IN THE UNITED STATES DISTRICT COURT
FOR THE 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.
_____/

MICCOSUKEE TRIBE'S RESPONSE TO DEFENDANT JULIO MARTINEZ'S MOTION TO DISMISS SECOND AMENDED COMPLAINT FOR LACK OF SUBJECT MATTER JURISTDICTION AND FAILURE TO STATE A CAUSE OF ACTION AND JOINDER IN ALL RESPONSES TO MOTIONS TO DISMISS TO ALL OTHER DEFENDANTS

COMES NOW, the Plaintiff, the Miccosukee Tribe of Indians of Florida (hereinafter, "the Miccosukee Tribe"), by and through the undersigned counsel, and files this Response to Defendant Julio Martinez's (hereinafter, "Defendant Martinez") Motion to Dismiss Second Amended Complaint (the "Second Amended Complaint") for Lack of Subject Matter Jurisdiction and Failure to State a Cause of Action and Joinder in All Responses to Motions to Dismiss to All Other Defendants. In support thereof it states:

Introduction

Defendant Julio Martinez inaccurately characterizes the causes of action in the Second Amended Complaint as being related to an intra-tribal dispute. However, Defendant Martinez is entirely mistaken in his characterizations. The causes of action in the Second Amended Complaint arise out of a complex scheme created and advanced by the Defendants, including

Defendant Martinez, to defraud and misappropriate millions of dollars belonging to the Miccosukee Tribe. Throughout the course of the scheme Defendant Martinez was employed by and maintained a position of trust with the Miccosukee Tribe. During his employment with the Miccosukee Tribe, Defendant Martinez abused his position of trust by participating in this complex scheme, and thus demonstrating the he was acting outside the parameters of his normal job duties. Since, the causes of action in the Second Amended Complaint arise out of the complex scheme created by the Defendants, and not an intra-tribal dispute, the Court does have the requisite subject matter jurisdiction to adjudicate this matter, as discussed below.

However, Defendant Martinez falsely states in his Motion to Dismiss that "In truth and in fact, Mr. Martinez NEVER even had a Tribal credit card issued in his name." D.E. No. 105 at FN2. To the extent of Defendant Martinez's statement regarding any Tribal credit card issued to him in FN2 of his Motion to Dismiss, it can be taken as a factual challenge to the Second Amended Complaint. Such statement by Defendant Martinez is deficient as such, the Miccosukee Tribe is in possession of the documentary support to prove that Defendant Martinez in fact possessed a Tribal credit card issued to him and was paid for with tribal funds. A copy of the relevant portions of the American Express Statements showing that Defendant Martinez was in fact in possession of a Tribal credit card is attached herein as Exhibit A.

Memorandum of Law

Defendants Martinez has facially attacked the Second Amended Complaint. The Eleventh Circuit has explained that when a complaint is facially attacked on a Rule 12(b) (1) motion to dismiss the court is required "to look and see if [the] plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion." *Lawrence v. Dunbar*, 919 F. 2d 1525, 1528-1529 (11th Cir. 1990). With a facial attack, "a plaintiff is afforded safeguards similar to those provided in opposing a Rule 12(b)(6) motion-the court must consider the allegations of the complaint to be true." *Id.* at 1529.

I. THE COURT HAS SUBJECT MATTER JURISDICTION AND THEREFORE MUST NOT DISMISS THE SECOND AMENDED COMPLAINT

This Court has subject matter jurisdiction over this case as alleged in the Second Amended Complaint. This case is about whether Defendant Cypress' illegal actions and Defendants Martinez, Hernandez, Lewis, Tein, Lewis Tein P.L., Lehtinen, and Morgan Stanley's

actions in concert with Defendant Cypress and each other, constitute a violation of RICO, conspiracy to commit RICO, civil theft, fraud, aiding and abetting fraud, Florida RICO, Florida RICO Conspiracy, embezzlement, breach of fiduciary duty, and fraudulent misrepresentation. There are no issues presented by the Second Amended Complaint that are outside this Court's jurisdiction.

A. The Second Amended Complaint does not present an intra-tribal dispute

This case is not about "whether Mr. Cypress improperly abused his tribal authority by using tribal funds in a manner somehow not within his "unrestricted" discretion granted by the Tribe." D.E. No. 105 at 8. On July 1, 2010 the Miccosukee General Council, acting in its official capacity, passed General Council Resolution No. MGC-03-10, attached herein as Exhibit B, where it determined that Defendant Cypress' use of tribal funds was "improper and unauthorized." The resolution states in relevant part:

> Whereas, the Miccosukee Tribe conducted a review of its financial records and found improper and unauthorized use of Tribal funds by former Chairman Billy Cypress while a member of the Miccosukee Business Council. Whereas, the Miccosukee Tribe finds former Chairman Billy Cypress' conduct detrimental and harmful to the welfare of the Miccosukee Tribe and its members. Whereas, former Chairman Billy Cypress, shall reimburse the Miccosukee Tribe all unauthorized and improperly used funds. Whereas, former Chairman Billy Cypress, is forever barred of holding political office or a position in the Miccosukee Business Counsel. Whereas, the terms of this Resolution shall apply to any current or future member of the Miccosukee Tribe that engaged in unauthorized or improper use of Tribal funds.

Contrary to Defendants Martinez's assertion, this case does not present an intra-tribal dispute. In accordance with the General Council Resolution, the Miccosukee Tribe alleged repeatedly in its Second Amended Complaint that Defendant Cypress' actions were unauthorized by the Miccosukee Tribe and without its knowledge and consent. *See* Second Amended Compl., D.E. No. 75 at ¶¶ 29, 34, 35(c), 49, 106, 108(e), 108(i), 125, 127(e), 127(i), 140, 142(e), 142(i), 161, 196, 197, 441, 458(c).

Furthermore, the contention regarding Defendant Cypress's "unrestricted access" has been rebutted by Jerry Cypress (hereinafter, "Mr. Jerry Cypress") during his sworn interview with the Internal Revenue Service regarding the tax investigation of Billy Cypress. A copy of the Transcript of Lucky Jerry Cypress, September 26, 2012 is attached herein as Exhibit C. Mr. Jerry Cypress is the current treasurer and member of the Miccosukee Tribe's Business Council. Ex. C

4:17-20. Mr. Cypress was the lawmaker and a member of the Miccosukee Tribe's Business Council from 1994 through 2005. Ex. C 5:14-25 and 6:1. Defendant Cypress did not have "unrestricted access" to these funds. Mr. Jerry Cypress unequivocally refutes this argument through his recent declaration, under oath, which shows that Defendant Cypress's expenses, like any other tribal employee, were specifically limited. Ex. C 12:1-25, 13:1-22, 14:1-25. These specific limitations also applied to credit card charges. Ex. C 14:1-22, 16:23-25, and 17:1-2. These specific limitations were in effect during the relevant periods described in the Second Amended Complaint. Ex. C 16:23-25 and 17:1-2. Additionally, the credit card statements would come to the finance department, pursuant to tribal policy. Ex. C 14:8-24. Moreover, Mr. Jerry Cypress confirms that it was the Miccosukee Finance Department who would be aware of Defendant Cypress's expenses. Ex. C 42: l 14-24. Mr. Jerry Cypress also confirms that Defendant Cypress's charge cards expenses or his business expenses were not disclosed at the General Council Meetings. Ex. C 50:23-25, 52:5-22, and 54:18-25.

Furthermore, the Miccosukee Tribe is in possession of the documentary support to prove that Defendants Martinez and Hernandez in fact received and reviewed the Morgan Stanley Smith Barney FMA Account records, thus demonstrating Defendants Martinez and Hernandez's knowledge and awareness of Defendant Cypress's misuse of the account. *See* Morgan Stanley Smith Barney FMA Account Year End Summaries for 2006 through 2009 reflecting Defendant Cypress' ATM withdrawals, attached as Exhibit D.

Defendant Martinez cites to one case in support of his proposition that this case presents an intra tribal dispute and that therefore, this Court would lack subject matter jurisdiction. Although Defendant Martinez asserts that this case revolves around an intra tribal dispute, he fails to provide a case that defines what an intra tribal dispute is. An intra tribal dispute is that which involves a matter of tribal self governance and relates to the control of internal relations. *Montana v. United States*, 450 U.S. 544, 564 (1981). "Jurisdiction to resolve internal tribal disputes and to interpret tribal constitutions and laws lies with the Indian tribes and not the district courts." *United States v. Wheeler,* 435 U.S. 313, 323–36 (1978). This case does not present a matter of tribal self governance and does not relate to the control of internal relations. Courts have found the following, none of which are present in this case, to be intra-tribal disputes: issues regarding tribal membership and membership requirements (*Martinez v. Southern Ute Tribe of Southern Ute Reservation*, 249 F. 2d 915 (10th Cir. 1957), *Prairie Band of*

Pottawatomie Tribe of Indians v. Udall, 355 F. 2d 364 (10th Cir. 1966), *Wopsock v. Natchees*, 279 Fed. Appx. 679, 2008 Wl 2152435 (10th Cir. May 23, 2008); issues regarding an internal controversy among Indians over tribal government (*Motah v. United States*, 402 F. 2d 1 (10th Cir. 1968)); issues regarding the right to vote in tribal elections (*Harjo v. Kepple*, 420 F. Supp. 1110, 1117 (D.C. Dist. 1976); issues regarding which tribal council is rightly in place under the tribal constitution (*Sac and Fox Tribe of the Mississippi in Iowa v. Bear*, 258 F. Supp. 2d 938 (N.D. Ia. 2003); election disputes between competing tribal councils over which council is authorized to govern tribe and casino (*Sac and Fox Tribe of Mississippi in Oiwa, Election Bd. v. Bureau of Indian Affairs*, 439 F. 3d 832 (8th Cir. 2006); issues regarding the appointment of a tribal official under tribal law (*Kaw Nation ex rel. McCauley v. Lujan*, 378 F. 3d 1139 (10th Cir. 2004); dispute between tribal members and members of the tribal council over who controls the financial assets of the tribe (*Wade v. Blue*, 369 F. 3d 407 (4th Cir. 2004); issues regarding the validity of a tribal resolution under tribal law (*Potts v. Bruce*, 533 F. 2d 527 (10th Cir. 1976); criteria to determine if someone is of Indian blood (*Groundhog v. Keeler*, 442 F. 2d 674 (10th Cir. 1971). Finally, a district court has already decided that the issue of alleged individual misconduct by the defendant tribal officials in the application of tribal funds presented in the Plaintiffs, Tribe's, Complaint is a not a political question. *Cheyenne–Arapaho Tribes Of Oklahoma v. Beard*, 554 F. Supp. 1 (D.W. Okla. 1980), *overturned on other grounds*.

Defendant Martinez quotes *Smith v. Babbit* as stating that "an Indian tribe, 'like other sovereigns, is immune from suit for alleged RICO violations'". 100 F. 3d 556, 559 (8th Cir. 1996). The Miccosukee Tribe's immunity, which is immunity from suit regardless of what statute is being violated, is not at issue in this case. The immunity belongs to the Miccosukee Tribe and to officers of the Tribe acting within the scope of their employment. The sovereign immunity of the Miccosukee Tribe does not extend here to the former tribal officers who engaged in illegal conduct against the Miccosukee Tribe and its members, and that the Miccosukee Tribe and its members have already determined that those acts were not within the scope of their employment. The Miccosukee Tribe filed this action after it determined, through its legislative body, that Defendant Cypress had misappropriated tribal funds without the authorization of the Miccosukee Tribe.

The court's holding in *Smith* does not provide any support to Defendant Martinez's arguments. The *Smith* court held that "because this dispute involves a question of tribal

membership, an inter-tribal matter, this court is without subject matter jurisdiction." Unlike this case, the dispute in *Smith* was a dispute "on the issue of tribal membership." *Smith*, 100 F. 3d at 558. The Eighth Circuit's reasoning indicates why *Smith* is not dispositive of this case. The *Smith* court explained that the power to determine tribal membership was an aspect of sovereignty retained by Indian tribes. *Id.* (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 54 (1978)). Indeed, as the *Smith* court expresses, "the Supreme Court has stated in *Santa Clara Pueblo* that "a tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Smith,* 100 F. 3d at 558. The court concluded that "therefore a membership dispute is an issue for a tribe and its courts." *Id.* The *Smith* court did not hold that Indian tribes could not pursue RICO claims against a former tribal officer. Instead, the *Smith* court held that the plaintiffs, tribal members, were attempting to appeal the tribe's determination of tribal membership, an issue which was purely intra tribal. *Id.* at 559.

Moreover, on May 3, 2011 the Miccosukee General Council, acting in its official capacity, passed General Council Resolution No. MGC-02-12, attached herein as Exhibit E, in which the filing of this lawsuit was authorized and approved against Guy Lewis, Esq., Michael Tein, Esq., Lewis Tein, PL, and any former employee of the Miccosukee Tribe that played a role in the misappropriation of tribal funds. The resolution states in relevant part:

> NOW, THEREFORE, BE IT RESOLVED, that the Miccosukee General Council has authorized and approved the filing of a lawsuit against Guy Lewis, Esq., Michael Tein, Esq. and Lewis Tein, PL. for legal malpractice, breach of fiduciary duty, fraud, fraud in the concealment, conspiracy to defraud, civil rico conspiracy, civil rico, civil theft, and conversion as a result of their willful and wrongful actions during their legal representation of the Miccosukee Tribe and Miccosukee Tribe members, *as well as any additional lawsuits against any former employee of the Miccosukee Tribe, vendor and/or company that participated in the theft and/or company that participated in the theft and/or embezzlement of tribal funds for the period of 2004 through 2009*.

(emphasis added). The adoption of these two General Council Resolutions demonstrates that there has been no violation of Rule 9(e) of the Federal Rules of Civil Procedure, as Defendant Martinez erroneously argued, because there has been an official decision made by the Miccosukee Tribe's governing body to authorize and approve the filing of this lawsuit. Furthermore, there has been no violation of Rule 9(a) and 12(b)(1) of the Federal Rules of Civil Procedure, because the passing of the General Council Resolutions evinces the Miccosukee

Tribe's granting of authority to allow filing of the lawsuit on their behalf, based on their determination regarding the Defendants' misappropriation of tribal funds. Lastly, there has also been no violation of Rule 9(d) of the Federal Rules of Civil Procedure, because the General Council Resolutions are the actual documents showing that official action has been taken in regards to the filing of this lawsuit.

Consequently, this Court has subject matter jurisdiction over this action for it does not present an intra-tribal dispute. In the alternative, if the Court finds that there is some intra-tribal issue involved in this case, it is not purely an intra-tribal dispute because the majority of the unauthorized and illegal conduct of the Defendants took place on non Indian country and the majority of the Defendants are non Indian. *See Goodface v. Grassrope*, 708 F. 2d 335 (8th Cir. 1983) (not an intra-tribal dispute because there were non Indian defendants and it involved the review of agency action by the federal government).

B. The Miccosukee Tribe's Sovereign Immunity

Defendant Martinez wholly misunderstands the concept of the Miccosukee Tribe's sovereign immunity and has argued it in a manner that is unclear and subject to two possible interpretations. First, Defendant Martinez incorrectly argues that the Court lacks subject matter jurisdiction over the Miccosukee Tribe, because in order for the Tribe to entertain this lawsuit there must be "a clear and direct averment in the Complaint that the Tribe has, through its internal governing bodies, waived its sovereign immunity…" D.E. No. 105 at 4. Secondly, Defendant Martinez states that "Mr. Cypress, and by extension the agents working for the Tribe under his supervision, likewise enjoyed immunity from RICO suit for actions taken in their official capacity." D.E. No. 105 at 8. However, as discussed below, Defendant Martinez is completely incorrect in his assertions.

i. The Miccosukee Tribe's sovereign immunity does not prevent the Court from maintaining subject matter jurisdiction over this suit

Defendant Martinez incorrectly argues that the Court lacks subject matter jurisdiction over the Miccosukee Tribe, because in order for the Tribe to entertain this lawsuit there must be "a clear and direct averment in the Complaint that the Tribe has, through its internal governing bodies, waived its sovereign immunity…" D.E. No. 105 at 4. The United States Supreme Court has stated that the federal government shares with Indian sovereigns the interest of providing access to courts to all. *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold*

Engineering, P.C., 476 U.S. 877, 888 (1986) (stating that "this Court and many state courts have long recognized that Indians share [the federal government's interest in ensuring that all citizens have access to courts] and that tribal autonomy and self government are not impeded when a State allows an Indian to enter its court to seek relief against a non-Indian concerning a claim arising in Indian Country."). Thus, the Miccosukee Tribe, as a sovereign, can access the courts for redress without waiving its sovereignty or immunity from suit.

Sovereigns, such as Indian tribes, enjoy immunity from suit. 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). 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. U.S. 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 Ass'n v. Miccosukee Tribe of Indians of Fla.,* 166 F. 3d 1126, 1130 (11th Cir. 1999)(citing *Worcester v. Georgia*, 31 U.S. 515, 559 (1832)); *Peña v. Miccosukee Service Plaza*, 2000 WL 1721806, at *2 (S.D. Fla. July 25, 2000).

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 v. Seminole Tribe of Fla.*, 243 F. 3d 1282, 1285 (11th Cir. 2001) (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."); *Fla. v. Seminole Tribe of Fla.*, 181 F. 3d 1237, 1241 (11th Cir. 1999)("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.v. Miccosukee Tribe of Indians of Fla.*, 63 F. 3d 1030, 1038 (11th Cir. 1995).

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 58-9 (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976); *United States v. King*, 395 U.S. 1, 4 (1969)). The United States Court of Appeals for the 11th Circuit in *Seminole Tribe of Fla.*, 181 F. 3d, 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. These well-established principles of tribal sovereign immunity will prevent a lawsuit **against** the Miccosukee Tribe in state or federal courts. However, these well-established principles of tribal sovereign immunity will not prevent the filing of a lawsuit by the Miccosukee Tribe in order to seek redress for a harm perpetuated by a non Indian defendant.

Indian tribes are independent and sovereign nations, whose sovereignty long predates that of the federal and state governments. *McClanahan v. State Tax Comm'n of AZ*, 411 U.S. 164, 173 (1973). As such, Indians have a pre-existing and unconditional right to access courts. *Three Affiliated Tribes*, 476 U.S. at 887-8. The act of accessing the courts, however, does not mean a waiver of an Indian Tribe's immunity from suit. *Newton v. Overseas Private Investment Corp.*, 544 So. 2d 224, 226 (Fla. 3d DCA 1989) (citing to *Frederick v. United States*, 386 F. 2d 481 (5th Cir. 1967) (stating that "when a sovereign sues it waives immunity as to claim of the defendant which asserts matters in recoupment, that is, arising out of the same transaction or occurrence which is the subject matter of the sovereign's suit, and to the extent of defeating sovereign's claim."). The *Frederick* court explained in further detail:

> when the sovereign sues it waives immunity as to claims of the defendant which assert matters in recoupment - arising out of the same transaction or occurrence which is the subject matter of the government's suit, and to the extent of defeating the government's claim but not to the extent of a judgment against the government which is affirmative in the sense of involving relief different in kind or nature to that sought by the government or in the sense of exceeding the amount of the government's claims; but the sovereign does not waive immunity as

> to claims which do not meet the "same transaction or occurrence test" nor to claims of a different form or nature than that sought by it as plaintiff nor to claims exceeding in amount that sought by it as plaintiff.

Frederick, 386 F. 2d at 488. In *Jicarilla Apache Tribe v. Andrus*, the 10th Circuit applied this doctrine to Indian tribes. 687 F. 2d 1324, 1344 (10th Cir. 1982) (citing to *U.S. Fid. & Guar. Co.*, 309 U.S. 506). The "government 'does not ipso facto relax its traditional immunity from suit by becoming a suitor in the courts.'" *Jicarilla,* 687 F. 2d at 1345. "A tribe does not automatically open itself up to counterclaims simply by virtue of filing a suit." *Wichita and Affiliated Tribes of Okla. v. Hodel*, 788 F. 2d 765 773-4 (D.C. Cir. 1986). Neither the United States nor Indian tribes lose their immunity from suit by filing an action, "even when the defendant files a compulsory counterclaim." *Id.* An Indian tribe entering a suit as a plaintiff anticipates that it can only improve or maintain its status quo. *Id.* at 773. The Eleventh Circuit has held in par with the *Frederick* and *Jicarilla* Circuits that sovereigns only waive immunity to recoupment claims raised by the defendant and that arise out of the same transaction or occurrence which is the subject matter of the sovereign's suit and which do not seek affirmative relief that is different in kind to that sought by the sovereign. *United States v. Timoth*y, 672 F. 2d 1373, 1379 (11th Cir. 1982). Therefore, waiver of the Miccosukee Tribe's immunity is not a requisite to this Court maintaining subject matter jurisdiction, as Defendant Martinez had inaccurately claimed in his Motion to Dismiss.

ii. Defendant Martinez cannot assert immunity against the Miccosukee Tribe

Defendant Martinez's poorly articulated argument that Defendant Cypress is immune from suit is devoid of common sense or legal support in light of the Miccosukee Tribe's resolutions quoted above. Additionally, Defendant Martinez seeks to have this Court find that the Miccosukee Tribe, an Indian Tribe, cannot sue former tribal officers, for acts it has determined were unauthorized and beyond the scope of his authority because that former tribal officer can assert the tribe's own sovereign immunity against it. This requires the Court to erroneously read and interpret Indian law and turn decades of well established law on its head. There are two reasons why Defendant Martinez's proposition fails.

First, Tribal sovereign immunity cannot be used against the superior sovereign. *See Miccosukee Tribe of Indians of Florida v. United States*, 698 F. 3d 1326, 1331 (11th Cir. 2012) (citing *Fla. Paraplegic Ass'n*, 166 F. 3d at 1135; *Reich v.Mashantucket Sand & Gravel*, 95 F.3d

174, 182 (2d Cir.1996); *Quileute Indian Tribe v. Babbitt*, 18 F. 3d 1456, 1459–60 (9th Cir.1994); *United States v. Red Lake Band of Chippewa Indians*, 827 F. 2d 380, 382 (8th Cir.1987) and holding that "Indian tribes may not rely on tribal sovereign immunity to bar a suit by a superior sovereign."). Thus, it is the next and only logical conclusion that an employee, such as Defendant Martinez, cannot use tribal sovereign immunity to bar a suit by the sovereign whom is the holder of the immunity.

Second, an Indian tribe's immunity only extends to a tribal officer if that tribal officer's actions are within his or her official capacity. *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 177 F. 3d 1212, 1225 (11th Cir. 1999); *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Florida*, No. 10 Civ. 60483, 2011 WL 1303163 *10 (S.D.Fla. March 31, 2011); *Lobo v. Miccosukee Tribe of Indians of Fla.*, 279 Fed. Appx. 926, 927, 2008 WL 2222074 * 1 (11th Cir. May 30, 2008); *Fletcher v. United States*, 116 F. 3d 1315, 1324 (10th Cir. 1997); *Teneco Oil Co. v. Sac & Fox Tribe of Indians*, 725 F. 2d 572, 576 (10th Cir. 1984); *Snow v. Quinault Indian Nation*, 709 F. 2d 1319, 1321 (9th Cir. 1983), cert. den. 467 U.S. 1214 (1984); *Terry v. Smith*, No. 09 Civ. 00722, 2011 WL 4915167 * 7 (S.D.Ala. July 20, 2011); *United States v. Menominee Tribal Enterprises*, No. 07 Civ. 316, 2008 WL 2273285 *10 (E.D. Wis. June 2, 2008); *Catskill Development, L.L.C. v. Park Place Entertainment Corp*., 206 F.R.D. 78, 86 (S.D. N.Y. 2002); *Buchanan v. Sokaogon Chippewa Tribe*, 40 F. Supp. 2d 1043, 1048 (E.D. Wis. 1999). Because the Miccosukee Tribe has already determined that Defendant Cypress, Defendant Martinez and Defendant Hernandez were not acting in his official capacity when they pillaged the coffers of the Miccosukee Tribe, Tribal sovereign immunity does not extend to Defendant Cypress, Defendant Martinez, or any other Defendant, to protect them from suit by the Miccosukee Tribe for their unauthorized and illegal actions.

II. THE COURT MUST NOT JUDICIALLY NOTICE THE FACTS REQUESTED BY DEFENDANT MARTINEZ

Defendant Martinez erroneously requests that this Court take judicial notice of several facts. Specifically Defendant Martinez requests that this Court take judicial notice of the following: (1) that Chairman Colley Billie and Billy Cypress are political rivals; (2) that the Miccosukee Tribe relies upon its sovereign immunity in order to avoid imposition of federal judicial authority/federal law over the Miccosukee Tribe; (3) that the Defendants in this case are known and respected individuals or institutions in the community; and (4) that three of the five

members of the Miccosukee Business Council, who approved all of the transactions alleged in the Complaint, are still members of the Business Council, but are not party defendants to this lawsuit. These allegations are totally baseless and irrelevant to the case at bar. Furthermore, Defendant Martinez fails to comply with the appropriate rules and procedure for the taking of judicial notice of an adjudicative fact.

Rule 201 of the Federal Rules of Evidence provides that "The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Therefore, indisputability is a prerequisite for judicial notice. *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F. 3d 1344, 1354 (11th Cir. 1344). The fact being judicially noticed "must be one that only an unreasonable person would insist on disputing." *United States v. Jones*, 29 F. 3d 1549, 1553 (11th Cir. 1994). Here the requests made by Defendant Martinez are completely questionable and are requests that a reasonable person would dispute, therefore these requests by Defendant Martinez cannot be judicially noticed by this Court.

A court "(1) may take judicial notice on its own; or (2) must take judicial notice if a party requests it and the court is supplied with the necessary information." FED. R. EVID. 201. The taking of judicial notice is a "highly limited process" because it "bypasses the safeguards which are involved with the usual process of proving facts by competent evidence in district court." *Shahar v. Bowers*, 120 F. 3d 211, 214 (11th Cir. 1997). Since Defendant Martinez did not supply this Court with any information to judicially notice these facts, the Court must then not take judicial notice of any of his requests. The courts will ordinarily take judicial notice of scientific facts, matters of geography, matters of political history, 120 F. 3d at 214, none of which Defendant Martinez requested in his Motion to Dismiss. Since the facts here are not easily capable of accurate and ready determination, nor is the subject matter appropriate for judicial notice, this Court must not take judicial notice of the facts requested by Defendant Martinez.

III. THE SECOND AMENDED COMPLAINT SATISFIES ALL OF THE REQUISITE LEVELS OF SPECIFICITY AND OTHER PLEADING REQUIREMENTS, IN ADDITION TO COMPLYING WITH THIS COURT'S ORDER, DATED OCTOBER 10, 2012, AND THEREFORE STATES A CLAIM FOR RICO, CIVIL THEFT, AND FRAUD

The Second Amended Complaint satisfies all of the requisite levels of specificity and other pleading requirements, in addition to complying with this Court's Order Granting in Part and Denying in Part Defendants' Guy Lewis, Esquire, Michael Tein, Esquire and Lewis Tein, PL's Motion to Require Plaintiff to File a RICO Case Statement (hereinafter, the "Order"). *See* D.E. No. 55.

Foremost, The Miccosukee Tribe has met the heightened pleading standard of Rule 9(b) of the Federal Rules of Civil Procedure, which is "the proper legal standard by which to judge the sufficiency of Plaintiff's Amended Complaint." D.E. No. 55 at 3. Under Rule 9(b) and per the Court's Order, the Miccosukee Tribe is required to allege, as to each defendant's participation, "(1) the precise statements, documents, or misrepresentations made; (2) the time, place, and person responsible for the statement; (3) the content and manner in which these statements misled the Plaintiffs; and (4) what the defendants gained by the alleged fraud." *American Dental Association v. CIGNA Corp,* 605 F. 3d 1283, 1291 (11th Cir. 2010). The court in *Bill Buck Chevrolet, Inc. v. GTE Florida, Inc.* stated that:

> Nevertheless, courts recognize that if the alleged fraud occurred over an extended period of time and the acts were numerous, the specificity requirements are less stringently applied. *Anthony Distributors, Inc. v. Miller Brewing Co.*, 904 F.Supp. 1363, 1366 (M.D.Fla.1995). This relaxed requirement is applied where "strict application of Rule 9(b) could result in substantial unfairness to private litigants who could not possibly have detailed knowledge of all the circumstances surrounding the alleged fraud." *NCR Credit*, 155 F.R.D. at 692. This does not negate the plaintiff's duty to adequately plead the contents of the alleged fraudulent representations and the places where the activity was to have occurred, however. *Anthony Distributors*, 904 F. Supp. at 1366.

54 F. Supp. 2d 1127, 1137 (11th Cir. 1994).

However, "after an extensive review of Plaintiff's Amended Complaint and the requirements of Rule 9(b)", D.E. No. 55 at 4, the Court found that the Miccosukee Tribe was deficient in three of the areas of the requirements of Rule 9(b) in regards to Defendant Martinez. The Court did note that the "Plaintiff's averments against Defendant Julio Martinez are more compliant" and that "the Plaintiff provided great detail of the alleged pattern of racketeering/criminal activity against Defendant Billy Cypress and Defendant Julio Martinez." D.E. No. 55 at 4-5. It is important to note that the Court made these comments based on the Miccosukee Tribe's First Amended Complaint. Therefore, at that point all of the requisite levels

of specificity and other pleading requirements had already been met. Yet the Miccosukee Tribe expanded upon the already compliant allegations against Defendant Martinez, and included additional specific factual allegations in its Second Amended Complaint. Therefore, Defendant Martinez's claims that the allegations contained in the Second Amended Complaint are vague and merely conclusory, are wholly absurd, since the Miccosukee Tribe has and continues to provide an abundance of detail in regards to the allegations relating to Defendant Martinez.

The Court Order required that the Miccosukee Tribe establish the factual basis for the RICO and Florida RICO claims against Defendant Martinez by supplementing its Complaint to include the following: the pattern of racketeering/criminal activity by Defendant Martinez; the description of the enterprise insofar as whether Defendant Martinez is separate from the enterprise, a member of the enterprise, or forms the enterprise itself; and a statement as to whether the same entity is both the liable "person" and the "enterprise."

First, the requirement by the Order that the factual basis for the pattern of racketeering/criminal activity by Defendant Martinez be established, was accomplished by the Miccosukee Tribe when repeated violations of 18 U.S.C. §1956, 18 U.S.C. §1957, and 18 U.S.C. §1341 were alleged in the Second Amended Complaint as the three separate predicate acts to a violation of RICO. Violation of 18 U.S.C. §1956 by Defendant Martinez was specifically described in paragraphs 66 through 72 of the Second Amended Complaint. Defendant Martinez's role in the overall scheme to defraud, by way of money laundering, was explicitly described in these paragraphs. His role was to issue payments for Defendants Lewis, Tein, and Lewis Tein, P.L. fraudulent invoices, which had been previously approved by Defendant Cypress. D.E. No. 75 at ¶ 68. This criminal conduct continued for a five year period, which is demonstrated in the detailed listing of dates in which Defendant Martinez unlawfully issued payments to Defendants Lewis, Tein, and Lewis Tein, P.L., through the use of the mail. D.E. No. 75 at ¶ 71. This specific listing included invoice numbers, date of invoices, and date of payments. All of these factual allegations and the reasonable inferences there from, when accepted as true, show that Defendant Martinez, as the Chief Financial Officer of the Miccosukee Tribe who routinely received and reviewed the Lewis Tein invoices, the Morgan Stanley bank statements, and the American Express statements, played an active role in the scheme to defraud.

Violation of 18 U.S.C. §1957 by Defendant Martinez was specifically described in paragraphs 73 through 75 of the Second Amended Complaint. Defendant Martinez's role in the

overall scheme to defraud, by way of engaging in monetary transactions with criminally derived property of a value greater than $10,000, which was derived from money laundering and mail fraud, was explicitly described in these paragraphs. In order to assert a violation of 18 U.S.C. §1957, the following elements must be alleged, as the Miccosukee Tribe so rightfully did in its Second Amended Complaint: "(1) the defendant engage or attempt to engage (2) in a monetary transaction (3) in criminally derived property that is of a value greater than $10,000 (4) knowing that the property is derived from unlawful activity, and (5) the property is, in fact, derived from 'specified unlawful activity.'" *United States v. Sokolow*, 91 F. 3d 396, 408 (3d Cir. 1996) (citing *United States v. Johnson,* 971 F. 2d 562, 567 n. 3 (10th Cir.1992)). Defendant Martinez knowingly engaged in monetary transactions with criminally derived property, when he charged the American Express charge issued under his name, but having the Miccosukee Tribe's investment account as collateral, for personal expenses for a total amount of $959, 269.65. D.E. No. 75 at ¶ 74-75. The court in *United States v. Silvestri* held that the completion of the underlying offense, in the case at hand the violation of 18 U.S.C. §1957, occurred before the checks were deposited and that the specified unlawful activity was completed as soon as the checks were sent through the mail, for the purpose of executing the scheme of fraud. 409 F. 3d 1311, 1334-35 (11th Cir. 2005). These allegations, the relevant case law, and the reasonable inferences there from, when accepted as true, show that Defendant Martinez engaged in monetary transactions with criminally derived property, very well knowing that such property was derived from specified unlawful activity, because he was actively involved in the pilfering that was part of the ultimate scheme to defraud the Miccosukee Tribe.

Of note is Defendant Martinez's denial of ever possessing an American Express card issued under his name and secured by the Morgan Stanley Investment Account. D.E. No. 105 at 14. Defendant Martinez's reasoning that the $959,269.65 in charges on the Miccosukee Tribe's American Express credit card "even if true (and those allegations are denied), the allegations do not amount to any unlawful act on the part of an executive of a multi-billion dollar entity", *Id*., is self-evident of how Defendant Martinez viewed his legal and fiduciary duty as the Chief Financial Officer for the Miccosukee Tribe during 2005 to 2009. As previously discussed, to the extent of Defendant Martinez's statement regarding any Tribal credit card issued to him in his Motion to Dismiss, it can be taken as a factual challenge to the Second Amended Complaint. Such statement by Defendant Martinez is deficient as such; the Miccosukee Tribe is in

possession of the documentary support to prove that Defendant Martinez in fact possessed a Tribal credit card issued to him and was paid for with tribal funds which is incorporated in part as Exhibit A.

Violation of 18 U.S.C. §1341 by Defendant Martinez was specifically described in paragraphs 76 through 78 of the Second Amended Complaint. In order to allege a violation of mail fraud two elements must be alleged: "(1) having devised or intending to devise a scheme to defraud (or to perform specified fraudulent acts), and (2) use of the mail for the purpose of executing, or attempting to execute, the scheme (or specified fraudulent acts)." *Schmuck v. United States*, 489 U.S. 705, 721 (1989). The factual allegations and the reasonable inferences there from, when accepted as true, shows that Defendant Martinez, acting in his supposed role as 'compliant employee' of the Miccosukee Tribe, caused the United States' mails to be used to perpetuate the scheme to defraud, when he processed and mailed the payments for the Lewis Tein invoices over the five year period in which this scheme took place. *See* D.E. No. 75 at ¶¶ 76-78, and 120.

Secondly, the requirement that the description of the enterprise insofar as whether Defendant Martinez is separate from the enterprise, a member of the enterprise, or forms the enterprise itself was established in paragraphs 18 through 24 of the Second Amended Complaint. In those paragraphs it was alleged that each Defendant is a person within the meaning of 18 U.S.C. §1961(3) and that the enterprise consisted of the individual Defendants to this case. Specifically, Defendant Martinez was named a member of the enterprise. *See* D.E. No. 75 at ¶ 21. The means by which the enterprise operated was specifically described in paragraphs 23 and 24. These specified factual allegations regarding the description of the enterprise and the reasonable inferences there from, when accepted as true, shows the members who made up the enterprise and how it operated in the scheme to defraud throughout the five year period. Lastly, a statement as to whether the same entity is both the liable "person" and the "enterprise" was specifically established in Paragraphs 18 through 22 of the Second Amended Complaint.

The Miccosukee Tribe therefore has satisfied the heightened pleading standard of Rule 9(b), by way of complying with the rule's requirements and the Court's Order, and by providing the factual allegations, all of which are specific in placing Defendant Martinez on notice as to all of the precise facts relied upon for the Miccosukee Tribe's RICO claim.

Defendant Martinez falsely claims that the "Complaint fails the 'plausibility standard as to the claims" against himself. D.E. No. 105 at 14. Yet Defendant Martinez fails to recognize that per the Court's Order all of the requisite levels of specificity, including the heightened pleading standard, which requires more information than the plausibility standard, have been satisfied. Thus the Miccosukee Tribe has satisfied the 'plausibility standard.' "Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. A well pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.' [i]dentifying facts that are suggestive enough to render a [] conspiracy plausible." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 556 (2007). Based on the numerous amount of detailed allegations in the Second Amended Complaint shows that an agreement was made between the Defendants in regards to the scheme to defraud, and provides a reasonable expectation that future discovery will provide the evidence for this scheme. *Twombly* does "not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face", 550 U.S. 554, 557 (2007), which the Miccosukee Tribe has established in its Second Amended Complaint. The court in *DeGirmenci v. Sapphire-Fort Lauderdale, LLP* established that a "[w]ith a shotgun pleading, it is virtually impossible to know which allegations of fact are intended to support which claims for relief." 693 F. Supp. 2d 1325, 1336 (S.D. Fl. 2010). However, unlike *DeGirmenci*, which involved a plaintiff not following a court's order to clearly state the facts of each count, the Miccosukee Tribe has adhered to and complied with this Court's Order. See D.E. No. 75 at ¶¶18-24 and 66-72.

"When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). The facts in the Miccosukee Tribe's Second Amended Complaint have been well-plead, which the Court should assume as true and infer that there has been misconduct by the Defendants, for which the Miccosukee Tribe is entitled to relief for this egregious behavior. To state otherwise, as Defendant Martinez has done, is ludicrous. However, Defendant Martinez has agreed in his Motion to Dismiss that these allegations are to be taken as true for purposes of a motion to dismiss. D.E. No. 105 at 9. Since the allegations in the Second Amended Complaint are not conclusory, the Court must assume that they are true. Once this

assumption is made, there is in fact a plausible suggestion of an entitlement to relief. Furthermore, there is no alternative explanation for Defendant Martinez's behavior, regardless of what he has argued.

Defendant Martinez's feeble attempt to classify the Miccosukee Tribe's allegations as "mere conclusory terms and thus cannot satisfy the pleading requirement…", D.E. No. 105 at 9, is undermined by the Miccosukee Tribe's plethora of allegations contained in its Second Amended Complaint. Defendant Martinez further attempts to argue that the Second Amended Complaint is contradicted by its "own allegations respecting the actual authority of the Chairman to unrestricted control of the Tribe's financial funds, the Tribal Business Council's and the Tribal General Council's actual review and approval of the Chairman's transactions", D.E. No. 105 at 9, is evidence of how Defendant Martinez inaccurately read the Second Amended Complaint. Yet there are no such allegations in the Second Amended Complaint that could lead a reader to believe that neither the Miccosukee General Council nor the Miccosukee Business Council ever reviewed or approved any of the transactions subject to this lawsuit. Such transactions were deliberately never included in the financial reports that were presented. In fact the Second Amended Complaint states that several misrepresentations were made to the Miccosukee Tribe regarding its finances. *See* D.E. No. 75 at ¶ 61 and 219.

Defendant Martinez's irreverent claim that he was merely acting as an employee by merely performing the assignments directed by his supervisors is nonsensical, because it was his willful actions as well as inaction as an employee having a legally recognized duty to protect and preserve the financial interests of the Miccosukee Tribe that has given rise to the allegations contained in the Second Amended Complaint. For example, Defendant Martinez stated that his actions were part of "job functions - all in accordance with the expected job duties of someone in Mr. Martinez's employment position." D.E. No. 105 at 3. Defendant Martinez further states that he was just doing his "role as an employee in merely performing the assignments directed by his supervisors (i.e., the Chairman Mr. Cypress and the Director of the Finance Department Michael Hernandez." D.E. No. 105 at 9. However, stealing was not part of Defendant Martinez's job functions or expected job duties. Willfully assisting Defendant Cypress and the other Defendants to steal was also not a part of his job functions or expected job duties. Therefore, there is no other obvious explanation for Defendant Martinez's behavior that would prevent the Court from finding that there is a plausible entitlement of relief for the Miccosukee Tribe.

Moreover, Defendant Martinez falsely states that no violation of any federal law has been alleged within the Second Amended Complaint. However, Defendant Martinez fails to recognize the various allegations regarding the violation of the federal and Florida RICO statutes, for which this Court has subject matter jurisdiction. Pursuant to this Court's subject matter jurisdiction, there is supplemental jurisdiction over the Miccosukee Tribe's allegations for Aiding and Abetting Fraud (Count V), Embezzlement (Count VIII), and Breach of Fiduciary Duty (Count IX), all of which Defendant Martinez has chosen to ignore in his Motion to Dismiss, thus effectively waiving any arguments in regards to these Counts.

Additionally, the Miccosukee Tribe is not required to present each alleged predicate act of racketeering activity by number, as Defendant wrongfully argued. D.E. No. 105 at 17. Instead the Miccosukee Tribe is bound to follow the instructions of the Court given in its Order. The Order allows for the Miccosukee Tribe to plead the RICO claims, without having to conform to a specified format. D.E. No. 55 at 4 and 6. Defendant Martinez cites *Koch v. Royal Wine Merchants, Ltd.*, 847 F. Supp. 2d 1370 (S.D. Fla. 2012), as support for his contention that each alleged predicate act of racketeering activity must be presented by number, i.e. Predict Act #1, Predict Act #2. First, *Koch* does not cite to any law or case precedent for that proposition. Secondly, it can be reasonably inferred that method of organization was the judge's preference, which is not based on any binding precedent. Therefore, the Miccosukee Tribe is left to comply with the Court's Order, which is controlling in this situation.

Since the Miccosukee Tribe has shown compliance with all of the requisite levels of specificity and other pleading requirements, all while complying with the Order, the Court must not dismiss this Second Amended Complaint. However, if the Court were to find that there has not been compliance with the requisite pleading standards, the Court should grant the Miccosukee Tribe leave to amend its Complaint.

IV. COUNT II OF THE SECOND AMENDED COMPLAINT SATISFACTORILY ESTABLISHES A CLAIM FOR CONSPIRACY

Count II of the Second Amended Complaint satisfactorily establishes a claim for conspiracy, and as such must not be dismissed. Defendant Martinez erroneously claims that when a conspiracy count does not contain additional allegations separate from the substantive RICO claim, then the claim for conspiracy to commit a RICO violation also fails. Defendant Martinez uses *American Dental Ass'n v. CIGNA Corp.* as support for his erroneous claim. *See*

605 F .3d 1283, 1296 n.6 (11th Cir. 2010). However, what Defendant Martinez fails to recognize is that such 'rule' has not been expressly stated or adopted by the Eleventh Circuit Court of Appeals. *See Id*. (stating that "This court has not expressly stated such a rule….there appears to be no controlling authority in our circuit or in the Supreme Court instructing us to adopt the reasoning of our sister circuits.") In the case at bar, the Miccosukee Tribe has specifically plead a RICO violation, as well as separate allegations for the conspiracy to commit a RICO violation, *see* D.E. No. 75 at ¶ 181 and 184, thus precluding the application of *American Dental* to these facts, even though the court has already stated that no such rule exists.

Defendant Martinez incorrectly argues that the Miccosukee Tribe failed to establish a RICO conspiracy claim by either showing that he agreed to the overall objective of the conspiracy or agreed to commit two predicate acts. D.E. No. 105 at 19. However, the Miccosukee Tribe is not required to offer direct evidence of either of those two elements. Instead the conspiracy "may be inferred from the conduct of the participants," *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F. 3d 935, 950 (11th Cir. 1997), which the Miccosukee Tribe has done so in its Second Amended Complaint. *See* D.E. No. 75 at ¶ 181. Furthermore, it has been acknowledged that certain examples of conduct could be sufficient to imply a conspiracy, such as "parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties." 605 F. 3d at 1295 n.5 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 n.4 (2007)). Defendant Martinez's parallel behavior, which did not result from coincidence, as an employee acting outside the scope of his employment and in violation of his fiduciary duty owed to the Miccosukee Tribe clearly implies that a conspiracy existed among the Defendants. Since the Miccosukee Tribe has sufficiently established a claim for conspiracy, it therefore must not be dismissed by this Honorable Court.

V. THE REMAINING COUNTS MUST NOT BE DISMISSED

The remaining counts must not be dismissed. Since the Miccosukee Tribe has already established that it sufficiently stated a claim for all of its counts, thus evidencing this Court's subject matter jurisdiction over this matter it is only logical that this Court maintain its supplementary jurisdiction over the remaining counts, which include state law claims. This Court maintains its supplemental jurisdiction pursuant to 28 U.S.C. §1367(a), which states that the "district courts shall have supplemental jurisdiction over all other claims that are so related to

claims in the action within such original jurisdiction that they form part of the same case or controversy." Given that Defendant Martinez has failed to recognize the allegations for Aiding and Abetting Fraud (Count V), Embezzlement (Count VIII), and Breach of Fiduciary Duty (Count IX), he has thus effectively waived any arguments he may have had in regards to these Counts.

THE MICCOSUKEE TRIBE'S JOINS ITS RESPONSES TO THE MOTIONS TO DISMISS FILED BY OTHER DEFENDANTS

The Miccosukee Tribe hereby joins by reference the legal arguments made and the legal authority cited in its Responses to the Motions to Dismiss Filed by Other Defendants.

WHERFORE, the Miccosukee Tribe respectfully requests this Honorable Court deny Defendant Julio Martinez's Motion to Dismiss Second Amended Complaint for Lack of Subject Matter Jurisdiction and Failure to State a Cause of Action and Joinder in Motions to Dismiss by Other Defendants. In the alternative, the Miccosukee Tribe respectfully requests that this Honorable Court grant the Miccosukee Tribe leave to amend its Second Amended Complaint

Respectfully submitted this 14th day of January 2013.

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