the necessity of a broad waiver of immunity from suit in state court and stated, "[t]he federal interest in ensuring that all citizens have access to the courts is obviously a weighty one." 476 U.S. at 888. If for no other reason, John Furry's claim should be allowed to continue[11] - - particularly in light of the Miccosukee Defendants' gamesmanship in prohibiting Plaintiff from serving his state court action thus far - - because there has to be a forum for these claims.[12]

Defendants argue that there is no clear and unequivocal expression of tribal sovereign immunity in 18 U.S.C. § 1161. However, an effective waiver does not require specific or magic words. *Bittle*, 192 P.3d at 826. In its licensing application, the Miccosukee Defendants agreed to be bound by the laws of Florida. *See* D.E. 24 (Exhibits A and B). That is enough to constitute a waiver of any alleged immunity pursuant to *Bittle* and other authority.

Pursuant to both federal and state law, the Miccosukees must abide by Florida's civil and criminal laws involving alcohol. *See* Fla. Stat. § 285.16(2); 25 U.S.C. § 1747. Furthermore, under 18 U.S.C. § 1161, Defendants must comply with Florida laws regarding serving liquor by the drink at their casino in Indian country. By agreeing to be bound by the Florida and federal law, and their enforcement mechanisms, the

[11] *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682, 685 (10th Cir. 1980) held that the district court had jurisdiction over action brought by hunting lodge corporation against Indian Tribes and noted, "[t]here has to be a forum where the dispute can be settled."

[12] The Defendants' Tribal Court, even assuming it would have jurisdiction over these claims, which Plaintiff does not admit, would not be an appropriate or fair forum. While researching this case, Plaintiff's counsel was informed by a reliable source at the State Attorney's Office that the Miccosukee Tribal Court is ***allegedly*** conducted in the native language and no interpreter is provided. The Tribal Court can not be considered a fair forum for John Furry inasmuch as the Tribe and its entities are the Defendants. Last but certainly not least, ***apparently*** there is a presumption whereby a Miccosukee can not lie to another Miccosukee, which obviously would stack the case against Plaintiff since testimony by any Miccosukee would ***apparently*** be accepted as true. In such a situation, there is at least a "reasonable question of the appearance of impartiality of the Tribal Court." *See Vance v. Boyd Mississippi, Inc.*, 923 F. Supp. 905, 913 (S.D. Miss. 1996). Thus, the only potential fora are the Southern District or Florida State Court.

Miccosukee Defendants waived any objection to the subject matter jurisdiction of federal and state courts in Florida since the criminal and civil penalties are enforceable only by and in those courts for purposes of this case.

Even Defendants' cited authority agrees. *See e.g., Filer*, 129 p.3d at 84. ("Although the tribe may have impliedly waived its immunity by applying for and obtaining an Arizona liquor license …"). Fla. Stat. § 285.16(2) notes that "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.**" By obtaining the Florida liquor license, Defendants agreed to the jurisdiction of Florida and Federal courts and, if it is even necessary to this analysis (Plaintiff submits it is not), they also waived their sovereign immunity by signing Exhibit A. Therefore, the Miccosukees are subject to the same enforcement mechanisms available to plaintiffs throughout this state for violations of dram shop law, which would include being party to this case as Defendants.

Defendants' next dram shop case, *Foxworthy v. Puyallup Tribe of Indians Assoc.*, is distinguishable again because it is at odds with *Bittle*, which was decided a year later and by a higher court. Also, *Foxworthy* mistakenly relies on *Kiowa*, which is inapposite, but also recognizes that the sovereign immunity doctrine should not be perpetuated:

> There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973); *Potawatomi, supra*; *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996). **In this economic context, immunity can harm those who are unaware that they are dealing with a tribe,**

> **who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims.**

Kiowa, 523 U.S. at 758. (Emphasis added).

The logical analysis of *Bittle v. Bahe* should again control. *Bittle* recognized that:

> Oklahoma's alcoholic beverage laws protect the public, as in this case, the public traveling along the busy highways. Many tribal casinos are located on or near our busy highways. The nexus between the serving of liquor by the drink at the casinos and the traveling public compels us to reject the Tribe's claim of legal irresponsibility for serving liquor to obviously intoxicated casino patrons. Like any other state-licensed commercial vendor operating a bar and serving alcoholic beverages for consumption on the premises, the Tribe is subject to the criminal and civil jurisdiction of the state courts and may be hailed into state court to answer allegations that it furnished alcoholic beverages to a noticeably intoxicated customer.

192 P.3d at 827-28. For the same reasons, the Miccosukee Defendants should be treated just like other Florida-licensed vendors of alcohol, who can obviously be haled into our Courts.

Lastly, *Vanstaen-Holland PPA v. Lavigne*, 2009 WL 765517 (Conn. Super. 2009), is another decision from Connecticut, which is inconsistent with Plaintiff's cited case, *Schram v. Ohar*, 1998 WL 811393 (Conn. Super. 1998). *Lavigne* found that the defendants' sovereign immunity defense was not congressionally abrogated (*see* 2009 WL at *4); however, in light of the inconsistency with *Schram*, *Lavigne* carries little weight. Because *Lavigne*, as the only post-*Bittle* decision cited by Defendants is at best unclear in its meaning, *Bittle v. Bahe*, which correctly decided that dram shop actions like the present case should not be dismissed, is the proper authority.

To summarize then, pursuant to *Bittle* and other authority, this Court has jurisdiction over Plaintiff's claims. Congress divested the Indians, including Defendants, of any power to regulate in the area of liquor transactions. Alternatively, if sovereign

immunity can be said to apply to this fact pattern, pursuant to the existing Federal and Florida statutes, Congress abrogated sovereign immunity in this context. *See* Fla. Stat. § 285.16(2); 25 U.S.C. § 1747, among others, which make no mention of the doctrine. Furthermore, pursuant to 18 U.S.C. § 1161, dram shop suits are authorized for private individuals like John V. Furry, who is merely attempting to assert his statutory and common law rights. Pursuant to § 1161, Defendants must comply with Florida law, which creates a federal cause of action. Defendants' failure to follow Florida and Federal law compels jurisdiction in this Court under this statute and other authority. Finally, in the alternative, if sovereign immunity applies here, Defendants also waived that defense by voluntarily applying and paying for Florida liquor licenses, thereby effectively waiving any entitlement to that defense.

VI. 25 U.S.C. § 2701

Defendants argue pursuant to *Fla. v. Seminole Tribe of Fla.*, 181 F.3d 1237 (11th Cir. 1999) that Congress abrogated tribal immunity only in the narrow circumstance in which a tribe conducts class III gaming in violation of an existing Tribal-state compact.[13] However, the *Seminole* case has been distinguished. *See State v. Oneida Indian Nation of New York*, 78 F. Supp. 2d 49, 54 -55 (N.D.N.Y. 1999), which in addition to finding *Seminole's* reading of the Indian Gaming Regulatory Act (IGRA) too narrow, also pointed out that numerous courts have found the IGRA abrogated Indian sovereignty. *See e.g. Maxam v. Lower Sioux Indian Community of Minn.*, 829 F. Supp. 277, 281 (D. Minn. 1993) (concluding that when an Indian tribe engages in gaming governed by the

[13] Plaintiff should be entitled to conduct discovery regarding the existence and, if any, the terms of Defendants' Compacts with Florida, Defendants' Constitution, and other applicable documents, which likely will shed further light on Defendants' alleged defense of sovereign immunity. Such discovery would also likely create certain factual issues, which undoubtedly Plaintiff is entitled to learn.

IGRA, it waives its immunity to suit for the narrow purpose of determining compliance). This is just one of many cases supporting the notion that sovereign immunity is waived for purposes of determining whether a Tribe has complied with the law.

Again, discovery in this case is necessary. For example, Plaintiff does not presently know if Defendants have a Compact, or other agreement with the state of Florida, or perhaps someone or another entity, which may be relevant to this dispute. There may be an agreement which addresses Defendants' service and sale of liquor at their casino. Plaintiff would also request an opportunity to conduct discovery about the information Defendants have about Tatiana Furry's actual gaming activities on the night she was killed, which could assist the Court in determining whether 25 U.S.C. § 2701 ("IGRA") applies. Plaintiff's counsel has learned that Defendants' maintain(ed) videotaped surveillance of Tatiana Furry's activities on the night she was killed, which may likely contain information relevant. Accordingly, the Motion to Dismiss is not ripe for adjudication and should be denied or, alternatively, stayed while discovery occurs.

Plaintiff has alleged that Defendants must operate their casino in compliance with both federal and state laws. If Plaintiff is able to discover violations of the state and federal liquor laws, these may potentially impact his IGRA claim as well. However, without the necessary discovery to illuminate these issues, it is difficult if not impossible for the Court to fairly determine whether and to what extent Defendants violated the law.

VII. Plaintiff's Complaint Should Not Be Dismissed as Subject Matter Jurisdiction is Proper

Plaintiff does not allege diversity of citizenship under 28 U.S.C. 1332. Plaintiff instead presents numerous federal questions in the Complaint, which establish jurisdiction in this Court under 28 U.S.C. § 1331.

In light of Plaintiff's careful analysis of federal law, Florida law and at least 2 cases allowing a private action involving state dram shop laws, Plaintiff clearly refutes Defendants' unfounded argument that his claims are "speculative." At best, for Defendants, there is a split of authority regarding whether sovereign immunity has been abrogated or waived in the area of dram shop litigation. At worst, for Defendants, Defendants' four inferior court opinions are trumped by the better reasoned approaches of *Bittle* and *Schram v. Ohar*. Clearly it is not only improper, but also prejudicial to Plaintiff, for the Court to dismiss any of Plaintiff's claims in light of the split authority and need for fact discovery on multiple issues.

Moreover, it would constitute error in light of Plaintiff's compliance with Rule 8(a)(2). Specific facts are generally not necessary; the statement need only "give the defendant fair notice of what the … claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964. Plaintiff's twenty-six (26), eight (8) Count Complaint provides more than sufficient detail to satisfy his minimal pleading burden. Accordingly, the Motion to Dismiss should be denied. Or, alternatively, if the Court is inclined to dismiss any portion of the Complaint, such dismissal should be <u>without prejudice</u>, thereby allowing Plaintiff to amend his complaint.

Additionally, Plaintiff has alleged that pursuant to 28 U.S.C. §1331 and 28 U.S.C. §2201 et seq., that this Court has subject matter jurisdiction because federal law has divested the Defendants of their power to compel Plaintiff, a non-Indian, to submit to the civil jurisdiction of the Miccosukee Indian Tribal Court; accordingly, it is federal law upon which Plaintiff relies as a basis for the asserted right of freedom from Tribal Court interference. In *National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471

U.S. 845 (1985), the Supreme Court held, "'claims founded upon federal common law as well as those of a statutory origin'" may give rise to federal question jurisdiction." *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians,* 471 U.S. 845, 850 (1985) (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972)). Furthermore, in order to invoke a federal district court's jurisdiction under § 1331, it is not essential to base one's claim on a federal statute or a provision of the Constitution. *Crow Tribe of Indians,* 471 U.S. at 850. It is; however, necessary to assert a claim "arising under" federal law. Plaintiff complies with this standard also. Specifically, numerous times in his Complaint, John Furry has referred to the fact that these claims are brought "pursuant to federal law." *See e.g.* Complaint, ¶ 20. Accordingly, Plaintiff has satisfied his pleading requirement.

It is firmly established that a district court's subject-matter jurisdiction is not defeated by the absence of a valid (as opposed to arguable) cause of action. *Steel Co. v. Citizens for a Better* Environment, 523 U.S. 83, 83 (U.S.1998). Subject-matter jurisdiction exists if the right to recover will be sustained under one reading of the Constitution and laws and defeated under another, unless the claim clearly appears to be immaterial, wholly insubstantial and frivolous, or otherwise so devoid of merit as not to involve a federal controversy. *Id.*

Plaintiff satisfies this minimum standard, with significant room to spare. Accordingly, the Motion to Dismiss should be denied.

VIII. Access to Courts

Presumably, since it refused to accept service of Plaintiff's state court action, and also herein requests that the Court dismiss this case with prejudice, Defendants would also argue that sovereign immunity bars suit in Plaintiff's state case as well.

The way in which Defendants phrased this issue is very telling since Defendants refused to accept service of process in the state court. Thus, if Defendants are correct, Plaintiff is effectively left without a forum. However, as Plaintiff noted above in Section V(C) it is inappropriate for Plaintiff to have no Court for this case. For that reason, if for no other, the Motion should be denied.

IX. Waiver

Defendants conceded and therefore waived any arguments regarding Plaintiff's asserted independent basis for federal subject matter jurisdiction under Count VIII – Declaratory Relief under 28 U.S.C. § 2201. Accordingly, with respect to this count, which by itself supports jurisdiction over this entire case by the Southern District of Florida, the Court can and should properly deny the Motion to Dismiss.

X. Conclusion

The defense of sovereign immunity does not apply in this case. If it does, Congress abrogated it. Or, alternatively, Defendants waived sovereign immunity when they applied and paid for, and obtained, Florida liquor licenses. Under any or all of these three points, sovereign immunity does not bar this suit. Pursuant to the cases interpreting 18 U.S.C. § 1161, this statute authorizes suit by a private person (John Furry) for the wrongful death of another (here, his deceased daughter, Tatiana Furry). Plaintiff's claim under 25 U.S.C. § 2701 is not barred by Tribal sovereign immunity. Finally, the Motion to Dismiss should be denied because Plaintiff's Complaint properly alleges subject matter jurisdiction and each of Plaintiff's claims state a cause of action.

WHEREFORE, for the following reasons, Plaintiff respectfully requests that the Court enter an Order denying the Motion to Dismiss. And/or, as applicable, Plaintiff requests the following relief:

a. Plaintiff requests an opportunity to conduct discovery prior to the Court making any decision on this Motion.

b. Plaintiff would also request a hearing on this matter and to the extent discovery is allowed, requests an evidentiary hearing.

c. If the Court is inclined to grant any portion of the Motion, Plaintiff requests that any dismissal be without prejudice such that Plaintiff is afforded a reasonable opportunity to amend the Complaint.

d. If the Court is inclined to grant any portion of the Motion with prejudice, Plaintiff requests that the Court grant an Order allowing the United States Marshal to serve Plaintiff's State Court Complaint, or alternatively, allow Plaintiff to again brief this issue for the Court's consideration. Plaintiff would also note for the Court that with respect to several of Plaintiff's claims Defendant has not raised any arguments; accordingly, those claims should stand.

e. Plaintiff requests an award of any and all other relief to which Plaintiff is entitled.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the clerk of Court by using the CM/ECF system this 28th day of February, 2011, which will send a notice of electronic filing to **Bernardo Roman, III, Esq.**, Tribal Attorney, Miccosukee Tribe of Indians of Florida, Legal Department, P.O. Box 440021, Tamiami Station, Miami, Florida 33144.

Respectfully submitted,

LAW OFFICES OF SEAN M. CLEARY, P.A.
19 West Flagler St., Suite 618
Miami, Florida 33130
Telephone: (305) 416-9805
Facsimile: (305) 416-9807
Email: sean@clearypa.com

By: _____/s/_____
SEAN M. CLEARY
Florida Bar No. 146341