UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

STEPHANIE MASTRO, an individual, Plaintiff, v. **SEMINOLE TRIBE OF FLORIDA** d/b/a **SEMINOLE INDIAN CASINO- IMMOKALEE**, Defendant.	**CIVIL ACTION** **Case No. 2:12-cv-411** **Judge: UA** **Mag. Judge: Sheri Polster Chappell**

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

NOW COMES the Plaintiff, **STEPHANIE MASTRO**, by and through her undersigned attorney, and files her response to Defendant's Motion to Dismiss and states as follows:

INTRODUCTION

While many potential plaintiffs decline to bring suit against casinos in the State of Florida because, as the fictitious Danny Ocean said, "the house always wins,"[1] this case defies that misperceived notion. As will be discussed *infra*, the doctrine of tribal sovereign immunity is inapplicable under the instant set of facts, and *arguendo*, even if found to be applicable, has unequivocally been waived by the instant Defendant. As will be evidenced below, the law and equities discussed herein mandate that the Defendant's Motion to Dismiss properly be denied.

On November 21, 2012, the Plaintiff filed a four (4) count Amended Complaint against the above captioned Defendant to amend the Complaint to reflect the proper Defendant:

I. Count I: Violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000 (e)(3)(a) ("Title VII") (Sexual Harassment);

[1] *Ocean's Eleven*, motion picture (1960).

II. Count II: Violation of the Florida Civil Rights Act (Sexual Harassment);

III. Count III: Violation of Title VII (Retaliation);

IV. Count IV: Violation of the Florida Civil Rights Act (Retaliation).

Following the filing of an Amended Complaint, the above-captioned Defendant filed its Motion to Dismiss on January 30, 2013, arguing that this Court lacks subject matter jurisdiction over this matter. As will be discussed, *infra*, such arguments as bases to dismiss the instant action must fail.

MEMORANDUM OF LAW

I. Legal Standard.

A motion to dismiss under Rule 12(b)(1) may assert either a factual attack or a facial attack to jurisdiction. *McElmurray v. Consol. Gov't of Augusta-Richmond County*, 501 F.3d 1244, 1251 (11th Cir. 2007); *Lawrence v. Dunbar*, 919 F.2d 1525, 1528-29 (11th Cir. 1990). A factual attack challenges "the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." *Lawrence*, 919 F.2d at 1529. In a facial attack, on the other hand and as is the case in the Defendant's instant Motion, the court examines whether the complaint has sufficiently alleged subject matter jurisdiction. As it does when considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court construes the complaint in the light most favorable to the plaintiff and accepts all well-pled facts alleged by in the complaint as true. *McElmurray*, 501 F.3d at 1251 (noting in a Rule 12(b)(1) facial challenge a plaintiff has "safeguards similar to those retained when a Rule 12(b)(6) motion to dismiss for failure to state a claim is raised").

A review of the Plaintiff's Second Amended Complaint reveals that the Plaintiff has affirmatively pled, and it must be taken as true, that the Defendant is not entitled to sovereign

immunity and is "not a "tribe" for the purposes of Title VII. (Sec. Am. Comp. ¶10). The evidence proffered by the Defendant in support of its Motion to Dismiss is woefully inadequate to meet its burden in persuading the Court that the Plaintiff's well-pled Complaint must be dismissed. The Defendant files no affidavits in support of its Motion and instead relies upon

II. The Doctrine, and Misnomer, of Tribal Sovereign Immunity.

a. The Rise of Tribal Sovereign Immunity and Its Downward Trend in the Modern Economic Era.

Currently, and contrary to the Defendant Tribe's assertions, much debate exists over the exact nature of tribal sovereignty, including the very source of the doctrine. One theory suggests that Native American tribes are inherently sovereign because they were self-governing entities before Europeans colonized North America. *See generally* G. William Rice, *Employment in Indian Country: Considerations Respecting Tribal Regulation of the Employer-Employee Relationship*, 72 N.D. L. REV. 267, 275-77 (1996); Steve E. Dietrich, *Tribal Businesses and the Uncertain Reach of Tribal Sovereign Immunity: A Statutory Solution*, 67 WASH. L. REV. 113, 117 (1992). Under this theory, tribal immunity pre-dates the formation of the United States, and therefore, the U.S. government has no right to modify or limit this immunity. *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978). The more widely accepted theory, however, is that by nature of their conquest by the Europeans and later the United States, the Native Americans' sovereignty no longer inherently exists but is permitted by the government. *Oliphant v. Suquamish Indian Tribes*, 435 U.S. 191, 207-08 (1978) Under this theory, the federal government has the ability to abrogate tribal immunity as it wishes. *Id*.

In *Johnson v. M'Intosh*, 21 U.S. 543 (1823), the Supreme Court first set forth the idea that the federal government allows tribal immunity as a matter of discretion. Chief Justice Marshall stated that the "discovery" of North America by Europeans "necessarily diminished" the Native

Americans' sovereign immunity. *Id*. at 574. The Court further clarified the role of Native Americans in the American legal system in a pair of cases decided almost a decade later. In *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), Marshall asserted that Native American tribes were not "foreign states," but were akin to the states or "domestic dependent nations" capable of managing their own affairs. *Id*. at 17. The *Cherokee Nation* line of reasoning established a broad interpretation of tribal immunity that would not be significantly reduced for almost 150 years.

Despite the original breadth given to tribal immunity, the recent trend among courts has been to place increasing restrictions on the application of the doctrine. Dietrich, *supra* at 110-15; Rice, *supra* at 278. This trend of limiting tribal immunity was ushered in by the 1978 Supreme Court case of *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). *In Oliphant*, the Court placed the first major restriction on tribal immunity since *M'Intosh*, holding that tribal sovereign immunity did not allow tribes to exert criminal jurisdiction over non-Native Americans. *Id*. *Oliphant* stood for the proposition that Native American nations are dependent on the United States, and retained only "quasi-sovereignty authority" restricted to powers consistent with their "domestic dependent" status. *Id*. at 208. Further, the Court implied that the immunity of the tribes would be limited "so as not to conflict with the interests" of the United States. *Id*. at 209. The *Oliphant* decision paved the way for other cases that have further limited sovereign immunity. *See*, *e.g.*, *Montana v. United States*, 450 U.S. 544, 549 (1981); *Rice v. Rehner*, 463 U.S. 713, 720 (1983).

b. The Intersection of the Modern Title VII and Traditional Tribal Sovereign Immunity: The Defendant is Not a "Tribe" Under Title VII.

Without question, Title VII protects employees from discrimination based on gender, race, color, religion, and national origin. *See* 42 U.S.C. §§ 2000e-2000e-17 (1994). While the language of Title VII suggests that Native American tribes are not considered "employers" under

the Act, the properly emerging jurisprudence represents a significant shift towards adapting the stagnant notion of tribal sovereign immunity in the modern employment arena.

The United States District Court for the District of North Dakota has held that this language of Title VII does *not* exempt tribal businesses from Title VII claims by non-Native Americans, such as the instant Plaintiff. In a case with an eerily similar set of facts to the case at bar, *Myrick v. Devils Lake Sioux Manufacturing Corp.*, 718 F. Supp. 753 (D.N.D. 1989), a corporation with a Native American tribe as the majority owner attempted to claim immunity from a race and age discrimination suit brought under Title VII and the Age Discrimination in Employment Act (ADEA). 29 U.S.C. §§ 621-634 (1994); *see also Myrick*, 718 F. Supp. at 754. There, the tribe claimed they were exempt under the Native American tribe exception to Title VII (*see Myrick*, 718 F. Supp. at 756) and that the ADEA does not apply to tribally owned businesses (*see id*. at 754). After close consideration, the court ruled that these defenses were "without merit," and allowed the suit against the tribally owned business to proceed. *Id*. The court took special care to distinguish contradictory cases such as *EEOC v. Cherokee Nation,* 871 F.2d 937 (10th Cir. 1989), by finding that they "did not consider the present situation of non-tribal reservation employees." *Myrick*, 718 F. Supp. at 754 n.1. Consequently, companies owned by Native American tribes cannot avoid claims brought under Title VII if those claims involve a non-Native American employee, as is true in the instant case. *Id*.

It is crucial to note that contrary to the holdings of the cases cited by the Defendant, neither Title VII nor its legislative history explicitly state that tribal companies that hire non-Native American employees enjoy absolute exemption from the statute. To the contrary, the vague language excluding Native American tribes (*see* 42 U.S.C. § 2000e(b) (1994)) and the legislative purpose behind it indicate congressional intent to bar Title VII claims only in very

limited situations, which will be discussed in detail *infra*. Specifically, the legislative history demonstrates an intent to protect tribes from suits in only two situations: employment decisions specifically involving tribal government and the preferential hiring of a Native American over a non-Native American. S*ee* 110 CONG. REC. 13702 (1964) (statement of Sen. Karl Mundt, Repub., S.D.).

The section of Title VII excluding tribes from the definition of "employer" states that the Act does not apply to "the United States, a corporation wholly owned by the Government of the United States, *an Indian tribe*, or any department or agency of the District of Columbia." 42 U.S.C. § 2000e-2(i) (1994) (emphasis added). Although this vague language does not specifically define "Indian tribe," Senator Karl Mundt of South Dakota, who proposed the amendment adding this provision, made its purpose clear when introducing the bill:

> "The reason why it is necessary to add these words is that Indian tribes, in many parts of the country, are virtually political subdivisions of the Government. To a large extent many tribes control and operate their own affairs, even to the extent of having their own elected officials, courts and police forces." 110 CONG. REC. 13702 (1964) (statement of Sen. Karl Mundt, Repub., S.D.).

Senator Mundt went on to say that his amendment would allow tribes to "conduct their own affairs" in "their capacity as a political entity." *Id*. This speech by the amendment's sponsor demonstrates that the intent was to protect the employment decisions of tribes relating to tribal government, not to deny non-Native American employees of Native American-owned corporations their rights under Title VII. This language does not exempt tribes from discrimination suits based on gender, religion, age, or race; it only permits tribal and geographically situated employers to exercise a hiring preference for Native Americans.

Quite simply, Senator Mundt's two Title VII amendments were not meant to protect tribal businesses from suits by non-Native American employees, but rather the purpose of these

additions to the Act was to "assure our American Indians of the continued right to protect and promote their own interests and to benefit from Indian preference programs." 110 CONG. REC. 13702 (1964) (statement of Sen. Karl Mundt, Repub., S.D.). The intent was not to allow tribes to profit from illegal acts against non-Native Americans, but to help Native Americans "decrease unemployment" and "integrate their people into the affairs of the national community." *Id*. The cases cited by the Defendant ruling that Title VII excludes tribal businesses from claims brought against them by non-Native American employees have failed to consider this legislative intent and thus, the reasoning of such cases is flawed. Moreover, the Defendant's own Tribal Sovereign Immunity Ordinance (attached to Defendant's Motion to Dismiss as Exhibit B) specifically indicates sovereign immunity applying only to "federal jurisdiction… over its (tribe's) employees… and tribal affairs which would impinge upon tribal self-government and economic development, including the protection of scarce tribal assets…" *See* Defendant's Tribal Sovereign Immunity Ordinance. The Defendant's Ordinance further makes clear that it extends to "the actions of tribal officials, employees and authorized agents…" Given this clear and express language, the Defendant has made it known that it wishes to have tribal sovereign immunity as it pertains to the Seminole tribe. However, as has been clearly alleged, the Defendant's employment of the Plaintiff was not in its tribal capacity but rather as a multi-billion dollar economic venture, which is discussed in greater detail *infra*.

c. The Emergence of Tribal Businesses and Employment Discrimination Claims.

While tribally owned businesses facing an employment discrimination suit may allege they are entitled to the same sovereign immunity defense as are tribal governments, the instant Defendant's arguments in this regard overlook or ignore the fact that most courts have actually held that tribal companies do not enjoy sovereign immunity from their dealings with non-Native

Americans. *See Donovan v. Coeur d'Alene Tribal Farm* 751 F.2d 1113 (9th Cir. 1985); *Roberson v. Confederated Tribes*, 103 L.R.R.M (BNA) 2749 (D. Or. 1980). Most courts distinguish tribal affairs relating to government matters from tribal affairs pertaining to commercial activities, and hold that immunity does not protect the latter. *See Eg. Worcester v. Georgia*, 31 U.S. 515, 560 (1832); *Williams v. Lee*, 358 U.S. 217, 223 (1959); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983).

Several courts have repeatedly found that corporations and other commercial activities operated by Native Americans do not enjoy the sovereign immunity of the tribe. In *Donovan v. Coeur d'Alene Tribal Farm*, the Ninth Circuit ruled that sovereign immunity could not protect a Native-American-owned-and-operated farm from a claim under the Occupational Safety and Health Act (OSHA). The holding in *Coeur d'Alene* reaffirmed the doctrine that tribal sovereignty applies only to tribal government and "purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations." *Coeur d' Alene*, 751 F.2d at 1116. Because the *Coeur d' Alene* farm employed non-Native Americans, was a "normal commercial farming enterprise," and did not involve intramural matters of self-government, the court found it fell within OSHA's definition of "employer." *Id*.

In another relevant case, *Roberson v. Confederated Tribes*, 103 L.R.R.M (BNA) 2749 (D. Or. 1980), the Federal District Court of Oregon allowed a commercial entity of a tribe to be sued under the National Labor Relations Act. *Id*. at 2751. The court in *Roberson* found a distinction between tribal employers acting in their governmental capacities and tribal employers acting as corporate animals. *See id.* (citing the Indian Reorganization Act, 25 U.S.C. §§ 476-477 (1994)). According to the *Roberson* court, tribally owned businesses that involve the hiring of non-Native Americans and commercial activities with non-Native American customers are not internal

affairs involving tribal government, and as such, these activities should not receive the benefit of tribal sovereign immunity. *See id.* at 2751. Under Title VII, Congress has authorized suit against tribally owned businesses that involve the hiring of non-Native Americans. Quite simply, non-Native American tribal employees of tribal businesses may bring suit under a doctrine originated by the Supreme Court and developed by the Ninth Circuit known as the "*Tuscarora* Rule."

More recently, in *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. Colo. 2010), the Tenth Circuit Court of Appeals elucidated six (6) factors to be used to determine whether tribal economic entities qualify as subordinate economic entities entitled to share in a tribe's immunity:

> "… we should look to a variety of factors when examining the relationship between the economic entities and the tribe, including but not limited to: (1) their method of creation; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) whether the tribe intended for the entities to have tribal sovereign immunity; (5) the financial relationship between the tribe and the entities; and (6) whether the purposes of tribal sovereign immunity are served by granting immunity to the entities." *Id*. at 1181.

As the Tenth Circuit has pointed out, the Supreme Court has consistently expressed reservations about the extension of tribal immunity to economic activities. *See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 757-60, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998); *see also Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288 (10th Cir. Okla. 2008) (in discussing *Kiowa Tribe*, stating that "the Supreme Court has expressed misgivings about recognizing tribal immunity in the commercial context…"). As tribal sovereign immunity is fashioned after, and may not exceed, federal sovereign immunity, "When the United States enters into commercial business it abandons its sovereign capacity and is to be treated like any other corporation." *Salas v. United States*, 234 F. 842, 844-45 (2d Cir. 1916). This same line of reasoning applied directly to the tribes.

The Ninth Circuit Court of Appeals has unequivocally expressed its misgivings about tribal sovereign immunity in the context of business operations clearly used purely for pecuniary gain. *See, e.g., Cook v. AVI Casino Enters.*, 548 F.3d 718, 725 (9th Cir. Ariz. 2008); *Parker Drilling Co. v. Metlakatla Indian Cmty*., 451 F. Supp. 1127, 1137 (D. Alaska 1978) ("Only with the potential for imposition of tort liability are Indian corporations truly equal, regardless of the desirability of certain aspects of that status."); *Namekagon Dev. Co. v. Bois Forte Reservation Hous. Auth*., 395 F. Supp. 23, 29 (D. Minn. 1974) ("It is repugnant to the American theory of sovereignty that an instrumentality of the sovereign shall have all the rights and advantages of a trading corporation, and the ability to sue, and yet be itself immune from suit…" (quoting *Fed. Sugar Ref. Co. v. U.S. Sugar Equalization Bd*., 268 F. 575, 587 (S.D.N.Y. 1920))).

As the Ninth Circuit notes in *In re Greene*, 980 F.2d 590, 600 (9th Cir. Mont. 1992), state supreme courts have addressed the commercial exception, but with ambiguous results. *See, e.g.*, *Dixon v. Picopa Constr. Co.*, 160 Ariz. 251, 772 P.2d 1104, 1109 (Ariz. 1989) (tribal sovereign immunity covers "tribal business" but not "non-tribal business," without definition); *Padilla v. Pueblo of Acoma*, 107 N.M. 174, 754 P.2d 845, 850 (N.M. 1988) (tribal sovereign immunity does not cover economic activities by the tribe off the reservation), cert. denied, 490 U.S. 1029, 1030, 104 L. Ed. 2d 202, 109 S. Ct. 1767 (1989); *see also Duluth Lumber and Plywood Co. v. Delta Development, Inc.*, 281 N.W.2d 377, 382 (Minn. 1979) ("Generally, state courts may assume jurisdiction over disputes arising from commercial transactions between Indians and non-Indians if the transaction is not confined to the Indian Reservation.").

d. The *Tuscarora* Rule.

The *Tuscarora* Rule stems from *Couer d' Alene's* interpretation of the Supreme Court's decision in *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960). In

Tuscarora, the Supreme Court ruled that "It is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Native Americans and their property interests." *Id.* at 116 (citing *Five Civilized Tribes v. Commissioner*, 295 U.S. 418 (1935)). Accordingly, under *Tuscarora*, Native Americans may be held liable under federal labor and employment statutes of general applicability. *See Donovan v. Coeur d' Alene Tribal Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985). In *Coeur d'Alene*, the Ninth Circuit further stated that a tribe's employment of non-Native Americans was a strong indication that the business enterprise was not an area of self-government. *Id*. at 1116.[2]

The Seventh Circuit has also adopted the *Tuscarora* Rule in *Smart v. State Farm Insurance Co.,* 868 F.2d 929 (7th Cir. 1989). In *Smart* the court ruled that the Employee Retirement Income Security Act (ERISA) applied to a group insurance policy issued to tribal employees of the Chippewa Indian Tribe. *See Smart*, 868 F.2d at 938. The *Smart* decision relied on the *Tuscarora* Rule by finding that the federal statute would apply unless the tribe could demonstrate that doing so would intrude on its self-governance or internal affairs. *See id.* at 933-34. Consequently, federal statutes and case law indicate that tribal businesses, as is the instant Defendant, should not be able to assert sovereign immunity as a defense to employment discrimination suits based on federal legislation brought by non-Native American employees. Moreover, the language of Title VII, as well as the Act's legislative intent, demonstrate that tribally owned companies should not be exempt from the statute, and as a result, the Defendant's arguments in this regard properly fail as a matter of law.

[2] In 1991, the Ninth Circuit reaffirmed the *Tuscarora* Rule in *Department of Labor v. Occupational Safety & Health Review Commission*, 935 F.2d 182 (9th Cir. 1991). The *Department of Labor* court ruled that the *Tuscarora* Rule mandated that OSHA be applied to a tribally run mill, even though the tribe had a treaty impliedly giving them the right to exclude OSHA inspectors from coming on to the property. *Id*. at 184.

III. The Modern Seminole Tribe of Florida and Its Well-developed, Multi-Billion Dollar Tribal Businesses Defy the Congressional Intent of Protecting "Financially Fragile" Native American Tribes.

It is often argued by tribes such as the instant Defendant that sovereign immunity should be applied to its "tribal businesses" because if immunity is not applied, the resulting financial loss would threaten the economic existence of the "financially fragile" tribes. *See generally* Recent Cases, 102 Harv. L. Rev. 556, 558 (1988) (claiming that a broad application of sovereign immunity is necessary to protect "financially fragile Indian tribes"). However, the recent impressive economic successes of Native American tribes demonstrate that this argument is no longer valid concerning most tribes, and specifically the Seminole tribe, which is a sophisticated business entity registered to do business in the State of Florida, operating at least seven (7) casinos in Florida to provide gaming and entertainment services to the entire public with a predominant workforce of non-Native American employees.

a. The Seminole Tribe and Its Tribal Companies Are No Longer "Financially Fragile."

The instant Defendant's casinos also compete with the numerous casinos operated elsewhere within the United States by public corporations and compete with Florida's industry of casino cruises embark daily from Florida's ports (including Tampa, Cape Canaveral, Fort Lauderdale and Miami). These other non-Native affiliated casinos are required to abide by Title VII and their respective state discrimination laws, yet this defendant, invokes the cloak of tribal sovereign immunity, having the gall to present its position that it does not have to concern itself with these discrimination laws, and can flout these laws that every other government has determined to be the basic standards on which the worker can expect to encounter in the workplace nationwide.

The traditionally cited statistics, which allegedly demonstrate that tribes are financially unstable, were compiled prior to the huge successes of Native American casinos and businesses. G. William Rice, *Employment in Indian Country: Considerations Respecting Tribal Regulation of the Employer-Employee Relationship*, 72 N.D. L. REV. 267 (1996). Despite the pre-Indian casino era's dire statistics from several years ago, many tribes have recently enjoyed explosive economic growth, and in many respects none more so than the instant Defendant. Specifically, and as the attached Exhibit A demonstrates, the Seminole tribe's businesses, in the form of Florida casinos, which includes Seminole Casino Immokalee, rake in a whopping $2,000,000,000.00 or more during the 2012-2013 fiscal year. The Defendant also owns and operates the casino management companies at many of its casinos, with the vast majority of casino personnel being non-Native American. If the Seminole tribe was a private company, they would rank among Florida's largest and most profitable. Much of the Defendant's successes have resulted from the opening of high stakes casinos on Native American reservations pursuant to the Indian Gaming Regulatory Act of 1988. 25 U.S.C. §§ 2701-21 (1994).[3] These astronomical profits are made all the more lucrative because Native Americans are exempt from state taxes on income that is earned on reservations. *See McClanahan v. Arizona St. Tax Comm'n*, 411 U.S. 164, 179-81 (1973).

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[3] Another prime example is the Mashantucket Pequot tribe of Connecticut, which began the reservation casino craze in 1990 (*See generally* Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024 (2nd Cir. 1990) and now owns the largest casino in the entire Western Hemisphere. The Foxwoods Casino, located on the Pequots' reservation, is a 139,000 square foot facility that includes shops, hotels, restaurants, theaters, and a planned theme park. Keith David Bilezerian, Note, *Ante Up or Fold: States Attempt to Play Their Hand While Indian Casinos Cash In*, 29 NEW ENG. L. REV. 463, 463 (1995). The tiny tribe, which has only about 275 members, employed 6900 workers with an estimated annual payroll of $226 million as of 1994. *Id*. The Foxwoods Casino has been so lucrative that the tribe made a donation of $10 million to the Smithsonian Institution. *Id*.

Lauderdale and Miami). These other non-Native affiliated casinos are required to abide by Title VII and their respective state discrimination laws, yet this defendant, invokes the cloak of tribal sovereign immunity, having the gall to present its position that it does not have to concern itself with these discrimination laws, and can flout these laws that every other government has determined to be the basic standards on which the worker can expect to encounter in the workplace nationwide.

Pursuant to the Gaming Compact executed between the state of Florida and the tribe, the tribe is to pay the state of Florida annually a minimum of $150 million, or a percentage which ranges from 12% of all amounts up to 2 ½ billion dollars of the "net win," and 25% of all amounts over 4 ½ billion dollars of "net win." *See* F.S. §285.711, Part XI. Any business with revenues in the billions of dollars can hardly be described as an unsophisticated, weak, helpless, or dependent entity who can selectively hide behind the outdated shield of sovereign immunity for protection from suit merely to suit its whims. The instant defendant operates a highly profitable commercial business that employs thousands of non-tribal member employees and caters to the entire public of the state of Florida and United States-its casino operations are as tribally related as Walmart's operations are exclusively charitable, and even the tribe cannot dispute the purely commercial and profit driven intent of its casino businesses.

To that end, spokesmen for the Defendant have informed the general public via media statements that they regularly settle lawsuits brought against them, but only when it comes to customers, who, of course, are the source of the casino's income. "It's more than just an issue of legal liability," said Gary Bitner, spokesman for the Seminole Tribe of Florida. "It's based on the value of the relationships with its customers and knowing how important that is. It's the tribe's intent to be a good neighbor and fair and to deal appropriately with all the customers who come

in." *See* Exhibit B. From these statements it is apparent that the Defendant wishes to resolve claims only when it will promote the business it operates and, as such, the Defendant is failing to operate any longer as a "tribe" within the meaning of Title VII but rather is the multi-billion dollar company that Title VII seeks to impute liability to.

Consequently, the Defendant, profiting from the $2 billion generated annually by gaming, as well as enjoying other major sources of revenue, can hardly be characterized as "financially fragile." The Defendant should be held accountable for wrongs committed against the non-Native American employees who contribute the labor that allows tribes the luxury of such financial fortune.

b. Non-Native Americans Employed By the Defendant Should Not Be Forced to Involuntarily Waive Their Rights Provided By Federal Employment Laws.

In light of the sustained economic boom of the Defendant, the justification for a policy of ensuring that non-Native Americans do not involuntarily waive the protections afforded them under federal employment discrimination statutes is even stronger. Congress has expressed a clear intent to ensure that employees do not forfeit their rights under the ADEA absent an explicit and consensual waiver. In 1990, Congress amended the ADEA to state that "[a]n individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary." Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978, 983 (codified at 29 U.S.C § 626(f)(1) (1994)). Additionally, the Supreme Court has ruled in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974): "We are unable to accept the proposition that petitioner waived his cause of action under Title VII . . . . [W]e think it is clear that there can be no prospective waiver of an employee's rights under Title VII." *Id*. at 51. The Court reasoned that the policy of Title VII is "absolute" and represents Congress's "command that each

employee be free from discriminatory practices." *Id*. One exception to this may be in the event of a voluntary waiver by the employee, *Id*. at 52, but that is not at issue here.

The Supreme Court has made clear in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), that while employees may voluntarily waive their *procedural* rights to a trial under federal employment statutes, they may not involuntarily surrender their substantive rights. *Id*. at 28. The Defendant here argues that merely being employed constitutes a waiver of the non-Native American employee/Plaintiff's substantive rights, which is improper as the Supreme Court has specifically ruled that citizens should be protected by the laws of the United States, even when they venture on to tribal lands.

In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Court limited sovereign immunity to matters that would not interfere with the interests of the United States. *Id*. at 208-09. The Court held that tribal sovereignty should not interfere with the protection of U.S. citizens from "unwarranted intrusions on their personal liberty." *Id*. at 210. Forcing non-Native Americans such as the Plaintiff to involuntarily waive their rights under federal statutes such as Title VII would certainly be an intrusion on those employees' personal liberties, and therefore tribal sovereign immunity should be denied.

In fact, most non-Native American employees, such as the instant Plaintiff, would not realize they were waiving certain rights by accepting a job at the casino and without being aware that they are forfeiting their rights, this waiver can hardly be considered "knowing and voluntary." Nowhere does the Defendant inform prospective employees (non-Native or Native alike), nor current employees, that it is not subject to any federal labor regulation and that it intends for the employees to have virtually no rights to ever seek damages for even the most egregious and offensive of employment decisions. The Defendant's own Constitution and

Bylaws (attached to Defendant's Motion to Dismiss as Exhibit A) fail to afford any of its non-Native American employees any remedy for any adverse action whatsoever, which would even extend to intentional torts. Because such an involuntary waiver of substantive rights is prohibited by the Supreme Court, employment discrimination statutes apply to tribally owned companies and tribes operating a casino such as the instant Defendant. Tribes should not be allowed to profit from non-Native American labor and then subsequently deny all liability stemming from their interaction with that workforce. This is contrary to the legislative intent of Congress in enacting Title VII and improperly affords even the loosest of tribally-related business the ability to run amok with virtually no legal ramifications. Congress intended to protect the financially destitute tribe from being sued by a direct employee, not to insulate a multi-billion dollar employer from its legal wrongs at every turn.

IV. It is Inarguable That, Even If Sovereign Immunity is Deemed to Apply, the Instant Defendant Has Clearly Waived the Same.

Even if this court holds that sovereign immunity is applicable to the instant Defendant, the facts of this case, and as would be confirmed if granted jurisdictional discovery, demonstrate that the tribe has waived sovereign immunity with regard to labor laws such as title VII and Florida civil rights loss as a whole. In its Motion to Dismiss, the tribe admits that it has entered into a Gaming Compact with the State of Florida concerning its casino operations. *See* F.S. §285.711, Part XVIII(G). As a direct consequence, there can be no disagreement that Title VII is a labor law that applies to the tribe by their own acquiescence to the same. *See id*. (emphasis added). Thus, the tribe has proclaimed in an official agreement with the State of Florida, and for the entire public to see, that it will comply with all federal and state labor laws. It similar litigation, this very same defendant has said that "… the Seminole Tribe of Florida has agreed to acknowledge or possibly even comply with such laws…" *See eg*. *Costello v. Seminole Tribe of*

Florida, FLMD Case No. 8:10-cv-778. Yet, here, when faced with litigation for potentially violating the same, the tribe cries for sovereign immunity to side-step its wrongs.

In a somewhat similar set of facts, the Supreme Court held that the tribe in question had waived its sovereign immunity by executing a similar contract as we have here. *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 531 U.S. 411 (2001). There, the Court held that a tribe's waiver of sovereign immunity "must be 'clear.'" *Id*. at 418. The *Potawatomi* Court went on to say that even where the words "sovereign immunity" do not appear, the tribe had waived sovereign immunity. *Id*. at 421.

The instant Defendant now attempts to put forth the same fundamentally flawed argument. The tribe would argue, essentially, that because the potential waiver in the Gaming Compact is incongruent with the Tribal Sovereign Immunity Ordinance, it cannot be effective. However, this is certainly at odds with the Supreme Court's holding in *Potawatomi*. As is the case here, the tribe's potential argument that the express waiver of sovereign immunity in the Gaming Compact is flawed due to some incongruence with the Tribal Ordinance must fail as a matter of law. The case law in this instance is actually remarkably clear in that where a tribe has engaged in contracts, such as the Gaming Compact, it may not hide behind some tribal sovereign immunity. It goes without saying that the State of Florida would, without question, properly seek redress if the tribe breached its contractual obligations to pay hundreds of millions of dollars to the State, without any tribal ordinance prohibiting it.

The tribe may not pick and choose which clauses of its contracts it will follow and hide behind sovereign immunity when put on the defensive. Here, the defendant has unequivocally waived its sovereign immunity where its Gaming Compact, in writing, states that the tribe will "comply with all federal and state labor laws…" (*See* F.S. §285.711, Part XVIII(G)) which is a

valid and "clear" waiver discussed by the Supreme Court in *Potawatomi* (at 418). Consequently, in consenting to "comply with all federal and state labor laws," which inarguably includes Title VII, the instant defendant has quite clearly consented to the provisions of these laws and the instant action should properly proceed.

CONCLUSION

WHEREFORE, the Plaintiff respectfully requests that the Court enter an Order denying the Defendant's Motion to Dismiss, and all other relief the Court deems just and proper.

PLAINTIFF'S MOTION TO CONDUCT LIMITED DISCOVERY FOR JURISDICTIONAL PURPOSES

As an additional matter, the Plaintiff avers that limited discovery in this matter should properly be permitted in order to fully ascertain the Defendant's purported entitlement to tribal sovereign immunity in light of its operation of a highly profitable, non-tribal business entity that employed the Plaintiff. Granting the same would not be without precedent. As with the court's handling of discovery in other stages of litigation, in the context of a 12(b)(1) motion, "[w]e give the district court much room to shape discovery," *Citizens for Responsibility & Ethics in Wash. v. Office of Admin*., 566 F.3d 219, 225, 386 U.S. App. D.C. 36 (D.C. Cir. 2009). To deny jurisdictional discovery in this matter would result in a denial that results in "prejudice to a litigant… where a more satisfactory showing of the facts is necessary.'" *Sizova v. Nat'l Inst. of Standards & Tech*., 282 F.3d 1320, 1326 (10th Cir. 2002) (quoting *Wells Fargo & Co. v. Wells Fargo Express Co*., 556 F.2d 406, 430 n.24 (9th Cir. 1977)); *see also Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir. 1992).

As has been demonstrated by the Defendant's Motion to Dismiss Under Rule 12(b)(1) and the Plaintiff's instant Response to the same, the Defendant's purported entitlement to tribal sovereign immunity is far from absolute, and for that reason it is in the interest of justice that this

honorable Court permit limited discovery for the purpose of allowing the merits of this jurisdictional question to be properly fleshed out for proper evaluation.

CONCLUSION

WHEREFORE, the Plaintiff respectfully requests that the Court enter an Order Granting the Plaintiff's Motion for Limited Jurisdictional Discovery, and all other relief the Court deems just and proper.

Dated: March 15, 2013

s/ Benjamin H. Yormak
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CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2013, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system. I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants: None.

s/ Benjamin H. Yormak
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