IN THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF FLORIDA

CASE NUMBER: 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.
_____/

MICCOSUKEE TRIBE'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND INCORPORATED MEMORANDUM OF LAW

COMES NOW, Defendants, the Miccosukee Tribe of Indians of Florida (hereinafter, "the MICCOSUKEE TRIBE"), Miccosukee Resort and Gaming, Miccosukee Corporation, Miccosukee Indian Bingo, Miccosukee Indian Bingo and Gaming, Miccosukee Resort and Gaming and Miccosukee Enterprises and Miccosukee Police Department (hereinafter, "MICCOSUKEE ENTERPRISES and AGENCIES") by and through their undersigned counsel, and pursuant to

Fed. R. Civ. P. 12(b)(1) and (6), hereby moves this Court to DISMISS the Plaintiff's Complaint, and in support thereof asserts that 1) the District Court lacks subject matter jurisdiction because this action is barred by Tribal sovereign immunity, 2) the District Court lacks subject matter jurisdiction because there is no diversity or federal question jurisdiction, and 3) the Plaintiff's Complaint fails to state a claim upon which relief may be granted.

FACTUAL ALLEGATIONS

On November 15, 2010, the Plaintiff filed an action in the Circuit Court for the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, which arises out of the same facts stated in this Complaint. The action in state court is presently pending.

On December 17, 2010, the Plaintiff filed with this Court the present Complaint alleging violations of Florida State statutes. The Plaintiff has invoked the jurisdiction of this Court under 28 U.S.C. § 1331, 28 U.S.C. § 2201, 18 U.S.C. § 1161, 25 U.S.C. § 2701 and supplemental jurisdiction under 28 U.S.C. § 1367. Complaint at ¶¶ 2, 6-8. The Plaintiff has filed this Complaint in federal court in an attempt to undermine Tribal sovereign immunity.

In his Complaint, the Plaintiff, as the Personal Representative of the Estate, alleges that on January 21, 2009, Tatiana H. Furry (hereinafter, "Ms. Furry") was involved in a fatal vehicle accident on SR-90, U.S. 41, Miami-Dade County, Florida, while "in an obviously intoxicated condition." Complaint at ¶¶

26-28. The Plaintiff alleges that Ms. Furry "had left Miccosukee Resort & Gaming in an obviously intoxicated condition." Complaint at ¶ 26.

MEMORANDUM OF LAW

The District Court lacks subject matter jurisdiction over the Plaintiff's suit because the suit is barred by Tribal sovereign immunity. Furthermore, the Plaintiff's Complaint fails to state a claim upon which relief may be granted. Consequently, the Plaintiff's Complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) and (6).

A. THE SOVEREIGN IMMUNITY OF THE MICCOSUKEE TRIBE, ITS ENTERPRISES, AGENCIES AND AGENTS BARS SUIT IN FEDERAL COURT

The Court does not have subject matter jurisdiction over the Plaintiff's lawsuit because the MICCOSUKEE TRIBE, its enterprises, agencies, agents, entities, and departments possess sovereign immunity from suit. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1979); *Kiowa Tribe of Okla. v. Mfg. Techs. Inc.*, 523 U.S. 751, 754 (1998); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 63 F.3d 1030, 1038 (11th Cir. 1995); *Fla. Paraplegic Ass'n v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126 (11th Cir. 1999); *Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282 (11th Cir. 2001); *Guevara v. Miccosukee Tribe of Indians of Florida*, No. 09 Civ. 20537 (S.D. Fla. November 13, 2009); *Oneida Indian Nation of N.Y. v. Madison County and Oneida County*, 605 F.3d 149, 156 (2d Cir. 2010) *vacated* and *remanded* in light of factual change in circumstances, *Madison County v. Oneida Indian Nation of N.Y.*, 2011 WL

55360, at *1 (January 10, 2011). Courts have long recognized that Indian tribes possess the common-law immunity from suit traditionally enjoyed by sovereign powers. *Santa Clara Pueblo*, 436 U.S. at 58.

"The doctrine of Tribal immunity from suit has a distinctive history in the Supreme Court." *Oneida*, 605 F.3d at 158 (holding that the "Oneida Indian Nation is immune from suit under the long-standing doctrine of Tribal sovereign immunity."). The Court has upheld this doctrine repeatedly. *Id.* (citing *Turner v. United States*, 248 U.S. 354 (1919) and *United States v. U.S. Fidelity & Guar. Co.*, 309 U.S. 506 (1940). The doctrine of Tribal sovereign immunity has not undergone considerable evolution and the Court looks only to Congress for any change in this area of the law. *Oneida*, 605 F.3d at 159. Congress has yet to make any changes or abrogate this long-standing doctrine. *Id.* at 158.

The Court must first consider the claim of sovereign immunity because of its jurisdictional nature. *State of Florida v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1241 (11th Cir. 1999) ("Because of its jurisdictional nature, we must consider the Tribe's claim of sovereign immunity before reaching the issue of failure to state a claim") (citing *cf. Santa Clara Pueblo*, 436 U.S. at 58-62 (deciding first that suit against [the] tribe was barred by sovereign immunity, and ... that plaintiffs had no implied right of action against tribal official)); *Taylor v. Ala. Intertribal Council Title IV J.T.P.A.*, 261 F.3d 1032, 1034 (11th Cir. 2001) (Court will sua sponte conduct inquiry into whether a party enjoys

Indian sovereign immunity, as this consideration determines whether a court has jurisdiction to hear an action).

As a federally-recognized and federally-protected Indian tribe, exercising powers of self-governance under a tribal Constitution approved by the Secretary of the Interior, 25 U.S.C. § 476, the MICCOSUKEE TRIBE, its enterprises, agencies, agents, entities and departments are not subject to suit in federal court because the MICCOSUKEE TRIBE has not waived its immunity nor has Congress abrogated it. A tribe "is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Sanderlin*, 243 F.3d at 1285, (citing *Kiowa Tribe of Okla.*, 523 U.S. at 754); *see also Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) ("Suits against Indian tribes are [thus] barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation."); *Seminole Tribe* 181 F.3d at 1241 ("A suit against an Indian tribe is barred unless the tribe clearly waived its immunity or Congress expressly abrogated that immunity by authorizing the suit."); *Tamiami Partners, Ltd.*, 63 F.3d at 1038.

1. Congress has not Abrogated the MICCOSUKEE TRIBE's Sovereign Immunity.

Congress has not abrogated the MICCOSUKEE TRIBE's sovereign immunity. There are two well-established principles of statutory construction with regard to Indian tribes: that Congress may abrogate an Indian tribe's sovereign immunity only by expressly using statutory language that makes its

intention unmistakably clear; and that ambiguities in federal laws implicating Indian rights must be resolved in the Indians' favor. *Seminole Tribe*, 181 F.3d at 1241 (citing *Fla. Paraplegic Ass'n*, 166 F.3d at 1131).

> "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). A suit against an Indian tribe is therefore barred unless the tribe clearly waived its immunity or Congress expressly abrogated that immunity by authorizing the suit. *See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991); *Fla. Paraplegic Ass'n v. Miccosukee Tribe of Indians*, 166 F.3d 1126 (11th Cir. 1999). We have previously held that "Congress abrogates tribal immunity only where the definitive language of the statute itself states an intent either to abolish Indian tribes' common law immunity or to subject tribes to suit under the act." *Fla. Paraplegic Ass'n*, 166 F.3d at 1131.

Seminole Tribe, 181 F.3d at 1241-42. Waivers of sovereign immunity cannot be implied on the basis of a tribe's actions but must be unequivocally expressed. *Id.* at 1243. In *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1194 (10th Cir. 2002), the court stated that rules of statutory construction generally "provide for a broad construction when the issue is whether Indian rights are reserved or established, and for a narrow construction when the Indian Rights are to be abrogated or limited." *Id.* (citing F. Cohen, *Handbook of Federal Indian Law* at 225). Doubtful or ambiguous expressions in statutes are to be construed as leaving tribal sovereignty undisturbed. *Id.* at 1194. Furthermore, sovereign immunity does not give way to federal sovereignty even if no other forum is available for the resolution of claims. *Seminole Tribe*, 181 F.3d at 1243. In other

words, "mere silence regarding Indian tribes is insufficient to establish an abrogation of traditional sovereign authority." *NLRB v. Pueblo of San Juan*, 280 F.3d 1278 (10th Cir. 2000).

> Indian tribes have sovereign immunity from lawsuits unless Congress has abrogated it in the statute creating the right of action that is asserted against the tribe. To be effective the expression of congressional intent must be a clarion call of clarity. Ambiguity is the enemy of abrogation...

Freemanville Water System, Inc. v. Poarch Bank of Creek Indians, 563 F.3d 1205 (11th Cir. 2009) ("When Congress intends to abrogate tribal sovereign immunity, it must do so expressly, with clear and unequivocal language.").

Moreover, although Congress "has occasionally authorized limited classes of suits against Indian tribes and 'has always been at liberty to dispense with tribal immunity or to limit it,' it nevertheless has consistently reiterated its approval of the immunity doctrine.'" *Sanderlin*, 243 F.3d at 1285 (citing *Okla. Tax Comm'n*, 498 U.S. at 510). "Moreover, 'statutes are to be construed literally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" *Id.* (citing *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985); *See also Fla. Paraplegic*, 166 F.3d at 1130 ("We should not assume lightly that Congress intended to restrict Indian sovereignty through a piece of legislation."); *Seminole Tribe*, 181 F.3d at 1242 (Congress may abrogate a sovereign's immunity only by using statutory language that makes its intention

unmistakably clear, and ambiguities in federal laws implicating Indian rights must be resolved in the Indians' favor.").

The Plaintiff's Complaint must be dismissed under these well established principles of sovereign immunity. The exercise of jurisdiction in excess of a court's rightful jurisdictional limits is illegitimate and as a result jurisdictional issues are properly decided as soon as they are raised. *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 838 (D.C. Cir. 1984). Indeed, it has been stated that a court lacking jurisdiction has "no power to do anything but to strike the case from the docket." *The Mayor v. Cooper*, 73 U.S. 247, 250-51 (1867); *See also*, *Lion Bonding & Sur. Co. v. Karatz*, 262 U.S. 640, 642 (1923). Consequently, the MICCOSUKEE TRIBE requests that the Court dismiss the Complaint.

2. The MICCOSUKEE TRIBE has not Waived its Sovereign Immunity.

The MICCOSUKEE TRIBE, including its agencies, entities and enterprises has not waived its sovereign immunity. A waiver or abrogation of tribal sovereign immunity "cannot be implied but must be unequivocally expressed." *See, e.g. Santa Clara Pueblo*, 436 U.S. at 58-59 (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976); *United States v. King*, 395 U.S. 1, 4 (1969)). The court in *Fla. v. Seminole Tribe of Fla.*, 181 F.3d 1237 (11th Cir. 1999), confirmed that a waiver of immunity by a tribe would and could be implied on the basis of a tribe's actions but must be unequivocally expressed. *Id.* at 1242 (stating that the tribe's election to engage in gaming subject to

regulation under IGRA did not waive the tribe's immunity). There is no allegation in the Plaintiff's Complaint that the MICCOSUKEE TRIBE has unequivocally expressed a waiver of its immunity. Nor can such allegation be made because the MICCOSUKEE TRIBE has not waived its immunity or consented to suit in federal or state court. Consequently, the Complaint must be dismissed.

3. The Statutes Asserted in the Plaintiff's Complaint do not Abrogate Tribal Sovereign Immunity

The Plaintiff has not shown any express provision in 18 U.S.C. § 1161 or 25 U.S.C. § 2701, the statutes upon which the Plaintiff relies, that clearly show that Congress unequivocally intended to abrogate tribal sovereign immunity under the facts alleged in this Complaint. In the absence of such an unequivocal expression of legislative intent to abrogate, the MICCOSUKEE TRIBE is protected by sovereign immunity in this case. *See Sanderlin*, 243 F.3d at 1291 ("Congress abrogates tribal immunity only where the definitive language of the statute itself states an intent either to abolish Indian Tribes' common law immunity or to subject tribes to suit under the act"); *see also Tamiami Partners*, 63 F.3d at 1038 n.30; *Basset v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357 (2d Cir. 2000).

a) The Plaintiff's claim under 18 U.S.C. § 1161 is barred by Tribal sovereign immunity because section 1161 does not authorized suit by a private individual for personal injury or wrongful death.

There is no clear and unequivocal expression of waiver of tribal sovereign immunity in 18 U.S.C. § 1161. The language of the statute has no expression, clear or otherwise, that would show Congress' intent to waive tribal sovereign immunity. Section 1161 states:

> The provisions of sections 1154, 1156, 3113, 3488, and 3669, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.

18 U.S.C. § 1161. Section 1154, titled "Intoxicants dispensed in Indian Country," makes a crime and brings under the power of federal prosecution the selling, giving away, disposing of, exchanging or bartering of any alcoholic beverage to any Indian. Section 1156, titled "Intoxicants possessed unlawfully." prohibits and criminalizes the possession of intoxicating liquors in Indian Country. Section 3113, titled "Liquor violations in Indian Country," gives authority to certain federal officers to search and seize any liquor that is brought into Indian Country. Section 3448, titled "Intoxicating liquor in Indian Country as evidence of unlawful introduction," states that possession of liquor in Indian Country shall be prima facie evidence of unlawful introduction when possession is prohibited. Section 3669, titled "Conveyances carrying liquor," makes any means

of transportation used to introduce liquor into Indian Country subject to seizure, libel and forfeiture whether it is used by the owner or not. In fact, despite Defendant's assertion that section 1161 reflects Congress' intent to abrogate Tribal immunity, this section's clear language states that introducing, possessing, or selling liquor in Indian Country is no longer a criminal offense under sections 1154, 1156, 3113, 3488, and 3669.

In addition, the statutory framework within which section 1161 was enacted affords no credence to the Plaintiff's assertion that section 1161 was meant to waive or waives tribal sovereign immunity in favor of a private plaintiff. Section 1161 is found in Title 18 which is titled "Crimes and criminal procedure," of part I titled "Crimes," and is within a chapter titled "Indians." The United States Supreme Court has explained the legislative history of section 1161: "as originally introduced, the bill was only intended to terminate federal discrimination against the Indians of Arizona" and "to eliminate federal prohibition because it was discriminatory and had a detrimental effect on the Indians." *Rice v. Rehner*, 463 U.S. 713, 726-27 (1983). The Court explained further:

> The legislative history indicates both that Congress intended to remove federal prohibition on the sale and use of alcohol imposed on Indians in 1832, and that Congress intended that state laws would apply of their own force to govern tribal liquor transactions as long as the tribe itself approved these transactions by enacting an ordinance.

Id. Finally, the Court concluded that "by enacting section 1161 Congress intended to delegate a portion of its authority to the tribes as well as to the States, so as to fill the void that would be created by the absence of the discriminatory federal prohibition." *Id.* at 734. In other words, the Court held that section 1161 gave concurrent power to the tribes and the States to regulate (i.e. license) liquor transactions. *Id.* at 733-34. Therefore, the Plaintiff's argument section 1161 shows a clear and unambiguous intent by Congress of abrogating Tribal immunity for personal injury suits is contrary to statutory construction and legislative history as explained by the Supreme Court in *Rice*. In *Rice*, a trader and store owner was seeking declaratory relief and to be exempted from the California liquor license requirements. *Id.* at 715-16. Because the Tribe was not a party to the case, the issue of sovereign immunity was not explored by the Court. The Court found that California could assert regulatory authority over the issuance and administration of licenses and as a result require a federally licensed Indian trader, to get a state license if he wanted to sell alcohol within the Indian reservation. *See Rice v. Rehner*, 463 U.S. 713, 726-27 (1983). Moreover, there is no mention of tribal immunity, express or otherwise, in section 1161. Therefore, Congress did not abrogate the Tribe's sovereign immunity from a personal injury suit when it enacted section 1161.

In *Holguin v. Ysleta Del Sur Pueblo*, 954 S.W.2d 843, 854 (Tex. App. El Paso 1997), the court found that tribal sovereign immunity protected the tribe from private suit for personal injuries resulting from non compliance with the

state's dram shop act. This case involved a patron that came into the tribe's casino, was sold alcohol "past the point at which she became obviously intoxicated", left the casino, lost control of her vehicle and collided head-on with another car by the border of the reservation. *Id.* at 845. The court explained that section 1161 only afforded **the state** the right to enforce its laws regarding the use and distribution of alcohol. *Id.* [Emphasis added]. However, the state's police power to require licenses and revoke them, which Congress delegated to the states and tribes through enactment of section 1161, did not waive tribal sovereign immunity because private plaintiffs "do not and cannot exercise the actual police power of the state". *Id.* In fact, the court found that even though a state could enforce a dram shop act against a Tribe by revoking the Tribe's license and permit, a private party could not enforce the police power of the state because a "private cause of action created by the state's Dram Shop Act does not constitute [state] enforcement of an alcohol related law" that would be actionable against an Indian tribe. *Id.*

Similarly, the court in *Filer v. Tohono O'Odham Nation Gaming Enter.*, 129 P.3d 78, 84 (Ariz. Ct. App. 2006) found that sovereign immunity was not waived by section 1161 for a private dram shop action. The facts of this case are also similar to the case at bar. A patron came into the Gaming Enterprise, was sold "excessive quantities of alcoholic beverages left the casino and was involved in a car collision where he was injured and his wife was deceased." *Id.* at 80. In response to the tribe's motion to dismiss on the grounds of sovereign immunity,

the court found that section 1161 did not even mention tribal immunity, much less waive it for private dram shop action. *Id.* at 83. The court found support for its holding in *Rice, Eiger v. Garrity*, 246 U.S. 97 (1918) and *Holguin*. It refused to entertain plaintiff's argument that *Rice* interpreted section 1161 as waiving sovereign immunity. The court stated:

> The tribe was not a party to the case, and its sovereign immunity was not at issue. Moreover, California was not asserting state court jurisdiction over the tribe but, rather, merely sought regulatory authority over the issuance and administration of liquor licenses. And the Court merely held that California could require a federally licensed Indian trader, who operated a store on the reservation, to obtain a state liquor license in order to sell alcohol for off-premises consumption. The Court in *Rice* certainly did not hold that California, let alone a private citizen, could sue the tribe in state court, despite a claim of sovereign immunity, if the action had some connection to the state's regulation of alcohol. That issue simply was not raised, addressed, or decided in that case.

Id. at 84. According to this court, *Rice* simply held that "the states could regulate the use and distribution of alcoholic beverages in Indian Country by requiring a state liquor license." *Id.* at 81. The court went on to find that as established by *Eiger* "a dram shop act fell under the state's broad power over the liquor traffic, and the right to pass legislation to prevent its evils." *Id.* at 82. This however, only referred to the state's right to enact the statute and to enforce it by revoking and suspending liquor licenses; it did not mean that it would be an exercise of the state's police power for a private individual to bring a suit against an Indian tribe for a violation of the statute. *Id.* The court further explained "that the state's power to regulate certain tribal activities" was different from its

"ability to bring a lawsuit against a tribe in state or federal court." *Id.* at 83. Moreover, the court stated that sovereign immunity may bar the state's ability to bring a lawsuit against a tribe in any court but it may not bar the state's power to regulate certain tribal activities. *Id.* Thus, a private plaintiff cannot achieve what the state cannot by claiming that it's exercising the state's police power.

Another case that has found that Congress did not abrogate Tribal sovereign immunity when it enacted section 1161 is *Foxworthy v. Puyallup Tribe of Indians Association*, 169 P.3d 53 (Wash. Ct. App. 2007). Once again a patron entered Tribal lands to go into the casino where he "consumed an unknown quantity of alcohol," drove his car out of the reservation and later got into a car accident injuring two people. *Id.* at 54. In *Foxworthy*, the plaintiff argued that Congress by enacting section 1161 implicitly waived the tribe's sovereign immunity. *Id.* at 54-55. As a response to this argument the court stated that "Congress has rarely, if ever, enacted a statute abrogating tribal sovereign immunity and Foxworthy concedes that Congress has not explicitly abrogated tribal immunity in the context of such private dram-shop-torts actions." *Id.* at 56. The court held that neither section 1161 nor *Rice* stood for the proposition that a tribe could be sued by a private individual for a violation of a dram shop act. *Id.* at 57. The court characterized *Rice*'s holding as a very

narrow "waiver of tribal sovereign immunity for state's regulations of alcohol licensing and distribution." *Id.*

Finally, in *Vanstaen-Holland PPA v. Lavigne*, 2009 WL 765517 (Conn. Super. February 26, 2009), a factually similar case, the court held that "the state's police power to regulate the sale and distribution of alcohol is not tantamount to an authorization by Congress to waive tribal sovereign immunity for dram shop actions or common law recklessness actions brought by private individuals." *Id.* at *4.

b) The Plaintiff's claim under 25 U.SC. § 2701 is barred by Tribal sovereign immunity because there is no congressional intent to abrogate it.

25 U.S.C. § 2701 does not abrogate the MICCOSUKEE TRIBE's sovereign immunity because it does not contain any evidence of unequivocal, clear and unambiguous expression of a waiver of tribal sovereign immunity. In *Seminole Tribe of Fla. v. State of Fla.*, 11 F.3d 1016 (11th Cir. 1994), the court explained that the Indian Gaming Regulatory Act (IGRA)'s primary purpose was:

> to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." § 2702(1). In order to accomplish this goal, Congress defined classes of Indian gaming, § 2703(6)-(8); established the National Indian Gaming Commission to monitor and regulate some forms of Indian gaming, §§ 2704-08; and provided a compacting procedure by which states might participate in the regulation of certain forms of Indian gaming, § 2710(d).

Id. at 1019. Moreover, in *Fla. v. Seminole Tribe of Fla.*, 181 F.3d 1237 (11th Cir. 1999), the court stated that it was clear that Congress, in enacting the IGRA,

abrogated tribal immunity only in the narrow circumstance in which a tribe conducts class III gaming in violation of an existing Tribal-state compact. Thus, IGRA does not abrogate tribal sovereign immunity in a private suit against a tribe for a violation of state law. *Santana v. Cherokee Casino*, 215 Fed. Appx. 763 (10th Cir. February 6, 2007) (holding that IGRA does not contain a private right of action in favor of an individual and as a result the court lacked jurisdiction over the state causes of action because no federal law afforded the court jurisdiction). The Complaint must be dismissed because Plaintiff failed to show that the MICCOSUKEE TRIBE's sovereign immunity was abrogated by Congress.

B. THE PLAINTIFF'S COMPLAINT MUST BE DISMISSED BECAUSE THE DISTRICT COURT LACKS SUBJECT MATTER JURISDICTION

The MICCOSUKEE TRIBE reasserts and reincorporates its arguments and legal authority set-forth above and requests this Court to dismiss the suit on the additional grounds that this Court lacks subject matter jurisdiction. This Court lacks subject matter jurisdiction because there is no diversity under 28 U.S.C. § 1332 or federal question jurisdiction under 28 U.S.C. § 1331. Both parties reside in the state of Florida and as such the necessary diversity is lacking. There is also no federal question jurisdiction under 28 U.S.C. § 1331 because as explained above the complaint fails to allege a violation of federal law. Neither 18 U.S.C § 1161 nor 25 U.S.C. § 2701 afford a private individual a cause of action against a tribe for a violation of state law.

C. THE PLAINTIFF'S COMPLAINT MUST BE DISMISSED BECAUSE IT FAILS TO STATE A CAUSE OF ACTION UNDER SECTION 1161.

The MICCOSUKEE TRIBE reasserts and reincorporates its arguments and legal authority set-forth above and requests this Court to dismiss the suit on the grounds of failure to state a claim. To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the factual allegations of the complaint must be enough to raise the right to relief above the speculative level. *Bell Atlantic Cor. v. Twombly*, 550 U.S. 544, 555 (2007); *see Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1295-96 (11th Cir. 2007). As explained above and contrary to the Plaintiff's allegation, section 1161 does not create a private cause of action in favor of individuals for a violation of state law. *See Holguin*, 954 S.W.2d at 845; *Filer*, 129 P.3d 78; *Foxworthy*, 169 P.3d at 57. Section 1161 allows states to exercise their police power against a sovereign to the extent of requiring Indian tribes to acquire a liquor license or permit. Section 1161 affords states the enforcement remedy of revoking an Indian tribe's liquor license. Therefore, the Plaintiff's contention that section 1161 provides him the right to sue the MICCOSUKEE TRIBE in federal court for a violation of a state statute is contrary to the Supreme Court's mandate in *Twombly*.

WHEREFORE, the MICCOSUKEE TRIBE, respectfully requests DISMISSAL of the Plaintiff's Complaint with prejudice.

CERTIFICATE OF SERVICE

I hereby certify that on January 31st, 2011, 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 or pro se parties identified on the attached Service List 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.

Respectfully Submitted,

s/Bernardo Roman III
Bernardo Roman III (Fl Bar No.: 2739)
E-mail: bromanlaw@bellsouth.net
Tribal Attorney
Miccosukee Tribe of Indians of Florida
Legal Department
P.O. 440021, Tamiami Station
Miami, FL 33144
Telephone: (305) 223-8380 ext. 2226
Facsimile: (305) 894-5212
Attorney for the Defendants

SERVICE LIST

Furry v. Miccosukee Tribe of Indians of Florida, et al.,
Case No.: 10-24524-CV-Seitz/O'Sullivan
United States District Court, Southern District of Florida

Sean Michael Cleary, Esq.
E-mail: sean@clearypa.com
Law Office of Sean M. Cleary, P.A.
19 West Flagler Street
Suite 618
Miami, Florida
Telephone: (305) 416-9805
Facsimile: (305) 416-9807
Attorney for the Plaintiff
John V. Furry
Sent via NEF by CM/ECF

CLOSED CIVIL CASE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 09-20537-CIV-GRAHAM/TORRES

DAVE GUEVARA,

Plaintiff,

v.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Defendants.
_____/

ORDER

THIS CAUSE came before the Court upon Defendant's Motion to Dismiss the Complaint [D.E. 11].

THE COURT has considered the Motion, the relevant portions of the record, and is otherwise fully advised in the premises.

I. BACKGROUND

Plaintiff Dave Guevara brings this action against the Miccosukee Tribe of Indians under 42 U.S.C. § 1981 [D.E. 1]. According to the Complaint, Plaintiff worked as a police officer in the Miccosukee Tribe of Indians of Florida, Miccosukee Police Department [D.E. 1]. Plaintiff alleges that during his tenure at the Miccosukee Police Department, he did not enjoy the same benefits, privileges, and terms and conditions of employment as white officers and/or non-African American officers [D.E. 1].

Before the Court is Defendant's Motion to Dismiss the Complaint [D.E. 11]. Specifically, Defendant argues that this

Court lacks subject matter jurisdiction because the action is barred by tribal sovereign immunity, and that Plaintiff fails to state a claim upon which relief may be granted.

II. DISCUSSION

"Indian Tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." Freemanville Water System, Inc. V. Poarch Band of Creek Indians, 563 F.3d 1205, 1207-08 (11th Cir. 2009). "Thus, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." Freemanville, 563 F.3d at 1208. "Tribal sovereign immunity, where it applies, bars actions against tribes regardless of the type of relief sought." Id. at 1208. "When Congress intends to abrogate tribal sovereign immunity, it must do so expressly, with clear and unequivocal language." Id. at 1208.

In Taylor v. Alabama Intertribal Council Title IV J.T.P.A., the Plaintiff brought a § 1981 employment discrimination claim against her employer, the Alabama Intertribal Council, and two board members of the Council. Taylor v. Alabama Intertribal Council Title IV J.T.P.A., 261 F.3d 1032 (11th Cir. 2001). On appeal, the Eleventh Circuit found that the lawsuit was barred by tribal sovereign immunity. Taylor, 261 F.3d at 1034. In determining whether § 1981 governed an Indian tribe, the Eleventh Circuit first inquired into Congressional intent. Taylor, 261 F.3d

at 1035. The court found that "Taylor's § 1981 claim, in substance, is a disparate treatment employment discrimination claim and, in its discussions of Title VII, Congress has explicitly indicated that it does not intend for Indian tribes to be subject to disparate treatment employment discrimination suits for Indian tribe-based employment." Taylor, 261 F.3d at 1035. Ultimately, the Eleventh Circuit concluded that "it would be wholly illogical to allow plaintiffs to circumvent the Title VII bar against race discrimination claims based on a tribe's Indian employment preference programs simply by allowing a plaintiff to style his claim as a § 1981 suit." Id. at 1035. Based on the foregoing, the court found that "permitting Taylor to bring a § 1981 claim against AIC for race discrimination would contradict congressional intent."

Like in Taylor, Plaintiff's claim is essentially a disparate treatment employment discrimination claim. Thus, based on the reasoning in Taylor, this Court finds that Plaintiff's action is barred by tribal sovereign immunity.

In his response to the motion to dismiss, Plaintiff argues that Defendant has waived its tribal sovereign immunity. "[W]aivers of tribal sovereign immunity cannot be implied on the basis of a tribe's actions, but must be unequivocally expressed." Sanderlin v. Seminole Tribe of Florida, 243 F.3d 1282, 1286 (11th Cir. 2001)(quoting State of Florida v. Seminole Tribe, 181 F.3d 1237, 1243(11th Cir. 1999)). In other words, Plaintiff must

demonstrate that Defendant "expressly and unmistakably waived its right to sovereign immunity from suit." Sanderlin, 243 F.3d at 1286. In support of his argument, Plaintiff provides the following language which allegedly appears in Defendant's "Law Enforcement Officer Bill of Rights":

> Every Law Enforcement Officer shall have the right to bring civil suit against any person, group of persons, or organization or corporation, for damages, either pecuniary or otherwise, suffered during the performance of the officer's official duties or for abridgment of the Officer's civil rights arising out of the Officer's performance of official duties.

[D.E. 15 at 11]. First of all, the alleged Law Enforcement Bill of Rights was not attached to Plaintiff's Complaint, so it should not be considered on a motion to dismiss. Furthermore, even assuming that such a document exists, the quoted language does not demonstrate that Defendant "expressly and unmistakably" waived its right to sovereign immunity from suit.

III. CONCLUSION

Accordingly, it is hereby

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss the Complaint [D.E. 11] is **GRANTED**. It is further

ORDERED AND ADJUDGED that this case is **CLOSED** and any pending motions are **DENIED as moot**.

DONE AND ORDERED in Chambers at Miami, Florida, this 13th day of November, 2009.

DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

cc: Counsel of Record

Not Reported in A.2d, 2009 WL 765517 (Conn.Super.), 47 Conn. L. Rptr. 306
(Cite as: 2009 WL 765517 (Conn.Super.))

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of New London.
Emily VANSTAEN-HOLLAND PPA, et al.
v.
Glenn R. LAVIGNE et al.

No. CV085007659.
Feb. 26, 2009.

West KeySummary**Indians 209 342**

209 Indians
209IX Gaming
209k342 k. Actions. Most Cited Cases

Claims brought under the Dram Shop Act by a minor child who sustained injuries after she was struck by a vehicle driven by an individual who was served alcohol at a Casino run by a tribal gaming authority were dismissed for lack of jurisdiction. The Indian Gaming Regulatory Act did not waive the tribal sovereign immunity. The gaming compact provided in relevant part: "Service of alcoholic beverages within any gaming facility shall be subject to the laws and regulations of the State applicable to sale or distribution of alcoholic beverages." However, an agreement to be subject to the state's regulations on the sale and distribution of alcohol did not constitute an unequivocal waiver of tribal sovereign immunity for all actions brought by private citizens related to alcohol use and consumption. C.G.S.A. § 30-102; 25 U.S.C.A. § 2701.

MARTIN, J.

FACTS

***1** On October 15, 2008, the plaintiffs, Susan Holland, ppa, Emily Vanstaen-Holland and Susan Holland, individually, filed a ten-count revised complaint against the defendants, Glenn R. LaVigne, Jane E. Nelson, Gary S. Crowder, Bruce Bozsum, Mitchell Etess, James Maloney and the Mohegan Tribal Gaming Authority (MGTA), seeking damages for personal injuries allegedly sustained by Vanstaen-Holland, the minor child, when she was struck by a motor vehicle operated by either LaVigne or Nelson on October 13, 2002 in Quaker Hill, Connecticut.[FN1] The plaintiffs' complaint alleges the following facts. Prior to the accident, LaVigne or Nelson was a patron of Sachem's Lounge, an establishment in the Mohegan Sun Casino Resorts in Uncasville, Connecticut, where he or she was recklessly served alcohol by the defendants. Crowder is the "duly licensed permittee" of Sachem's Lounge, Bozsum, Etess and the MGTA are the "duly licensed backers and/or owners" of Sachem's Lounge and Maloney is the "agent and/or employee of one or all of the defendants." Counts seven, eight, nine and ten of the plaintiffs' complaint are directed toward the defendants. Counts seven and eight seek recovery pursuant to the Dram Shop Act, General Statutes § 30-102, for the reckless service of alcohol to LaVigne or Nelson, respectively. Counts nine and ten seek recovery pursuant to common-law liability for the reckless service of alcohol to LaVigne or Nelson, respectively.

FN1. LaVigne and Nelson are not parties to this motion. Hereinafter, the term "the defendants" refers to Crowder, Bozsum, Etess, Maloney and the MGTA, collectively.

On September 24, 2008, the defendants filed a motion to dismiss counts seven, eight, nine and ten of the plaintiffs' complaint on the ground that the court lacked subject matter jurisdiction pursuant to the doctrine of tribal sovereign immunity. The defendants submitted a memorandum of law in support of the motion. The plaintiffs filed a memorandum of law in opposition on October 21, 2008. On October 30, 2008, the defendants filed a reply memorandum of law in further support of their motion. The matter was argued on short calendar on

November 3, 2008. Subsequent to the short calendar hearing, the plaintiffs filed a sur-reply on November 17, 2008. On November 24, 2008, the defendants filed a reply to the plaintiffs' sur-reply.

DISCUSSION

"A motion to dismiss ... properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court ... A motion to dismiss tests, *inter alia*, whether, on the face of the record, the court is without jurisdiction." (Internal quotation marks omitted.) *Beecher v. Mohegan Tribe of Indians of Connecticut*, 282 Conn. 130, 134, 918 A.2d 880 (2007). "Pursuant to the rules of practice, a motion to dismiss is the appropriate motion for raising a lack of subject matter jurisdiction." *St. George v. Gordon*, 264 Conn. 538, 545, 825 A.2d 90 (2003). "When a ... court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light ... In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." (Internal quotation marks omitted.) *Cogswell v. American Transit Ins. Co.*, 282 Conn. 505, 516, 923 A.2d 638 (2007).

***2** "[T]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss." (Internal quotation marks omitted.) *Beecher v. Mohegan Tribe of Indians of Connecticut*, 282 Conn. 130, 134, 918 A.2d 880 (2007). "[T]he plaintiff bears the burden of proving subject matter jurisdiction, whenever and however raised." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC v. New London*, 265 Conn. 423, 430 n. 12, 829 A.2d 801 (2003). "The burden rests with the party who seeks the exercise of jurisdiction in his favor ... clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." (Internal quotation marks omitted.) *Goodyear v. Discala*, 269 Conn. 507, 511, 849 A.2d 791 (2004).

The defendants argue that the court lacks subject matter jurisdiction over both the plaintiffs' statutory and common-law claims for reckless service of alcohol pursuant to the doctrine of tribal sovereign immunity. The defendants claim that the MGTA is immune as a federally recognized Indian tribal entity and that tribal sovereign immunity extends to the individual defendants in their capacity as tribal representatives. The plaintiffs counter that tribal sovereign immunity has been both congressionally abrogated and explicitly waived for their claims. The plaintiffs also claim that tribal sovereign immunity does not extend to the individual defendants. The plaintiffs further argue that the court should permit additional discovery before determining the motion to dismiss for the individual defendants.

"The Mohegan Tribe is a federally recognized Indian tribe." *Paszkowski v. Chapman*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV 01 0072786S (August 30, 2001, Arnold, J.). "Tribal sovereign immunity is governed by federal law ... Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers ... We begin with the premise that Indian tribes are domestic dependent nations which exercise inherent sovereign authority over their members and territories ... Tribal sovereign immunity is dependent upon neither the location nor the nature of the tribal activities ... [*Beecher v. Mohegan Tribe of Indians of Connecticut, supra*, 282 Conn. at 130, 134-35]." (Internal quotation marks omitted.) *Terry v. Mohegan Tribal Gaming Authority*, Superior Court, judicial district of New London at Norwich, Docket No. 4107163 (May 16, 2008, Peck, J.) (45 Conn. L. Rptr. 502, 503).

"[A]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity ... and the tribe itself has consented to suit in a specific

forum ... Absent a clear and unequivocal waiver by the tribe or congressional abrogation, the doctrine of sovereign immunity bars suits for damages against a tribe ... However, such waiver may not be implied, but must be expressed unequivocally." (Internal quotation marks omitted.) *Chayoon v. Sherlock*, 89 Conn.App. 821, 826, 877 A.2d 4 (2005).

***3** The plaintiffs argue that tribal sovereign immunity for both statutory and common-law actions for reckless service of alcohol is waived pursuant to the state's police power to regulate the reservation's alcohol sales. The defendants counter that the state's ability to govern the tribe's alcohol distribution does not constitute a waiver of tribal sovereign immunity to all alcohol-related actions brought by private individuals.

Our appellate courts have not yet addressed this issue and there exists a split of authority among other courts. The view promoted by the plaintiffs argues that Congress implicitly waived tribal sovereign immunity for alcohol-related claims in its passage of 18 U .S.C. § 1161.[FN2] In *Rice v. Rehner*, 463 U.S. 713, 103 S.Ct. 3291, 77 L.Ed.2d 961 (1983), the United States Supreme Court held that a tribal entity that sold alcohol for off-premises consumption must obtain a state liquor license pursuant to 18 U.S.C. § 1161. The court in *Schram v. Ohar*, Superior Court, judicial district of New London at Norwich, Docket No. 0114403 (November 16, 1998, Hurley, J.T.R.) (23 Conn. L. Rptr. 407), extended the holding in *Rice v. Rehner, supra*, 463 U.S. at 713, to conclude that the plaintiff's claims, which included actions pursuant to the Dram Shop Act and common-law recklessness, were not barred by tribal sovereign immunity pursuant to 18 U.S.C. § 1161 because such actions further the legitimate purpose of the state's liquor regulations. See also *Bittle v. Bahe*, 2008 OK 10, 192 P.3d 810 (2008) (finding 18 U.S.C. § 1161 constituted implicit waiver of tribal sovereign immunity for actions brought pursuant to Oklahoma's Dram Shop Act).

FN2. 18 U.S.C. § 1161 provides in relevant part: "The provisions of ... this title shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country ..."

Other courts, however, have refused to extend the waiver of tribal sovereign immunity to include additional alcohol-related claims brought by private citizens. In *Greenidge v. Volvo Car Finance, Inc.*, Superior Court, complex litigation docket of New London at Norwich, Docket No. X04 CV 96 0119475 (August 25, 2000, Koletsky, J.) (28 Conn. L. Rptr. 2, 3), the court dismissed a reckless service of alcohol claim, stating that, "[f]rom the fact that a *state* may *regulate* the use and distribution of alcohol on a reservation, the leap to the conclusion that a tribe's immunity does not apply when a private party brings a private cause of action against a tribe in any situation involving the use or consumption of alcohol on a reservation is a leap which this court is unwilling to take, particularly in view of the recent affirmation of the existence (if not the logical basis) of tribal immunity from suit. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998)." (Emphasis in original.) Further, the court acknowledged that it was "aware of the superior court decision *Schram v. Ohar*, [*supra*, at Docket No. CV 98 0114403], in which the court denied a motion to dismiss a cause of action at the casino, but respectfully disagree[d] with the conclusion reached therein." *Id.* See also *Van Etten v. Mashantucket Pequot Gaming Enterprise*, Superior Court, judicial district of New London, Docket No. KNL CV 04 4001587 (October 31, 2005, Jones, J.) (finding case law supported result reached in *Greenidge* in court's dismissal of plaintiff's alcohol-related negligence claims pursuant to tribal sovereign immunity).

***4** Most recently, in *Richards v. Champion*, Superior Court, judicial district of New London, Docket No. CV 07 5004614 (July 11, 2008, Abrams, J.), the plaintiffs sought recovery against the MGTA after they were struck by a motor vehicle operated by a driver who had allegedly been served alcohol at the Mohegan Sun Resorts Casino prior to the accident. After acknowledging a split in authority, the court aligned with *Greenidge v. Volvo Car Finance, Inc., supra,* 28 Conn. L. Rptr. at 2, in finding that, "the relationship between state regulation of the sale and distribution of alcohol on tribal lands and dram shop actions brought by private parties is simply too attenuated to support a finding that § 1161 serves as a Congressional declaration of the waiver of tribal sovereign immunity as it relates to dram shop actions." *Id.*

Additionally, the majority of appellate courts in other states have found that private individuals cannot bring an action against a tribe pursuant to either the Dram Shop Act or common law theories of liability. See *Foxworthy v. Puyallup Tribe of Indians Ass'n.*, 141 Wash.App. 221, 169 P.3d 53 (2007), cert. granted, 164 Wash.2d 1019, 95 P.3d 89 (2008) , *Filer v. Tohono O'Odham Nation Gaming Enterprise*, 212 Ariz. 167, 129 P.3d 78, cert. denied, 2006 Ariz. LEXIS 117 (2006), *Holguin v. Ysleta Del Sur Pueblo*, 954 S.W.2d 843 (Tex.App.-El Paso 1997, petition denied). This court joins the latter group of decisions in finding that the state's police power to regulate the sale and distribution of alcohol is not tantamount to an authorization by Congress to waive tribal sovereign immunity for dram shop actions or common-law recklessness actions brought by private individuals.

The plaintiffs further argue that tribal sovereign immunity should not extend to their claims against the defendants because the state has a strong interest in keeping its roadways safe for travel. The plaintiffs note that unlike the Mashantucket Pequot Tribal Nation, the MTGA has not taken steps to address the issue. The United States Supreme Court, however, has indicated that the decision to abrogate tribal sovereign immunity is properly left to Congress. "[T]he [United States] Supreme Court has refused to find a waiver of tribal immunity based on policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case ... The Supreme Court has stated that there are reasons to doubt the wisdom of tribal sovereign immunity, for example, the fact that it 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 ... To the extent, however, that [t]hese considerations might suggest a need to abrogate tribal immunity, courts must defer to the role Congress may wish to exercise in this important judgment [*Beecher v. Mohegan Tribe of Indians*, 282 Conn. 130, 136-38, 918 A.2d 880 (2007)]." (Internal quotation marks omitted.) *Terry v. Mohegan Tribal Gaining Authority*, Superior Court, *supra*, 45 Conn. L. Rptr. at 503. Moreover, while the court in *Richards v. Champion, supra*, at Docket No. CV 07 5004614, expressed trepidation at the public policy impact of allowing the defendants to escape liability for the plaintiffs' dram shop action after finding no evidence that the MGTA had taken any action to address such claims, it acknowledged that the resolution rests with the legislature, not the judiciary. Therefore, the defendants' tribal sovereign immunity defense against the plaintiffs' claims has not been congressionally abrogated.

***5** The plaintiffs also argue that the Mohegan Tribe waived its tribal sovereign immunity to alcohol-related actions in the Mohegan Tribe-State of Connecticut Gaming Compact (gaming compact), an agreement with the state regarding the tribe's sale and distribution of alcohol. Specifically, the plaintiffs allege that Section 14(b) of the gaming compact constitutes an explicit waiver of immunity. The defendants counter that this section does not provide an explicit waiver.

"[C]ourts consistently have applied two complementary principles to waivers: (1) a sovereign's waiver must be unambiguous, and (2) a sovereign's

interest encompasses not merely whether it may be sued, but where it may be sued." (Internal quotation marks omitted.) *Chayoon v. Sherlock, supra,* 89 Conn.App. at 827, 877 A.2d 4.

"The Indian Gaming Regulatory Act (gaming act); 25 U.S.C. § 2701 et seq. (1994); regulates gaming operations on tribal land. The gaming act permits a recognized tribe to conduct 'Class III' gaming only when the gaming operation is conducted in accordance with a gaming compact with a state and approved by the United States Secretary of the Interior. See 25 U.S.C. § 2710(d)(1)(c) and (8) (1004). The [Mohegan] tribe has been recognized by an act of Congress and by the State of Connecticut. In accordance with the gaming act, the tribe and the state of Connecticut entered into the Mohegan Tribe-State of Connecticut Gaming Compact (gaming compact), which governs gaming operations on the tribe's reservation. The gaming compact was approved by the Secretary of the Interior and was incorporated by reference into federal law. See 25 U.S.C. § 1775 (1994). General Statutes § 47-65b allows '[t]he state of Connecticut [to assume] ... civil regulatory jurisdiction pursuant to the May 17, 1994, Agreement and the May 17, 1994, Gaming Compact between the state of Connecticut and the Mohegan Tribe of Indians of Connecticut and Public Law 103-377.' " *Kizis v. Morse Diesel International, Inc.*, 260 Conn. 46, 54-55, 794 A.2d 498 (2002).

Section 14(b) of the gaming compact provides in relevant part: "Service of alcoholic beverages within any gaming facility shall be subject to the laws and regulations of the State applicable to sale or distribution of alcoholic beverages." The defendants argue that this language does not constitute an explicit waiver by identifying Section 13(c), which discusses the consequences of a gaming compact violation, as an example of an explicit waiver. Section 13(c) provides in relevant part: "The Tribe hereby waives any defense which it may have by virtue of its sovereign immunity from suit with respect to any such action in the United States District Courts to enforce the provisions of this Compact, and consents to the exercise of jurisdiction over such action and over the Tribe by the United States District Courts with respect to such actions to enforce the provisions of this Compact." Unlike Section 13(c), Section 14(b) does not unambiguously waive the tribe's sovereign immunity. An agreement to be subject to the state's regulations on the sale and distribution of alcohol does not constitute an unequivocal waiver of tribal sovereign immunity for all actions brought by private citizens related to alcohol use and consumption. Moreover, Section 14(b) does not provide where the tribe may be sued for such actions. Therefore, the court finds that the defendants' tribal sovereign immunity has not been explicitly waived for the plaintiffs' claims in the gaming compact.

***6** The plaintiffs also argue that even if the MGTA is immune from liability for their claims, tribal sovereign immunity does not extend to the individual defendants. Our Supreme Court stated that, "[t]he doctrine of tribal immunity extends to individual tribal officials acting in their representative capacity and within the scope of their authority." (Internal quotation marks omitted.) *Kizis v. Morse Diesel International, Inc., supra,* 260 Conn. at 54, 794 A.2d 498. "Tribal immunity has been held to extend, not only to tribal officials, but also to tribal employees acting in a representative capacity and within the scope of their authority." *Van Etten v. Mashantucket Pequot Gaming Enterprise, supra,* at Docket No. KNL CV 044001587.

"In the tribal immunity context, a claim for damages against a tribal official lies outside the scope of tribal immunity only where the complaint pleads-and it is shown that a tribal official acted beyond the scope of his authority to act on behalf of the Tribe." *Basset v. Mashantucket Pequot Museum & Research Center, Inc.,* 221 F.Sup.2d 271, 280 (D.Conn.2002). "Claimants may not simply describe their claims against a tribal official as in his 'individual capacity' in order to eliminate tribal immunity." *Id* . A court should "examine the *actions*

of the individual tribal defendants ... [A] tribal official even if sued in his individual capacity is only stripped of tribal immunity when he acts manifestly or palpably beyond his authority ...” (Internal quotation marks omitted.) *Id.;* see *Oneida Indian Nation of New York v. Sherrill,* 337 F.3d 139, 169 (2d Cir.2003). Further, “[i]n order to overcome sovereign immunity, the [plaintiff] must do more than allege that the defendants' conduct was in excess of their ... authority; they also must allege or otherwise establish facts that reasonably support those allegations.” *Hultman v. Blumenthal,* 67 Conn.App. 613, 624, 787 A.2d 666, cert. denied, 259 Conn. 929, 793 A.2d 253 (2002).

As previously noted, it is the party seeking the exercise of the court's jurisdiction to allege facts clearly establishing subject matter jurisdiction. In the present case, the plaintiffs identify Crowder as the licensed permittee of Sachem's Lounge, and Bozsum and Etess as the licensed owners of the establishment. The plaintiffs made no allegations that Crowder, Bozsum or Etess were not acting in their representative capacities. Therefore, as tribal members, they are immune from the plaintiffs' claims pursuant to tribal sovereign immunity. Additionally, in their complaint, the plaintiffs allege that Maloney “was in the course and scope of his agency and/or employment at [Sachem's Lounge].” Therefore, according to the facts alleged by the plaintiffs, Maloney's conduct was within the scope of his employment. Because the plaintiffs have failed to plead that the individual defendants were not acting in a representative capacity and outside the scope of their authority, this court finds that tribal sovereign immunity extends to the individual defendants.

***7** The plaintiffs further argue that the court should hold an evidentiary hearing before dismissing the plaintiffs' claims against the individual defendants. “When issues of fact are necessary to the determination of a court's jurisdiction due process requires that a trial-like hearing be held, in which an opportunity is provided to present evidence and to cross-examine adverse witnesses.” *Golodner v. Women's Center of Southeastern Connecticut, Inc.,* 281 Conn. 819, 826, 917 A.2d 959 (2007). On the other hand, “the due process requirement of a hearing is *required only when issues of facts are disputed.* ” (Emphasis in original.) *Weihing v. Dodsworth,* 100 Conn.App. 29, 38, 917 A.2d 53 (2007). The plaintiffs argue that Maloney was not acting within the scope of his employment by serving alcohol to an intoxicated individual. The plaintiffs also argue that the arrest warrant will show that Maloney refused to discuss the events leading up to the accident with the police because LaVigne was a tribal member and he did not want to risk losing his employment. According to the plaintiffs, this additional information would prove that Maloney was acting on behalf of his own self-interest on the evening of the accident.

“In order to circumvent tribal immunity, the plaintiff must have alleged and proven ... that the defendants acted ‘without any colorable claim of authority.’ “ *Chayoon v. Sherlock, supra,* 89 Conn.App. at 830, 877 A.2d 4. “The vital inquiry in determining if an individual acted within his scope of employment is whether the employee acted, at least in part, to serve the employer or, alternatively, whether his conduct was disobedient or unfaithful to the employer's business. *A-G Foods v. Pepperidge Farm,* 216 Conn. 200, 210, 579 A.2d 69 (1990).” (Internal quotation marks omitted.) *Van Etten v. Mashantucket Pequot Gaming Enterprise, supra,* at Docket No. KNL CV 04 4001587. “In determining whether an employee has acted within the scope of employment, courts look to whether the employee's conduct: (1) occurs primarily within the employer's authorized time and space limits; (2) is of the type that the employee is employed to perform; and (3) is motivated, at least in part, by a purpose to serve the employer.” *Harp v. King,* 266 Conn. 747, 782-83, 835 A.2d 953 (2003).

“In *Puyallup Tribe, Inc. v. Dept. of Game of Washington,* [433 U.S. 165, 97 S.Ct. 2616], the United States Supreme Court determined that, when

engaged in the conduct of fishing, tribal officials were acting as fisherman rather than as tribal officials and were acting outside the scope of their authority. The court concluded, therefore, the tribal sovereign immunity did not reach tribal officials while they were fishing. *Id.*, at 173. In that instance, the tribal officials' conduct was unrelated to the performance of the official duties for the tribe." (Citation removed.) *Chayoon v. Sherlock, supra*, 89 Conn. at 829, 96 A. 153.

By contrast, in the present case, even taking into consideration the additional information alleged by the plaintiffs, the plaintiffs have failed to show that Maloney was acting without any colorable claim of authority on the night of the accident. Maloney's alleged conduct was not disobedient or unfaithful to Sachem's Lounge. His alleged actions occurred while he was working at the lounge, involved the type of conduct that he is employed to perform and were motivated by a purpose to serve the establishment. As a result, the plaintiffs have failed to establish that Maloney's conduct was unrelated to the performance of his official duties. Therefore, the court may base its determinations on the allegations in the complaint, without additional discovery or a hearing.

CONCLUSION

***8** Based on the foregoing, the court hereby grants the defendants' motion to dismiss counts seven, eight, nine and ten of the plaintiffs' complaint.

Conn.Super.,2009.
Vanstaen-Holland v. LaVigne
Not Reported in A.2d, 2009 WL 765517 (Conn.Super.), 47 Conn. L. Rptr. 306

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215 Fed.Appx. 763, 2007 WL 356058 (C.A.10 (Okla.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 215 Fed.Appx. 763, 2007 WL 356058 (C.A.10 (Okla.)))

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This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Tenth Circuit Rule 32.1. (Find CTA10 Rule 32.1)

United States Court of Appeals,
Tenth Circuit.
Eddie SANTANA, Plaintiff-Appellant,
v.
N.D. Oklahoma CHEROKEE CASINO; Osage Casino; Creek Nation Casino, Defendants-Appellees.

No. 06-5210.
Feb. 6, 2007.

Eddie Santana, Tulsa, OK, pro se.

Before KELLY, MURPHY, and O'BRIEN, Circuit Judges.

ORDER AND JUDGMENT[FN*]

FN* This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R.App. P. 32.1 and 10th Cir. R. 32.1.

MICHAEL R. MURPHY, Circuit Judge.

****1** After examining the briefs and appellate record, this court has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R.App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

On September 25, 2006, Appellant Eddie Santana filed a complaint in federal district court wherein he asserted Defendants use billboards and other forms of advertising to entice individuals to gamble at their casinos. Santana alleges he is currently being treated for a gambling addiction. He asserts Defendants' advertising unfairly targets individuals with gambling addictions, resulting in Defendants' unjust enrichment. Santana seeks damages in the amount of $9000, a sum he alleges he has lost gambling since 2002.

Santana based his claims on the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701, and asserted the federal court had subject matter jurisdiction under 28 U.S.C. § 1331. The district court, however, dismissed the suit for lack of jurisdiction, noting Santana was attempting to pursue state law tort claims against Defendants through the IGRA and concluding the IGRA does not contain a private right of action in favor of an individual. *See Hartman v. Kickapoo Tribe Gaming Comm'n,* 319 F.3d 1230, 1232-33 (10th Cir.2003) ("[N]owhere does IGRA expressly authorize private individuals to sue directly under the statute for failure of a tribe, a state, or the NIGC to comply with its provisions."). The court further concluded Santana could not rely on diversity jurisdiction since all parties are citizens of ***764** Oklahoma for purposes of 28 U.S.C. § 1332.[FN1]

FN1. We note Santana has also failed to allege that the amount in controversy exceeds $75,000. *See* 28 U.S.C. § 1332; *Laughlin v. Kmart Corp.,* 50 F.3d 871, 873 (10th Cir.1995) (holding that the requisite amount in controversy and the existence of diversity must be affirmatively established in the pleading of the party seeking to invoke jurisdiction).

This court reviews a dismissal for lack of subject matter jurisdiction de novo. *See U.S. West, Inc. v. Tristani,* 182 F.3d 1202, 1206 (10th Cir.1999). Based on our review of the record, the pleadings,

and the arguments asserted by Santana in his appellate brief, we conclude the district court did not err when it dismissed Santana's complaint for lack of subject matter jurisdiction. Accordingly, we **affirm** the district court's dismissal of Santana's action.

C.A.10 (Okla.),2007.
Santana v. Cherokee Casino
215 Fed.Appx. 763, 2007 WL 356058 (C.A.10 (Okla.))

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