IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 11-13673

JOHN FURRY,
Plaintiff-Appellants,

v.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, MICCOSUKEE RESORT AND GAMING, MICCOSUKEE CORPORATION, MICCOSUKEE INDIAN BINGO, MICCOSUKEE INDIAN BINGO AND GAMING, MICCOSUKEE ENTERPRISES AND MICCOSUKEE POLICE DEPARTMENT,
Defendants-Appellees.

On Appeal from the United States District Court
For the Southern District of Florida
Case No. 10-cv-24524-PAS

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, MICCOSUKEE RESORT AND GAMING, MICCOSUKEE CORPORATION, MICCOSUKEE INDIAN BINGO, MICCOSUKEE INDIAN BINGO AND GAMING, MICCOSUKEE ENTERPRISES AND MICCOSUKEE POLICE DEPARTMENT'S APPELLEE BRIEF

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CERTIFICATE OF INTERESTED PERSONS
AND
CORPORATE DISCLOSURE STATEMENT

As Appellees, the Miccosukee Tribe of Indians of Florida submit this list, which includes the names of the trial judge and all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this review:

The Judge that has an interest in this appeal is the Honorable Patricia A. Seitz.

The parties to this appeal are:

Furry, Helene, mother of Tatiana Furry

Furry, John V., Plaintiff/Appellant and father of Tatiana Furry

Miccosukee Tribe of Indians of Florida, Appellee

Miccosukee Tribe of Indians of Florida d/b/a Miccosukee Resort and Gaming, Appellee

Miccosukee Corporation, Appellee

Miccosukee Indian Bingo, Appellee

Miccosukee Indian Bingo and Gaming, Appellee

Miccosukee Resort and Gaming, Appellee

Miccosukee Enterprises, Appellee

Miccosukee Police Department, Appellee

The following persons or entities have an interest in the outcome of this appeal:

Bert, Andrew Sr. Secretary, Miccosukee General Council

Billie, Collie, Chairman, Miccosukee General Council

Cleary, Sean M., P.A., Counsel for Appellant

Cleary, Sean M., Esq., Counsel for Appellant

Law Offices of Bernardo Roman III

Nelson, Jasper, Assistant Chairman Miccosukee General Council

Osceola, William, Lawmaker Miccosukee General Council

Pino, Yinet, Esq., Counsel for Appellees

Rogow, Bruce S., P.A., Counsel for Appellant

Rogow, Bruce S., Esq., Counsel for Appellant

Roman, Bernardo III, Tribal Attorney, Counsel for Appellees

There are no publicly traded companies with an interest in the outcome of this appeal.

Respectfully submitted on the 16th of November 2011.

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STATEMENT REGARDING ORAL ARGUMENT

Appellee, Miccosukee Tribe of Indians of Florida, Miccosukee Resort and Gaming, Miccosukee Corporation, Miccosukee Indian Bingo, Miccosukee Indian Bingo and Gaming, Miccosukee Enterprises and Miccosukee Police Department (hereinafter, collectively "the Miccosukee Tribe") respectfully request oral argument because it may assist this Court in adjudicating the important issues presented in this appeal, which involve the well established principle that Indian tribes as sovereigns enjoy common law immunity from suit.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT OF JURISDICTION

Appellee, the Miccosukee Tribe of Indians of Florida, Miccosukee Resort and Gaming, Miccosukee Corporation, Miccosukee Indian Bingo, Miccosukee Indian Bingo and Gaming, Miccosukee Enterprises and Miccosukee Police Department (hereinafter, collectively "the Miccosukee Tribe"), does not contest that the District Court's decision to dismiss John Furry's (hereinafter, "Furry") claims against the Miccosukee Tribe is a final decision within the meaning of 28 U.S.C. § 1291 (2010). The Miccosukee Tribe, however, does contest this Court's jurisdiction of John Furry's claims against the Miccosukee Tribe on the grounds that because this is a suit against an Indian tribe, which is immune from suit, there is no subject matter jurisdiction in this or any other court.

STATEMENT OF THE ISSUES

1. Whether the Miccosukee Tribe is immune from suit under the doctrine of tribal sovereign immunity when: 1) an individual files suit against the Miccosukee Tribe for a violation of the State of Florida's Dram Shop Act, § 768.125 Fla. Stat. (2009); 2) the Miccosukee Tribe has not waived its immunity; and 3) Congress has not abrogated it.

STATEMENT OF THE CASE

This is an appeal of a final order by the District Court for the Southern District of Florida where the Judge granted the Miccosukee Tribe's Motion to Dismiss because the Court found that the Miccosukee Tribe enjoyed immunity from suit and there was an absence of waiver or abrogation of said immunity.

1. The State Case

On November 15, 2010, Furry filed an action in the Circuit Court for the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, which arose out of the same facts stated in Furry's Complaint in the district court case in the Southern District. The action in state court is presently pending because the Miccosukee Tribe has not accepted service. The Miccosukee Tribe has not accepted service because it is clear that Florida courts have held that pursuant to the law governing tribal sovereign immunity state courts do not have jurisdiction of a claim against an Indian tribe where the tribe has not waived immunity and Congress has not abrogated it. *Cypress v. Tamiami Partners Ltd.,* 662 So.2d 1292 (Fla. 3d DCA 1995) (holding that "Florida state courts do not have subject matter jurisdiction over a Native American tribe unless the tribe has expressly consented to suit or Congress has waived the tribe's sovereign immunity to civil actions." (citing *Houghtaling v. Seminole Tribe of Florida*, 611 So.2d 1235 (Fla. 1993))).

2. The Case in the District Court for the Southern District of Florida

On December 17, 2010, Furry filed his Complaint alleging violations of Florida State statutes and 18 U.S.C. §1161. Furry invoked the jurisdiction of the district 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. Furry filed the Complaint in district court in an attempt to undermine tribal sovereign immunity. In the Complaint, Furry alleged 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.

The Miccosukee Tribe answered by filing a Motion to Dismiss. [D.E. No 17]. The Miccosukee Tribe's Motion to Dismiss sought dismissal on three grounds: 1) tribal sovereign immunity bars suit in federal court, 2) the court lacks jurisdiction because there is no diversity or federal question jurisdiction; and 3) the Complaint fails to state a cause of action under 18 U.S.C. § 1161.

The District Court entered an Order dismissing Furry's Complaint and granting the Miccosukee Tribe's Motion to Dismiss after the issues were fully briefed. [D.E. No. 59]. The District Court held that the Miccosukee Tribe had not waived its immunity by applying and paying for the Miccosukee Tribe's liquor

license. [*Id.* at 10-11]. The court further held that Congress had not abrogated the Miccosukee Tribe's immunity from suit to permit private lawsuits that result from violations of state dram shop acts. *Id.*

SUMMARY OF THE ARGUMENT

The Miccosukee Tribe of Indians of Florida, (hereinafter, "the Miccosukee Tribe"), as a sovereign and federally recognized Indian tribe enjoys sovereign immunity from suit. The doctrine of tribal sovereign immunity is decades old and establishes that courts do not have subject matter jurisdiction over Indian tribes, such as the Miccosukee Tribe, its enterprises, agencies, agents, entities, and departments unless Congress has expressly, clearly, unambiguously and unequivocally abrogated such immunity or the Indian tribe has clearly and unambiguously waived said immunity. Waiver cannot be implied but express and it will never be implied from an Indian tribes' action. An Assertion by an Indian tribe of sovereign immunity is a jurisdictional issue that must be decided at the earliest stage possible.

The statutes cited by Furry do not express a clear, unambiguous and unequivocal intent to subject Indian tribes to suit for a violation of Florida's Dram Shop Act. Furthermore, the Miccosukee Tribe has not waived its immunity expressly or otherwise. Consequently, the Miccosukee Tribe's sovereign immunity bars Furry's Suit.

The Complaint fails to allege any basis for jurisdiction. Additionally, it fails to state a cause of action upon which relief can be granted. Thus, Furry's Complaint must be dismissed and the District Court's ruling affirmed.

ARGUMENT

This Court reviews a district court's dismissal of a complaint for sovereign immunity de novo. *Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1285 (11th Cir. 2001). Additionally, the Court in *Carmichael v. Kellogg, Brown and Root Services, Inc.* stated that the standard of review of a district court's legal conclusions in a dismissal for lack of subject matter jurisdiction is de novo and clear error for the district court's factual findings. 572 F.3d 1271, 1279 (2009) (stating that "we review the district court's legal conclusions de novo and its factual findings for clear error. The clearly erroneous standard is highly deferential.").

I. THE MICCOSUKEE TRIBE ENJOYS TRIBAL SOVEREIGN IMMUNITY

Federal and Florida Courts do 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);

Houghtaling v. Seminole Tribe of Fla., 611 So.2d 1235, 1239 (Fla. 1993). *See also Cypress v. Tamiami Partners, Ltd.*, 662 So.2d 1292 (Fla. 3d DCA 1995); *Miccosukee Tribe of Indians v. Napoleoni*, 890 So.2d 1152, 1153 (Fla. 1st DCA 2004); *Cupo v. Seminole Tribe of Fla.*, 860 So.2d 1078, 1079 (Fla. 1st DCA 2003).

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 sovereign nature of Indian tribes has been recognized since *Worcester v. Georgia*, 31 U.S. 515 (1832), and subsequently reaffirmed by the United States Supreme Court. *See, e.g., Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982) ("Indian tribes within 'Indian country' are… 'unique aggregations possessing attributes of sovereignty over both their members and their territory.'"). Indian tribes enjoy immunity because they are sovereigns predating the United States Constitution, and tribal sovereign immunity is necessary to preserve autonomous tribal existence. *See generally United States v. United States Fid. & Guar. Co.*, 309 U.S. 506 (1940). The Eleventh Circuit has explained that "in a line of cases decided over a period of 150 years, the Supreme Court has recognized that Indian tribes "retain[ ] their original natural rights" which vested in them, as sovereign entities, long before the genesis of the United States. *Fla. Paraplegic*, 166 F.3d at 1130 (citing *Worcester v. Georgia*, 31 U.S. 515, 559 (1832)) (footnote omitted); *Peña v. Miccosukee Service Plaza*, 2000 WL

1721806, at *2 (S.D. Fla. July 25, 2000). Tribal sovereign immunity is a matter of federal law and as such is not subject to diminution by the States. *Kiowa Tribe of Okla.*, 523 U.S. at 756. The protection for Indian tribes extends to commercial activities on and off the reservation. *Id.* at 754-55.

When presented with a motion to dismiss, Courts must first consider the claim of sovereign immunity asserted by an Indian Tribe 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).

This judicial circuit and other sister federal courts have consistently recognized tribal sovereign immunity, not as a defense, but as a jurisdictional issue that must be resolved at the earliest stage in the proceedings. *State of Fla. v. Seminole Tribe*, 181 F.3d 1237, 1241 n.4 (11th Cir. 1999); *Taylor*, 261 F.3d at 1034; *Sanderlin*, 243 F.3d at 1285. Moreover, "even if the Court has Statutory

Jurisdiction, tribal sovereign immunity bars an action against the Indian Tribe." *Inglish Interests, LLC v. Seminole Tribe of Florida, Inc.*, 2001 WL 208289 *2 (M.D. Fla. January 21, 2011) (citing *Taylor v. Ala. Intertribal Council, Title IV J.T.P.A.*, 261 F.3d 1032, 1034 (11th Cir. 2001)).

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.

A. The Miccosukee Tribe Has Not Waived Its Immunity From Suit

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 not and could not 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 Indian Gaming Regulatory Act did not waive the tribe's immunity). Judge Patricia A. Seitz (hereinafter, "Judge Seitz") recognized in her Order Granting Motion to Dismiss and Closing Case that "the Eleventh Circuit has strictly applied these principles when determining whether sovereign immunity has been abrogated or waived." *Id.* at 4. [D.E. No. 59].

In *Sanderlin v. Seminole Tribe of Fla.*, the Court rejected the same argument espoused by Furry. 243 F.3d at 1286. Sanderlin argued that the tribe had waived its sovereign immunity by accepting federal funds with an assurance of compliance with federal laws and the Rehabilitation Act particularly. *Id.* The tribe responded that "a certification or assurance of compliance given by or on behalf of a Native

American tribe with respect to certain laws is not tantamount to a clear and unmistakable waiver of tribal sovereign immunity with regard to a claim brought under such laws." *Id.* at 1288. The Court agreed with the tribe and held that "the contracts for federal financial assistance in which Chief Billie promised that the Tribe would not discriminate in violation of federal civil rights laws merely convey a promise not to discriminate." *Id.* at 1289. This promise, according to the Court, did not "constitute an express and unequivocal waiver of sovereign immunity and consent to be sued in federal court on the specific claim alleged by Sanderlin." *Id.*

In *Florida v. Seminole Tribe of Fla.*, the Court held that the tribe had not waived its sovereign immunity when it elected to engage in gaming subject to regulation under the Indian Gaming Regulatory Act (hereinafter, "IGRA"). 181 F.3d at 1243-44. The Court reasoned that "the Supreme Court has made it plain that waivers of tribal sovereign immunity cannot be implied on the basis of a tribe's actions, but must be unequivocally expressed. *Id.* at 1243. Accordingly, the Court found that the state's argument that the tribe's gaming activities constituted a waiver of the tribe's sovereign immunity was inconsistent with this principle. *Id.*

With these principles in mind, any allegation by Furry that the Miccosukee Tribe has unequivocally expressed a waiver of its immunity is without merit. As correctly concluded by Judge Seitz there was no waiver on the facts of this case. Judge Seitz further explained:

> Plaintiff argues that by executing the affidavit attached to the license Defendants waived their sovereign immunity because they agreed to be bound by Florida Law. The only language to this effect in both the affidavit and application is language which states: 'the place of business, if licensed, may be inspected and searched during business hours or at any time business is being conducted on the premises without a search warrant by officers of the Division of Alcoholic Beverages and Tobacco, the Sheriff, his Deputies, and Police Officers for the purposes of determining compliance with the beverage and retail tobacco laws.' Under Eleventh Circuit law, a tribe's waiver of its sovereign immunity must be unequivocally expressed; a waiver will not be implied based on tribal actions. *Seminole*, 181 F.3d at 1243. Nothing in the language of the affidavit and application constitutes an unequivocal, express waiver of sovereign immunity. First, contrary to Plaintiff's assertion, neither the application nor the affidavit contain a broad agreement to be bound by Florida law. Second, the language quoted does not address private suits by individuals. Thus, nothing in this language even implies a waiver of tribal immunity, let alone equivocally express a waiver. Moreover, the Eleventh Circuit expressly rejected such an argument in *Seminole*, when it held that the Seminole Tribe had not waived its sovereign immunity by electing to engage in gaming subject to regulation under the IGRA. *Id.* at 1242-43.

Order Granting Motion to Dismiss and Closing Case, D.E. No. 59 at 11. The Miccosukee Tribe did not and has not consented to this suit. Indeed, the Miccosukee Tribe has contested such a waiver in all of its pleadings filed in the district court. However, even assuming *arguendo* that the Miccosukee Tribe checked a box in a standardized form, the act which Furry interprets as a promise to abide by Florida law, this Court has held that such an action is not a clearly and unequivocally expressed waiver because waivers will not be implied from a tribe's

actions. *Seminole*, 181 F.3d at 1243; *Sanderlin*, 243 F.3d 1288 (citing *Santa Clara Pueblo*, 436 U.S. at 58).

Furry argues that the combination of § 1161, *Rice v. Rehner*, 463 U.S. 713, 726-27 (1983), title 25 U.S.C. 1747(b)(2), § 285.16(2), Fla. Stat., and the Miccosukee Tribe's application for a liquor license constitute a waiver. This interpretation of the test for waiver of an Indian tribe's sovereign immunity is unsupported by law. As explained above in detail, case law from the Supreme Court and this Court, the test to determine waiver is a strict test. Waiver must be expressed, not implied. *Seminole*, 181 F.3d at 1243; *Sanderlin*, 243 F.3d 1288 (citing *Santa Clara Pueblo*, 436 U.S. at 58). The district court followed precedent from this Court when it held that the Miccosukee Tribe did not waive its sovereign immunity when it applied for, and obtained, a liquor license. Consequently, the Court should affirm the district court's decision to grant the Miccosukee Tribe's Motion to Dismiss.

B. Congress Has Not Abrogated The Miccosukee Tribe's Immunity From Suit

Congress has not abrogated the Miccosukee Tribe's sovereign immunity from private action for a violation of Florida's Dram Shop Act. 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). "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*, 166 F.3d at 1131. Additionally, courts should not assume lightly that Congress intended to restrict Indian sovereignty through a piece of legislation. *Fla. Paraplegic*, 166 F.3d at 1130. In *Seminole Tribe* the Court stated:

> '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. 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). In *Freemanville Water Systems*, explained the level of clarity that must be evident from the statutory language:

> 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, 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 trial court's holding must be affirmed because it correctly dismissed Furry's Complaint under these well established principles of tribal sovereign immunity. There was no jurisdiction in the district court and there is no jurisdiction in this Court. 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).

1. The statutes cited by Furry do not abrogate the Miccosukee Tribe's Immunity

Furry has not shown any express provision in 18 U.S.C. § 1161 or 25 U.S.C. § 2701, the statutes upon which Furry relies, that clearly show that Congress

unequivocally intended to abrogate tribal sovereign immunity under the facts alleged in the Complaint before this Court. 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) Furry's claim under 18 U.S.C. § 1161 is barred by tribal sovereign immunity because section 1161 does not authorize suit by a private individual for personal injury or wrongful death.

There is no clear and unequivocal expression of abrogation 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 Furry'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 as long as those actions conform to state and tribal law.

Furthermore, the statutory framework within which section 1161 was enacted affords no credence to Furry's assertion that section 1161 was meant to abrogate or in fact abrogates 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." If, as Furry suggests, Congress intended to abrogate tribal sovereign immunity in enacting section 1161, such an intent cannot be ascertained from the statutory language.

Moreover, the United States Supreme Court 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." *Rehner*, 463 U.S. at 726-27. 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. 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, Furry's argument that 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 *Rehner*.

In *Rehner*, a trader and store owner sought 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 Rehner, 4*63 U.S. at 726-27. As correctly noted by the district court,

> *Rehner* addressed the narrow issue of whether an Indian trader had to comply with state liquor licensing requirements. It did not address the issue before this Court-whether § 1161 should be read to have abrogated tribal sovereign immunity to private lawsuits arising from the sale of liquor to individuals. Because of the narrow issue resolved in *Rehner*, its guidance is limited in resolving the issue before the court. Nothing in *Rehner* suggests that § 1161 should be read to have abrogated tribal sovereign immunity to private lawsuits arising from violations of state dram shop laws.

Order Granting Motion to Dismiss and Closing Case at 6. [D.E. No. 59].

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 that 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 a private dram shop action. *Id.* at 83. The court found support for its holding in *Rehner*, *Eiger v. Garrity*, 246 U.S. 97 (1918) and *Holguin*. It refused to entertain plaintiff's argument that *Rehner* 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 *Rehner* 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 the *Filer* Court, *Rehner* 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 is 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 *Rehner* 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 *Rehner*'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.

All of the cases cited above correctly applied federal Indian law as established by the United States Supreme Court and this Circuit and reached the correct conclusion: the statutory language of § 1161 does not show an intent by Congress, express or otherwise, to abrogate Indian tribes' immunity from suit in an action by a private individual for a violation of a state dram shop act. The district court agreed. It found that these cases had applied the same principles to determine whether tribal sovereign immunity has been abrogated that was used by the United States Supreme Court in *Kiowa* and by this Court in *Seminole* and *Sanderlin*. *Order Granting Motion to Dismiss and Closing Case* at 7. [D.E. No. 59]. It further stated:

> there is nothing in § 1161 that indicates that Congress intended to abrogate tribal sovereign immunity to allow suits by individuals injured as a result of a tribe's sale or distribution of alcohol to the public. While the statute requires that alcohol transactions be in

> 'conformity both with the laws of the States in which such act or transaction occurs and with an ordinance duly adopted by the tribe,' the statute does not expressly provide for any remedies, by a state or individual, if such transactions are not in conformity with state laws. Thus nothing in § 1161's language definitively indicates 'an intent to either abolish Indian tribes' common law immunity or to subject tribes to suit under the act." Seminole, 181 F.3d at 1242. Moreover, the Supreme Court has noted that "there is a difference between the right to demand compliance with state laws and the means available to enforce them.

Granting Motion to Dismiss and Closing Case at 8. [D.E. No. 59].

b) 25 U.S.C. § 2701 does not abrogate the Miccosukee Tribe's immunity from suit

Congress did not abrogate the Miccosukee Tribe's sovereign immunity when it enacted § 2701 because this section does not contain any evidence of an unequivocal, clear and unambiguous expression of a waiver of tribal sovereign immunity. In *Seminole Tribe of Fla. v. Florida*, 11 F.3d 1016 (11th Cir. 1994), the court explained that the 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 *Florida 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). Thus, the Complaint must be dismissed and the district court's ruling affirmed because Plaintiff failed to show that the Miccosukee Tribe's sovereign immunity was abrogated by Congress.

c) Other Statutes cited by Furry do not apply to this case nor does it abrogate tribal sovereign immunity

Furry argues that 25 U.S.C. § 1747(b)(2) and § 285.16 abrogate the Miccosukee Tribe's sovereign immunity. Any reliance in these statutes is misplaced.

Section 1747(b)(2) does not mention abrogation of tribal sovereign immunity. Therefore, it cannot constitute a clear, unambiguous and unequivocal abrogation under the binding precedent establishing the doctrine of tribal sovereign immunity. Moreover, the Florida Supreme Court has already decided that § 285.16 does not afford Florida courts jurisdiction of suits by individuals against an Indian tribe unless there is abrogation by Congress or waiver by the tribe. *Houghtaling v. Seminole Tribe of Fla.*, 611 So.2d 1235, 1239 (Fla. 1993). *See also Cypress v.*

Tamiami Partners, Ltd., 662 So.2d 1292 (Fla. 3d DCA 1995); *Miccosukee Tribe of Indians v. Napoleoni*, 890 So.2d 1152, 1153 (Fla. 1st DCA 2004); *Cupo v. Seminole Tribe of Fla.*, 860 So.2d 1078, 1079 (Fla. 1st DCA 2003). The state of Florida cannot abrogate Indian tribes immunity, this only Congress can do. *See Kiowa*, 523 U.S. at 756; *Napoleoni*, 890 So.2d at 1153.

Consequently, the Miccosukee Tribe requests that the Court dismiss the Complaint and affirm the district court's holding.

II. FURRY'S COMPLAINT MUST BE DISMISSED BECAUSE THE 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. Firstly, both parties reside in the State of Florida. Secondly, The Miccosukee Tribe is not a citizen of any state, thus the Court is without diversity jurisdiction to hear this case. *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Cir. 1974); *Auto-Owners Ins. Co. v. Tribal Court of the Spirit Lake Indian Reservation*, 495 F.3d 1017, 1020 (8th Cir. 2007); *Frazier v. Brophy*, 358 Fed. Appx. 212, 213, 2009 WL 3228781 (2nd Cir. October 8, 2009); *Romanella v. Hayward*, 114 F.3d 15, 16 (2nd Cir. 1997); *Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993); *Nerad*

v.Astrazenca Pharmaceuticals, Inc., 203 Fed.Appx.911, 2006 WL 2879057 * 2 (10th Cir. October 11, 2006); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21 (1st Cir. 2000); *Merit Mgmt. Group v. Ponca Tribe of Indians of Okla.*, No. 08 Civ. 825, 2011 WL 1485492 *1 (N.D. Ill. April 19, 2011); *CTGW, LLC v. GSBS, PC*, No. 09 Civ. 667, sip op. at 2, 2010 WL 2739963 *2 (W.D.Wis. July 12, 2010); *Copeland v. Miss. Band of Choctaw Indians*, No. 10 Civ. 20 TSL-LRA, 2010 WL 2667359 slip op. at 1 (S.D. Miss. June 25, 2010); *Lac Vieux Desert Band of Lake Superior Chippewa Indians Holdings Mexico, LLC v. Atlico USA, LLC et al.*, No.. 08 Civ 1067 PHX-ROS, 2009 WL 411560 *1 (D. Ariz. February 17, 2009); *Cedant Mort. Corp. v. Clemmer*, No. 05 Sac 4068, 2005 WL 2455577 *2 (D. Ks. October 5, 2005); *Frazier v. Turning Stone Casino*, 254 F.Supp.2d 295, 304 (N.D. N.Y. 2003); *Tenney v. Iowa Tribe of Kansas*, 243 F.Supp. 2d 1196, 1198 (D. Ks. 2003). A federal court "does not have diversity jurisdiction over a case in which a real party in interest is not a citizen of any state." *CTGW*, 2010 WL 2739963 slip op. at 2, citing *Newman-Green, Inc. v. Alonzo-Larrain*, 490 U.S. 826, 829-30 (1989). Such a stateless person is a "jurisdictional spoiler." *Id.*

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, 25 U.S.C. § 2701 nor 25 U.S.C. § 1747 afford a private

individual a cause of action against a tribe for a violation of Florida's Dram Shop Act.

III. 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 Furry's allegation, § 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 does not delineate any enforcement remedy. As the District Court below noted: "While the statute requires that alcohol transactions be in 'conformity with both the laws of the state in which such act or transaction occurs and with an ordinance duly adopted by the tribe,' the statute does not expressly provide for any remedies, by a state or individual, if such transactions are not in conformity with state laws."

Order Granting Motion to Dismiss and Closing Case at 7, [D.E. No. 59]. Therefore, Furry's contention that § 1161 provides him the right to sue the Miccosukee Tribe in federal court for a violation of Florida's Dram Shop Act is contrary to law.

CONCLUSION

This Court lacks subject matter jurisdiction of this appeal. The Miccosukee Tribe's sovereign immunity bars this suit because there has been no abrogation by Congress or waiver by the Miccosukee Tribe. There is no federal question jurisdiction and the Complaint fails to state a cause of action upon which relief can be granted. Consequently, the Complaint should be dismissed and the District Court's ruling should be affirmed.

CERTIFICATE OF COMPLIANCE

I certify that this Brief complies with the type-volume limitation set forth in FED.R.APP.P. 32(a)(7)(B). This Brief contains seven thousand three hundred six (7306) words, excluding the parts of the brief exempted by FED.R.APP.P. 32(a)(7)(B)(iii). This Brief complies with the typeface requirements of FED.R.APP.P. 32(a)(5) and the type style requirements of FED.R.APP.P. 32(a)(6) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in Times New Roman, size 14.

Dated: November 16, 2011.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via electronic mail on this 16th day of November of 2011 and United States Mail on this 17th day of November of 2011upon the parties listed below.

Respectfully submitted,

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