

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
Miami Division

Case No.: 12-CV-22439-Cooke/Bandstra

MICCOSUKEE TRIBE OF INDIANS OF  
FLORIDA, a sovereign nation and  
Federally recognized Indian tribe,

Plaintiff,

vs.

BILLY CYPRESS, DEXTER WAYNE  
LEHTINEN, ESQUIRE, MORGAN STANLEY  
SMITH BARNEY, JULIO MARTINEZ,  
MIGUEL HERNANDEZ, GUY LEWIS,  
ESQUIRE, MICHAEL TEIN, ESQUIRE AND  
LEWIS TEIN, PL, a professional association,

Defendants.

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**DEFENDANT, MIGUEL HERNANDEZ', AMENDED<sup>1</sup> MOTION TO DISMISS  
SECOND AMENDED COMPLAINT AND TO JOIN ALL OTHER  
DEFENDANTS' MOTION TO DISMISS SECOND AMENDED  
COMPLAINT TO THE EXTENT APPLICABLE**

**COMES NOW**, Defendant, MIGUEL HERNANDEZ, by and through his undersigned attorneys, pursuant to Rules 9(b), 12(b)(1) and 12(b)(6), and hereby moves this Court to dismiss the Second Amended Complaint and to join all other Defendants' Motion to Dismiss Second Amended Complaint to the extent applicable. In support of said Motion, Defendant states:

1. On October 10, 2012, this Court granted Plaintiff leave to amend its Complaint to address the deficiencies outlined in this Court's Order Granting in part and Denying in part

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1 In its December 17, 2012 Order (D.E. 97), the Court indicated that Hernandez "failed to respond to Plaintiff's Second Amended Complaint." However, even though Hernandez joined in the Motion for Enlargement, because an Order was not entered by the due date, Hernandez did timely file his Original Motion to Dismiss on Friday, December 14, 2012. (D.E. 96). Since the Court subsequently granted the extension, HERNANDEZ uses this opportunity to Amend his previously filed Motion to Dismiss.

Defendants' Guy Lewis, Esquire, Michael Tein, Esquire, and Lewis Tein, PL's Motion to Require Plaintiff to File a Rico Case Statement. (D.E. 55)

2. On October 12, 2012, this Court extended the leave to amend as to all Defendants. (D.E. 64)

3. Thereafter, on November 9, Plaintiff, MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, served its 314 page Second Amended Complaint against the former head of the tribe, two tribe employees, three attorneys, a law firm and the Tribe's banking institution which is long on words and general conclusory allegations but remains woefully short on specific actions and details which Defendant, MIGUEL HERNANDEZ, is alleged to have committed.

4. As to Defendant, MIGUEL HERNANDEZ, Plaintiff brings claims of Civil RICO, Florida Civil RICO, Conspiracy to Commit RICO, Conspiracy to Violate Florida RICO, Fraud, Aiding and Abetting Fraud, and Breach of Fiduciary Duty.

5. Defendant, MIGUEL HERNANDEZ, seeks to join in the to be filed Motion to Dismiss by Defendant, BILLY CYPRESS, which will seek dismissal of the entire complaint based on the inapplicability of Federal Civil RICO laws to claims arising out of the operation of a sovereign nation such as the Plaintiff, MICCOSUKEE TRIBE OF INDIANS OF FLORIDA. In addition, the to be filed Motion to Dismiss will address issues of sovereign immunity and that the alleged acts committed by CYPRESS as chairman of the Plaintiff, along with the alleged acts of Defendant, HERNANDEZ, are protected by sovereign immunity. In addition, the Plaintiff has failed to expressly waive its sovereign immunity or the sovereign immunity of its leader and employers. The to be filed motion to dismiss will also address issues such as subject matter jurisdiction and capacity to sue.

6. The above issues will be addressed by Defendant, BILLY CYPRESS, in his

Motion to Dismiss and is equally applicable to Defendant, MIGUEL HERNANDEZ, in his capacity as an employee of the Plaintiff.

7. Based on the analysis contained in Defendant, BILLY CYPRESS', to be filed Motion to Dismiss Second Amended Complaint and herein, Defendant, MIGUEL HERNANDEZ, seeks dismissal of all counts as all allegations center around Defendant, MIGUEL HERNANDEZ', role as the Director of the Finance Department for the Plaintiff. All acts alleged to have been committed by Defendant, MIGUEL HERNANDEZ, were at the direction of Defendant, BILLY CYPRESS, who was his direct supervisor and the leader of the Plaintiff. Thus, all alleged acts were committed within the course and scope of his employment with the Plaintiff. Further, all acts alleged by the Defendant, MIGUEL HERNANDEZ, were committed on tribal lands and involved tribal actions. As such, this Court does not have subject matter jurisdiction over these disputes, and the Florida and Federal laws which form the basis of Plaintiff's claim do not apply to the purely tribal activities which are alleged in the Second Amended Complaint. Again, Defendant, BILLY CYPRESS, will fully brief these issues and his analysis is equally applicable to Defendant, HERNANDEZ, in his capacity as an employee of the Plaintiff. Defendant, HERNANDEZ, includes a limited analysis of these issues in his Memorandum of Law below.

8. In conjunction with the dismissal of these counts, Defendant also requests that this Court decline to exercise supplemental jurisdiction over any remaining state law claims.

9. Separate and apart from the above bases for dismissal, Defendant, MIGUEL HERNANDEZ, seeks dismissal of all claims for failure to state a cause of action and failure to plead with specificity pursuant to Rule 9(b) of the Fed. R. Civ. P. Taken as a whole, the allegations of the Complaint against Defendant, MIGUEL HERNANDEZ, do not plead the RICO claims (Federal, Florida and conspiracy), the fraud claims and/or the breach of fiduciary duty

claim with enough specificity. In addition, Plaintiff still has failed to comply with the mandates of the Court's Order as to the specificity required. Plaintiff still fails to set forth the "precise, statements, documents, or misrepresentations made and "the time, place, and person responsible for the statement" along with the other requirements of the RICO statutes.

10. Last, Plaintiff has pled all elements of damages following all counts. This is improper as all damages do not apply to all counts. Plaintiff should have to specify which damages are applicable to each count.

11. Because this is now Plaintiff's third bite at the apple, Defendant respectfully requests that this Court dismiss the Second Amended Complaint with prejudice with no further leave to amend.

### **MEMORANDUM OF LAW**

#### **I. INTRODUCTION**

Plaintiff, MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, has filed a ten count Second Amended Complaint against the former head of the tribe, two former tribe employees, three former tribe attorneys, a law firm and the Tribe's banking institution. In pertinent part, as to Defendant, MIGUEL HERNANDEZ, the Plaintiff brings claims of RICO, Conspiracy to Violate RICO, Fraud, Aiding and Abetting Fraud, Florida Civil RICO, Conspiracy to Violate Florida RICO, and Breach of Fiduciary Duty.

#### **II. ALLEGATIONS OF THE SECOND AMENDED COMPLAINT**

Since this is a Motion to Dismiss, it is important to analyze the allegations of the Second Amended Complaint as they relate to Defendant, MIGUEL HERNANDEZ. Rather than delineate paragraph by paragraph of the 314 page Second Amended Complaint, Defendant, MIGUEL HERNANDEZ, will summarize and paraphrase the pertinent allegations of the Second Amended

Complaint.

The Miccosukee Tribe is a sovereign nation exercising powers of self governance. (P.5) Defendant, CYPRESS, was the elected Chairman of the Miccosukee Tribe. "In this capacity, Defendant CYPRESS oversaw, controlled, supervised and had unrestricted access and control over all the financial funds and records of the Miccosukee Tribe which are the subject of this lawsuit." (P.6)

Defendant HERNANDEZ was Director of the Finance Department of the Miccosukee Tribe. (P.9) Defendant CYPRESS arbitrarily recruited and maintained the group of individuals, (P.25) Defendant CYPRESS continued to employ HERNANDEZ in order to facilitate the concealment of CYPRESS'S withdrawal of millions of dollars from the Miccosukee Tribe and to receive financial advice. (P.26)

CYPRESS had final approval of invoices submitted by LEWIS TEIN, P.L. after HERNANDEZ had approved them in the Finance Department. (P.33) HERNANDEZ received MORGAN STANLEY account statements containing the unauthorized withdrawals by CYPRESS and knowingly failed to notify the Tribe. (P.34) HERNANDEZ was aware that Defendant CYPRESS was stealing. (P.83) HERNANDEZ kept a monthly log of CYPRESS' gambling activities. (P.84) HERNANDEZ assisted CYPRESS with accounting advice. (P.86) HERNANDEZ issued tribal checks in exchange for CYPRESS withdrawals. (P.85) HERNANDEZ was aware CYPRESS was charging his Tribal credit cards.(P.87) HERNANDEZ issued payments for these cards and ensured the payments were kept secret.

In exchange for the above, HERNANDEZ received personal benefits in the form of luxurious travels and outings, approved by Defendant CYPRESS and paid by the MICCOSUKEE TRIBE, a hefty salary, perks, and other benefits unique to him, including, but not limited to, the

employment of his daughter under his direct supervision at the Finance Department. (P.88, 97 emphasis added).

HERNANDEZ attended General Council meetings where a financial report was presented. (P.213) The Second Amended Complaint does not indicate HERNANDEZ provided any financial report or had authority to do anything at a General Council meeting. CYPRESS prepared the status of the MORGAN STANLEY account and presented it to the Business Council at every monthly Business Council Meeting. (P.216) During the presentation of the financial report, the nature and purpose of the legal work reflected in the invoices was discussed at every meeting. (P.218) CYPRESS fraudulently misrepresented to the Business Council that the work reflected on the invoices was for a "tribal purpose" when in fact it was for Defendant CYPRESS'S personal legal representation. (P.219)

HERNANDEZ was present in his official capacity as Chief Financial Officer at every General Council Meeting. (P.237) At some monthly Business Council Meetings, HERNANDEZ prepared, submitted, reported and/or presented to the members of the Business Council, in his official capacity as Chief Financial Officer, the status of the Morgan Stanley Investment Account and reassured them that the funds were best protected and failed to inform of the activities of Defendants CYPRESS and MARTINEZ.

The Second Amended Complaint then makes general allegations to try and plead the requirements of the Florida RICO Statute. Last, HERNANDEZ was in a position to protect the financial interests of the MICCOSUKEE TRIBE. (P.447) HERNANDEZ was responsible for reviewing all of the financial information as Director of the Finance Department. (P.448) HERNANDEZ breached his duty by planning and assisting CYPRESS to steal, embezzle and covert the funds, assisting CYPRESS in investing the funds and actively concealing the fraudulent



scheme.

### **III. LEGAL ARGUMENT**

- A. This Court lacks subject matter jurisdiction over the claims raised in the Second Amended Complaint based on sovereign immunity, lack of standing, and the inapplicability of the Federal RICO claims to acts involving tribal disputes and the acts alleged by Plaintiff in its Second Amended Complaint.**

This area of argument is more thoroughly detailed in the to be filed Motion to Dismiss by Defendant, BILLY CYPRESS. Defendant, HERNANDEZ, joins in the CYPRESS Motion to Dismiss as it relates to the issues summarized below. Defendant, HERNANDEZ, includes a brief summary of these points below to preserve full consideration by the Court.

All of the allegations as to Defendant HERNANDEZ are alleged acts which he committed in his capacity as the Director of Finance Department for the Plaintiff, MICCOSUKEE TRIBE. By its own admission, Defendant CYPRESS was the elected Chairman of the Plaintiff and oversaw, controlled, supervised and had unrestricted access and control over all financial funds. There is no allegation that Defendant HERNANDEZ committed any acts outside of tribal lands. Furthermore, the Second Amended Complaint alleges that CYPRESS hired HERNANDEZ and had final approval over all of HERNANDEZ' actions. Thus, HERNANDEZ was an agent of the Miccosukee Tribe at the time of all of the acts alleged in the Second Amended Complaint.

A waiver of sovereign immunity "must be unequivocally expressed." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) The sovereign immunity extends to all agents of the tribe. Linneen v. Gila River Indian Community, 276 F.3d 489 (9<sup>th</sup> Cir. 2002); Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 479 (9<sup>th</sup> Cir. 1985) "Indian tribes retain elements of sovereign status, including the power to protect tribal self government and to control internal relations." Smith v. Babbitt, 100 F. 3d 556 (8<sup>th</sup> Cir. 1996) Courts do not have jurisdiction to determine what are essentially tribal disputes, Id. Suits against tribal officials for violating a fiduciary duty are

barred. Montgomery v. Flandreau Santee Sioux Tribe, 905 F.Supp. 740, 746 (D. S.D. 1995) Plaintiff has not expressly waived the sovereign immunity applicable to Defendant, HERNANDEZ, and the other Defendants. This Court does not have jurisdiction to resolve the purely tribal disputes which are at the center of the Second Amended Complaint.

Likewise, RICO violations are inapplicable to tribal disputes and acts allegedly committed within the course and scope of Defendant HERNANDEZ' employment with the Plaintiff. As alleged by the Plaintiff, the issues in this lawsuit relate solely to "purely intramural matters touching exclusive rights of self government." Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9<sup>th</sup> Cir. 1985)

In In re: Sac & Fox Tribe of the Miss. In Iowa/Meskwaki Casino Litig., 340 F.3d 749 (8<sup>th</sup> Cir. 2003), the Court dismissed a claim for lack of subject matter jurisdiction based on a RICO claim centering on a dispute concerning the authority of a council to act on behalf of the tribe. The court determined that this was solely a tribal matter and depended on the authority under tribal law. In the Second Amended Complaint, Plaintiff has specifically alleged that Defendant CYPRESS had the authority to control the funds and that Defendant HERNANDEZ was acting within the course and scope of his employment at the direction of Defendant CYPRESS. Thus, if Plaintiff is now challenging that authority, it amounts to a tribal dispute without any allegation whatsoever that CYPRESS and/or HERNANDEZ violated tribal law.

In addition, the Indian Major Crimes Act proscribes which criminal acts are subject to federal jurisdiction. 18 U.S.C. §1153. This statute lists specific crimes wherein a tribal member is subject to the "same law and penalties as all other persons." The RICO violations are not among the enumerated crimes and thus, whether those acts are crimes within the Miccosukee Tribe fall within the sovereign rights of the Tribe. Because there is no predicate act which is established to



be or alleged to be a violation of Miccosukee law, the predicate acts alleged by Plaintiff are inapplicable to Defendant, HERNANDEZ, in his capacity as an employee of the Miccosukee Tribe and acting under the direction of its Chairman who had unrestricted access and control over all the financial funds and records of the Miccosukee Tribe which are the subject of this lawsuit. Based on the sovereign immunity applicable to HERNANDEZ, the lack of jurisdiction over the claims raised in this lawsuit, and the inapplicability of the federal RICO laws to issues arising out of the governance and operation of the Miccosukee Tribe, this Court should dismiss Plaintiff's Second Amended Complaint with prejudice.

**B. The Complaint fails to meet the requirements of Rule 8 and 10 of the Federal Rules of Civil Procedure.**

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). To survive a Motion to Dismiss, Plaintiff must meet the "flexible 'plausibility' standard under which a complaint's 'factual allegations must be enough to raise a right to relief above the speculative level.'" Solomon v. Blue Cross and Blue Shield Assoc., 574 F. Supp.2d 1288, 1291 (S.D. Fl. 2008) Despite specific instructions from this Court, the Second Amended Complaint as a whole amounts to general conclusory allegations followed by a formulaic recitations of the elements of each cause of action.

The Second Amended Complaint remains a "shotgun pleading" which "contains several counts, each one incorporating by reference the allegations of its predecessors, leading to a situation where most of the counts (i.e., all but the first) contain irrelevant factual allegations and legal conclusions." DeGirmenci v. Sapphire-Fort Lauderdale, LLLP, 693 F.Supp.2d 1325

(S.D.Fla. 2010) “Shotgun pleadings impede the orderly, efficient and economic disposition of disputes as well as the court’s overall ability to administer justice.” Id.

In addition, the Second Amended Complaint lists all demands for relief at the end of the Second Amended Complaint. Clearly, not all of the relief requested is applicable to each and every claim. “A proper complaint ‘will present each claim for relief in a separate count, as required by Rule 10(b), and with such clarity and precision that the defendant will be able to discern what the plaintiff is claiming.’” Harris v. Radioshack Corporation, 2002 WL 1907569 (S.D.Fla. 2002) At a minimum, this Court should require the Defendant to specifically identify which relief it is seeking as to each count as individual counts may or may not withstand a Motion to Dismiss.

**C. The Second Amended Complaint fails to state a claim with specificity and the allegations against Defendant HERNANDEZ do not meet the requirements of 18 U.S.C. 1962.**

While Defendant does not believe the civil RICO laws apply to this tribal dispute, in the alternative, Defendant addresses the pleading issues with the civil RICO counts. “To establish a federal civil RICO violation under §1962(c), the plaintiffs must satisfy four elements of proof: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.” Adams v. Rothstein, 2012 WL 1605098 (S.D. FL 2012) To state a RICO claim and establish a “pattern of racketeering activity”, Plaintiff must demonstrate “at least two acts of racketeering activity ...” 18 U.S.C. §1961(5); American Dental Association v. Cigna Corp., 605 F.3d 1283 (11<sup>th</sup> Cir. 2010) “[R]acketeering activity’ is any act that is chargeable and punishable under certain state law felony classifications or indictable under specific federal criminal provisions. Any act that does not fall within the purview of Section 1961(1) is not an act of racketeering activity.” U.S. v. Private Sanitation Industry Assoc. of Nassau/Suffolk, Inc., 793 F. Supp 1114 (E.D. N.Y. 1992) “[A]cts of common law fraud that do not implicate the mails (or the wires) do not constitute

‘rackeering activity’ under the definition found within the RICO statute.” Fleet Credit Corp. v. Sion, 893 F. 2d 441 (1<sup>st</sup> Cir. 1990)

The Second Amended Complaint fails to establish the requisite predicate acts. The allegations in paragraph 82 that CYPRESS was stealing, diverting, and misappropriating millions of dollars are in direct contradiction to the allegations that CYPRESS had unrestricted control and access to all of the funds. (P.6) Plaintiff’s allegation to try and establish a predicate act under 18 USC §1956 are conclusory and devoid of any specificity. Furthermore, the allegation that Defendant HERNANDEZ assisted in preparing false income tax returns is insufficient as there is no allegation that Defendant HERNANDEZ actually filed the return or signed off on the return on CYPRESS’ behalf. The same analysis applies to the attempted predicate act under 18 USC §1957. The allegations of the Second Amended Complaint contradict each other and the allegations are conclusory and devoid of any specificity as to any specific transaction. With respect to the mail fraud allegations, there is no specificity as to how the invoices were fraudulent. Furthermore, the allegations again are that the invoices were approved by CYPRESS who was the authorized representative of the Plaintiff to do so. There is no allegation that Defendant HERNANDEZ had the discretion to fail to pay an invoice which was ordered to be paid by his supervisor and the authorized representative of the Plaintiff. There is no allegation that HERNANDEZ derived any benefit, from his employer or anyone else, in connection with the alleged mail fraud. “[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) The allegations of the complaint must move the Court “across the line from conceivable to plausible.” Id. at 680. Throughout the entire Second Amended Complaint, the court may infer “obvious alternative explanations” which suggest lawful conduct. Bell Atlantic Corp. v. Twombly, 550

U.S. 544 (2007) In this particular case, the Plaintiff has provided such lawful conduct by its allegation that CYPRESS had unfettered access and control over the money and the right to utilize same. As such, the obvious alternate explanation is that there is no deceptive conduct which would be applicable to these allegations. American Dental Association v. Cigna Corp., 605 F.3d 1283 (11<sup>th</sup> Cir. 2010) The conclusory nature of the allegations concerning the predicate acts do not meet the requirements of a “mini-indictment” which are required in RICO claims. Koch v. Royal Wine Merchants, Ltd., 847 F.Supp.2d 1370, 1376 (S.D.Fl. 2012)

18 USC §1962(a) requires that a person receive “income derived, directly or indirectly, from a pattern of racketeering activity.” In paragraphs 79-81, Plaintiff attempts to bring Defendant HERNANDEZ within the RICO statute by alleging “Defendant HERNANDEZ knowingly derived income through money laundering, mail fraud, and engaging in monetary transactions in criminally derived property ...” However, the allegations of the Second Amended Complaint specifically allege that Defendant HERNANDEZ received his benefits directly from the Miccosukee Tribe. (P.88, 97) There is no allegation that Defendant HERNANDEZ was not entitled to said benefits in his capacity as the Director of the Finance Department. The alleged hiring of his daughter is not income to Defendant HERNANDEZ. There is no allegation that Defendant HERNANDEZ derived any income from the money that was allegedly utilized by Defendant CYPRESS. Plaintiff instead specifically alleges that it paid the Defendant as opposed to Defendant receiving any benefits directly from the Enterprise. Plaintiff also fails to allege how Defendant HERNANDEZ maintained an interest in or control of the enterprise. By all accounts of the Plaintiff, Defendant HERNANDEZ did not receive any direct or indirect benefit from the enterprise, was not the person in charge of the enterprise, and was not the person utilizing tribal funds. The allegations of the Second Amended Complaint specifically allege that Defendant

CYPRESS directed and controlled the enterprise. There are no allegations with sufficient specificity that Defendant HERNANDEZ participated in the operation or management of the enterprise. Reves v. Ernst & Young, 507 U.S. 170 (1993). The allegations of the Second Amended Complaint essentially identify Defendant CYPRESS as the operator and manager of the enterprise. Thus, Plaintiff fails to state a RICO action.

Furthermore, as noted above, all of Plaintiff's allegations relate to Defendant, HERNANDEZ' role as Director of the Finance Department while in the employ of the Plaintiff. In his capacity as Director of the Finance Department, Defendant HERNANDEZ reported directly to the tribal chair, Defendant CYPRESS. Plaintiff is essentially suing HERNANDEZ due to the performance of his job and the instructions of its elected representative. "[A]n employee acting within the scope of his or her employment is normally found to be incapable of conspiring with the corporate employer. This principle has been applied in the RICO conspiracy context. Neb. Sec. Bank v. Dain Bosworth Inc., 838 F. Supp. 1362, 1371 (D. Neb. 1993)

Despite a specific order from the Court, Defendant's allegations of RICO, and essentially all counts of the complaint, including fraud and breach of fiduciary duty, continue to lack the specificity required. There are general allegations of attending meetings and not saying anything. There is not a single piece of concrete information which identifies any particular act or transaction with specificity. There is not a single action wherein a particular statement or misrepresentation is attributed to Defendant HERNANDEZ. The entirety of the allegations are conclusory allegations. The fraud allegations do not specifically allege that Defendant HERNANDEZ even had knowledge of the facts he is alleged to have misrepresented or omitted. Plaintiff's lack of concrete factual allegations as to the fraud and aiding and abetting counts doom those counts to failure. Rule 9(b) of the Fed. R. Civ. P., provides that a party alleging fraud "must state with

particularity the circumstances constituting fraud or mistake.” To satisfy this requirement, the Plaintiff must set forth “(1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud.” United States ex rel. Clausen v. Lab. Corp. of America, Inc., 290 F. 3d 1301 (11<sup>th</sup> Cir. 2002). Essentially, the Plaintiff must detail the “who, what, when, where and how” about the fraud that took place.” Garfield v. NDC Health Corp., 466 F. 3d 1255, 1262 (11<sup>th</sup> Cir. 2006)

There is not a single detail about what specific information Defendant HERNANDEZ either said or was supposed to have said. There is no allegation that Defendant HERNANDEZ had authority to say anything at the General Council meetings which he is identified as attending. There is no specificity as to what information was presented at Business Council meetings and how that information was fraudulent or deceptive. There are simply general conclusory allegations about misuse of accounts and the accounts not being a safe place for the Tribe’s money. Presumably, based on the allegations, Defendant CYPRESS would have had unfettered access to the money regardless of what type of account the money was in. By its own allegations, the Tribe was not damaged by any alleged misconduct, but rather by its own policies and procedures which allowed Defendant CYPRESS to have unfettered access to the funds.

Likewise, in pleading its claim that Defendant, MIGUEL HERNANDEZ, conspired to commit RICO violations, Plaintiff “must allege facts that infer conspiracy instead of mere ‘parallel conduct and a bare assertion of conspiracy.’” Solomon, at 1291. The Second Amended Complaint at issue does not sufficiently, with factual detail, describe the Agreement between all Defendants



which it contends was in place and is conclusory like the remainder of the Second Amended Complaint. The conspiracy count fails to include any different allegations than the underlying RICO claims. This makes the conspiracy count subject to dismissal on the same basis as the civil RICO count. Am. Dental Ass'n v. Cigna, 605 F.3d 1283, 1296 n.6 (11<sup>th</sup> Cir. 2010). Plaintiff relies on general formulaic allegations to support its allegations of RICO, Conspiracy to Commit RICO, fraud and aiding and abetting fraud.

**D. The Florida RICO claims and Conspiracy claims fail.**

Plaintiff has patterned its Florida RICO claims on its allegations under the civil RICO claims. Because the Florida RICO statutes are patterned after the federal RICO statutes, this Court should dismiss the claims on the same basis. Jackson v. BellSouth Telecommunications, 372 F. 3d 1250, 1263-64 (11<sup>th</sup> Cir. 2004) The allegations of the Florida RICO claims are simply recitations of the statute without any detail. For instance, Paragraph 365 of the Second Amended Complaint alleges "Defendant HERNANDEZ participated in a pattern of criminal activity as defined in §772.102(1)(a)(22) Fla. Stat. by committing multiple acts of fraud." Looking at Fla. Stat. §772.102(1)(a)22, it provides, "'Criminal activity' means to commit, to attempt to commit, to conspire to commit, or to solicit, coerce, or intimidate another person to commit (a) Any crime that is chargeable by indictment or information under the following provisions: (22) Chapter 817, relating to fraudulent practices, false pretenses, fraud generally, and credit card crimes." Defendant is left to imagine and figure out which section of Chapter 817 it has violated. These types of allegations should not withstand a Motion to Dismiss. Eagletech Communications, Inc. v. Bryn Mawr Inv. Group, Inc., 79 So. 3d 855, 864 (Fla. 4<sup>th</sup> DCA 2012)

Plaintiff fails to specifically state a cause of action under Florida Statute §772.103(1) because Plaintiff specifically alleged that Defendant HERNANDEZ was paid directly by the

Plaintiff and did not receive any proceeds derived directly or indirectly from the enterprise. There is no specificity as to how Defendant HERNANDEZ used or invested the proceeds but only the conclusory allegation which tracks the language of the statute. Likewise, there is no allegation other than the conclusory allegation that Defendant HERNANDEZ acquired, maintained an interest in or control of the enterprise which is required under Fl. St. §772.103(2). The same applies to the conclusory allegations as to Fl. St. §772.103(3). Because Plaintiff's claim is without substantial fact or legal support, Defendant is entitled to attorney's fees pursuant to Fl. St. §772.104.

**E. This Court should dismiss all counts once the Federal Civil RICO claims are dismissed.**

Because Plaintiff is unable to plead a cognizable claim under any federal cause of action, this Court should dismiss this matter in its entirety and leave the state claims, if properly pled, and not barred by lack of subject matter jurisdiction or sovereign immunity, for adjudication in state court. In its Second Amended Complaint, in Paragraph 2, Defendant identifies the subject matter jurisdiction as (a) Federal question jurisdiction pursuant to 28 U.S.C. 1331 and (b) Supplemental jurisdiction pursuant to U.S.C. §1367(a). Thus, if the Federal RICO claim and conspiracy claims are dismissed, the only remaining counts are all state law counts. There will exist no federal question in which to enable the Court to continue to maintain supplemental jurisdiction.

**F. Defendant HERNANDEZ joins in all bases raised in all other Defendants' Motions to Dismiss Second Amended Complaint.**

At the time of filing this Motion to Dismiss Second Amended Complaint, Defendant has reviewed Defendant, DEXTER LEHTINEN's, Motion to Dismiss Second Amended Complaint, the LEWIS TEIN Motion to Dismiss Second Amended Complaint and a rough draft of CYPRESS' Motion to Dismiss. To the extent that other Defendants raise arguments which are equally

applicable to Defendant HERNANDEZ' position as to the general failure to properly plead the requirements of the civil RICO, conspiracy, Florida RICO, and claims relating to fraud and the general, conclusory nature of the allegations, Defendant HERNANDEZ joins in their arguments and motions. As outlined above, Defendant HERNANDEZ joins in Defendant CYPRESS' to be filed Motion to Dismiss. Defendant HERNANDEZ requests this Court permit him to join in the CYPRESS motion once filed.

**IV. RELIEF REQUESTED**

Defendant, MIGUEL HERNANDEZ, requests that this Court dismiss Plaintiff's Second Amended Complaint with prejudice for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted. Defendant HERNANDEZ also requests this Court grant Defendant, HERNANDEZ, attorney's fees and costs pursuant to Florida Statute §772.104.

**I HEREBY CERTIFY** that on December 14, 2012, 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 / Scott A. Lazar, Esq.  
SCOTT A. LAZAR, ESQ.