UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 14-60679-CIV-LEONARD/GOODMAN

LUJEN BRANDS, LLC,

Plaintiff,

vs.

THE SEMINOLE TRIBE OF FLORIDA, INC.,
MICHAEL ULIZIO, CHRIS OSCEOLA and
HARD ROCK CAFÉ INTERNATIONAL (USA), INC.,

Defendants.
_____/

STOFI DEFENDANTS' MOTION TO DISMISS COMPLAINT WITH PREJUDICE FOR LACK OF SUBJECT MATTER JURISDICTION WITH INCORPORATED MEMORANDUM OF LAW

Defendants, The Seminole Tribe of Florida, Inc., d/b/a Tribe, Inc. ("STOFI"), Mike Ulizio ("Mr. Ulizio"), and Chris Osceola ("Mr. Osceola"), (collectively, "STOFI Defendants"), by and through undersigned counsel, and pursuant to Federal Rules of Civil Procedure 12(b)(1) and Rule 7.1(A), Local Rules of the U.S. District Court, Southern District of Florida, move to dismiss Lujen Brands, LLC's ("Lujen") Complaint (ECF No. 1)(the "Complaint") for lack of subject matter jurisdiction.[1] More specifically, the STOFI Defendants are immune from suit by virtue of the doctrine of tribal sovereign immunity.[2]

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[1] Based on the allegations in the Complaint, which ignore the issue of sovereign immunity, discovery should be stayed until resolution of this Motion. *See, e.g., Furry v. Miccosukee Tribe of Indians of Fla.*, 2011 WL 1303281, at *2 (S.D. Fla. Mar. 31, 2011) (citing *Butler v. Sukhoi Co.*, 579 F.3d 1307, 1312 (11th Cir. 2009)) (applying FSIA in determining whether to grant discovery concerning tribal immunity and observing that jurisdictional discovery should only be granted "to verify allegations of specific facts crucial to an immunity determination"). If the Court determines that discovery should proceed, Plaintiff should proffer how the discovery it seeks will bear on the issue of tribal immunity. *Breakthrough Mgmt. Group, Inc. v. Chukchansi*

I. INTRODUCTION

Plaintiff Lujen, the former alleged promoter and manager of the non-party rock band "Candlebox" has sued STOFI for damages. But, as a federal corporation chartered and approved by the U.S. Department of the Interior (the "Department"), pursuant to section 17 of the Indian Reorganization Act of 1934 (the "Act"; 25 U.S.C. § 477), STOFI is entitled to tribal sovereign immunity from suit in state and federal courts unless it has *expressly* waived its immunity. Here, STOFI has not expressly waived its sovereign immunity with respect to the claims asserted by Lujen. In fact, as alleged, STOFI did not enter into a contractual relationship with either Lujen or Candlebox, the band that retained Lujen to represent it as its manager. Instead, STOFI and Candlebox executed a mere Letter of Intent ("LOI") for a "potential investment" in Candlebox's business. The LOI is non-binding by its express terms and devoid of any mention of a waiver of sovereign immunity, let alone the required express waiver. *See* ECF No. 1-1. Further, neither the Seminole Tribe of Florida (the "Tribe") nor STOFI's Board of Directors passed a resolution

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Gold Casino and Resort, 629 F.3d 1173, 1190-91 (10th Cir. 2010) (holding that jurisdictional discovery concerning tribal sovereign immunity was unnecessary where the party seeking the discovery failed to explain how it would defeat the tribal immunity claim); *see also Instabook Corp. v. Instantpublisher.com*, 469 F. Supp. 2d 1120, 1123 (M.D. Fla. 2006) (denying jurisdictional discovery where request did not set forth "how such discovery would bolster [jurisdictional] contentions").

[2] The arguments raised herein are made without prejudice to other arguments the STOFI Defendants have with respect to defects in the Complaint. However, since the basis for this motion is the STOFI Defendants' sovereign immunity from suit, that jurisdictional issue should be conclusively decided before other arguments can be presented and considered by the Court. Even so, in addition to tribal sovereign immunity, another basis exists for questioning the Court's subject matter jurisdiction. Specifically, Lujen has not alleged sufficient facts to establish Article III standing as it has not pled that it suffered an actual or threatened injury that is fairly traceable to the STOFI Defendants' conduct. *Saladin v. City of Midgeville*, 812 F.2d 687, 690 (11th Cir. 1987). All of the injuries alleged in the Complaint were suffered by Candlebox, not Lujen, and Lujen has not alleged sufficient facts to establish that Candlebox fired it due to any actions taken by STOFI. Simply put, agents and employees can be fired for any number of reasons unrelated to the purported conduct of a third-party. As such, Lujen has not adequately alleged injury to confer Article III standing.

agreeing to waive sovereign immunity. Accordingly, the Court lacks subject matter jurisdiction over STOFI, and the case should be dismissed with prejudice.

Similarly, Mr. Ulizio, as STOFI's chief financial officer ("CFO"), and Mr. Osceola, who at all relevant times alleged in the Complaint was a member of STOFI's Board of Directors,[3] are entitled to the protections of sovereign immunity because they are authorized agents of STOFI acting solely for the benefit of STOFI, the Tribe, and the Tribe's members, and all allegations asserted in the Complaint against them relate to the performance of their duties as STOFI's agents. Thus, the tribal sovereign immunity of the STOFI Defendants divests the Court of subject matter jurisdiction over the claims asserted against them, warranting immediate dismissal with prejudice.

II. BACKGROUND

As set forth fully below, STOFI, as a Section 17 corporation, derives its sovereign immunity from the Tribe.

A. THE TRIBE AND SOVEREIGN IMMUNITY.

The Tribe was formally organized for the common welfare of its tribal members in accordance with the provisions of section 16 of the Act and has since been federally recognized and designated as an organized Indian tribe. *See, e.g., Inglish Interests, LLC v. Seminole Tribe of Fla., Inc.*, 2011 WL 208289, at *1 (M.D. Fla. Jan. 21, 2011) (observing that the Tribe has "long been recognized as an Indian tribe"); *Houghtaling v. Seminole Tribe of Fla.*, 611 So. 2d 1235, 1239 (Fla. 1993) (recognizing that the Tribe is a section 16 entity). The Tribe, with the consent and approval of the Department of the Interior (the "Department") adopted its Constitution and

[3] At the time of STOFI's dealings with Lujen and Candlebox, Mr. Osceola was a member of STOFI's Board of Directors, and acted solely for the benefit of STOFI, the Tribe, and Tribal members. Mr. Osceola is currently a member of the Tribal Council. *See* Declaration of Chris Osceola, ¶ 1.

By-Laws on August 21, 1957. Declaration of LaVonne Kippenberger ("Kippenberger Decl."), ¶ 3.[4] A copy of the Tribe's Constitution and By-Laws, as amended, is attached as Exhibit A. As set forth therein, the Tribe is governed by the Tribal Council, consisting of five members of the Tribe. Tribal Const., Art. III, Sec. 1. Control of the Tribe and STOFI is linked by mandatory participation of certain individuals on each entity's respective controlling body. The Chairman of the Tribal Council also sits as Vice-President of the STOFI Board of Directors, and the President of the STOFI Board sits as Vice-Chairman of the Tribal Council. *Id.* at Art. III, Sec. 2; Tribal By-Laws, Art. I, Sec. 1.

In 1995, the Tribe enacted Ordinance C-01-95 (the "Ordinance") to specifically address the issue of sovereign immunity and how such immunity could lawfully be waived on behalf of the Tribe and "*its subordinate economic and governmental units, its tribal officials, employees and authorized agents*," which includes STOFI, Mr. Ulizio, and Mr. Osceola.[5] *See* Kippenberger Decl. at ¶ 5; Exhibit B, Ordinance at 1 (emphasis added). The Ordinance expressly provides that

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[4] In addressing a factual attack on the Complaint based on lack of subject matter jurisdiction, the Court may consider extrinsic evidence outside the Complaint. *See, e.g., Carmichael v. Kellogg, Brown & Root Serv.*, 572 F.3d 1271, 1279 (11th Cir. 2009) ("[W]here a defendant raises a factual attack on subject matter jurisdiction, the district court may consider extrinsic evidence such as deposition testimony and affidavits.").

[5] Section 16 of the Act states, in relevant part:

> (h) Tribal sovereignty
>
> Notwithstanding any other provision of this Act –
>
> (1) each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section; and
>
> (2) nothing in this Act invalidates any constitution or other governing document adopted by an Indian tribe after June 18, 1934, in accordance with the authority described in paragraph (1).

25 U.S.C. § 476(h).

the Tribe, its economic units, and its officials, employees, and authorized agents are immune from suit unless sovereign immunity is expressly waived.[6] The Ordinance puts the public at large on notice that:

> [T]he [Tribe] desires to make clear to *all persons having business or otherwise dealing with* the [Tribe], *its subordinate economic* and governmental *units*, its tribal officials, employees and authorized agents that the [Tribe] *does not under any circumstances intend to voluntarily waive its entitlement to immunity from suit in state and federal courts under the doctrine of tribal sovereign immunity absent strict compliance with the procedures set forth below which shall be the exclusive method for effecting a voluntary tribal waiver of sovereign immunity*....

Id. at 3 (emphasis added).

As the Ordinance confirms, and federal courts have long recognized, the Tribe enjoys sovereign immunity from suit.[7] "As a matter of federal law, an Indian tribe is subject to suit only

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[6] The Ordinance states, in pertinent part:

> [T]he [Tribe], *its subordinate economic and governmental units, its tribal officials, employees and authorized agents are immune from suit* brought by any third-party in any state or federal court absent the clear, express and unequivocal consent of the [Tribe] or the clear, express and unequivocal consent of the United States Congress. *This immunity shall apply whether the Tribe or any subordinate economic or governmental unit is engaged in a private enterprise or governmental function*. *Id*. at 3
>
> *[A]ll tribal officials, employees or other authorized agents shall likewise be immune from suit brought by any third-party in any state or federal court where such tribal official, employee or other authorized agent is either acting on behalf of the Tribe in the course of their agency or where the acts of such tribal official, employee or other authorized agent, though mistaken,* negligent or otherwise improper are within that degree of authority which the [Tribe] is capable of bestowing upon the agent as a matter of federal, constitutional or tribal law…. *Id*. at 4 (Emphasis added).

[7] It is well-settled that laws are to be construed liberally in favor of Indian tribes invoking sovereign immunity. *See, e.g., White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980) (holding ambiguities should be construed generously to comport with "traditional notions of sovereign immunity and with the federal policy of encouraging tribal independence"); *Sanderlin*, 243 F.3d at 1285; *State of Fla. v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1242 (11th Cir. 1999).

where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754, (1998); *Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 172 (1977). The United States Supreme Court has clearly stated that "[a]bsent an effective waiver or consent, it is settled that a court may not exercise jurisdiction over a recognized Indian tribe." *Puyallup Tribe, Inc.*, 433 U.S. at 172; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers . . .").

Under the Ordinance, the exclusive method for effectuating a waiver of immunity is "through the clear, express and unequivocal consent of the [Tribe] *pursuant to a resolution duly enacted by the Tribal Council of the [Tribe] sitting in legal session. Any such resolution* purporting to waive sovereign immunity as to the [Tribe], *any of its subordinate economic or governmental units or any of its tribal officials, employees or authorized agents shall specifically acknowledge that the [Tribe] is waiving its sovereign immunity on a limited basis and describe the purpose and extent to which such waiver applies . . .*" *Id.* at 4 (emphasis added). The validity and effect of the Ordinance have been recognized by multiple courts that have examined the issue of the Tribe's sovereign immunity. *See, e.g., Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1287 (11th Cir. 2001); *Seminole Tribe of Fla. v. Ariz*, 67 So. 3d 229, 231-32 (Fla. 2d DCA 2010); *Seminole Tribe of Fla. v. McCor*, 903 So. 2d 353, 355-56 (Fla. 2d DCA 2010).

B. STOFI

STOFI is a federally chartered corporation approved by the Department pursuant to Section 17 of the Act. Kippenberger Decl. at ¶ 4; Exhibit C, STOFI Charter and By-Laws ("Charter"). STOFI's Charter and By-Laws were approved by a majority of the members of the

Tribe on August 21, 1957. Exh. C, Charter at 13. The corporate existence and purpose of STOFI is set forth in the Charter:

> In order to further the economic development of the [Tribe] by conferring on said tribe certain corporate powers, privileges, and immunities; to secure for the members of the tribe an assured economic independence; and to provide for the proper exercise by the tribe of various functions heretofore performed by the Department of the Interior, the aforesaid tribe is hereby chartered as a body politic and corporate of the United States of America….

Exh. C, Charter, Art. II, Sec. 1. Ownership of STOFI is vested in the registered members of the Tribe, while STOFI's operations are controlled by its Board of Directors. Exh. C, Charter, Art. IV, Sec. 1; Art. V, Sec. 1.

Under its own Charter, STOFI, acting through its Board of Directors, has the authority to waive the sovereign immunity from suit it derives from the Tribe, "*but only if expressly stated by the contract and* that such waiver shall not be deemed a consent by the said corporation or the United States to the levy of any judgment, lien or attachment upon the property of [STOFI,] other than income or chattels especially pledged or assigned pursuant to such contract." Exh. C, Charter, Art. VI (Corporate Powers), Sec. 9 (emphasis added).[8]

C. LUJEN'S INTERACTIONS WITH STOFI

In order for the Complaint against the STOFI Defendants to survive this Motion, Lujen must first carry its burden of demonstrating to the Court that sovereign immunity as to STOFI, its officials, employees and authorized agents, as well as those of the Tribe, has been properly and lawfully waived. *See, e.g., Furry v. Miccosukee Tribe of Indians of Fla.*, 685 F.3d 1224,

[8] This provision was enacted in 1996, pursuant to Board Resolution BD-03-94, the year after the adoption of the Ordinance by the Tribe, and deleted previously existing language that allowed STOFI to "sue or be sued." *See* Kippenberger Decl. at ¶ 6 (identifying STOFI Board of Directors resolution authorizing the deletion of the "sue or be sued" language and approving current language in Charter); *see also Inglish*, 2011 WL 208289, *2 (noting that the 1996 amendment to the Charter deleted the "sue or be sued" language in favor of the current stricter authorization).

1234 (11th Cir. 2012) (holding that plaintiff must establish an express waiver of sovereign immunity from suit); *Cf. Samco Global Arms, Inc. v. Republic of Honduras*, 2012 WL 1372197, at *5 (S.D. Fla. Mar. 29, 2012) (Leonard, J.) (observing that, under FSIA, in order to establish subject matter jurisdiction, the plaintiff must overcome the presumption that the foreign state is immune from suit by producing evidence . . .).[9]

Although the Complaint is replete with allegations as to how Lujen's principal, Matt Iudice, negotiated with STOFI representatives regarding Candlebox performances and a potential investment into Candlebox's anniversary tour, Lujen fails to allege that STOFI waived its sovereign immunity in its dealings with Lujen (because that would be untrue). In fact, STOFI did not enter into a contract with either Lujen or Candlebox and so there can be no express contractual waiver as required by law. Instead, STOFI and Candlebox executed merely a *non-binding* Letter of Intent for a "*potential investment*" into Candlebox's business, which is devoid of any mention of a waiver of sovereign immunity. *See* ECF No. 1-1. Indeed, STOFI and Candlebox never entered into the contemplated transaction.

Accordingly, STOFI's Board did not even consider waiving sovereign immunity. *See* Kippenberger Decl., ¶ 8. To be clear, in order to waive STOFI's sovereign immunity or that of Messrs. Ulizio and Osceola, a resolution would have been required authorizing an express contractual waiver, which did not occur as the deal did not go through. *See id*. at ¶ 7; Exh. B, Ordinance at 4. Accordingly, the STOFI Defendants' sovereign immunity remains intact and all claims against them should be dismissed for lack of subject matter jurisdiction.

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[9] Both the U.S. Supreme Court and the Eleventh Circuit have observed the similarities between foreign sovereign immunity and tribal sovereign immunity. *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla*., 692 F.3d 1200, 1206-07 (11th Cir. 2012) (citing *Kiowa Tribe*, 523 U.S. at 759)).

III. ARGUMENT

A. ABSENT AN EXPRESS WAIVER, STOFI IS ENTITLED TO SOVEREIGN IMMUNITY.

It is well-settled in this Circuit that STOFI, as an economic entity of the Tribe, is entitled to sovereign immunity. In *Maryland Cas. Co. v. Citizens Nat'l Bank of West Hollywood*, 361 F.2d 517 (5th Cir. 1966),[10] the court considered the sovereign immunity of STOFI when it was subjected to garnishment proceedings. *Id.* at 518. The Fifth Circuit concluded that STOFI was immune from the proceedings by virtue of its Charter, which limited the circumstances under which immunity could be waived,[11] and held that the Charter must be "liberally construed in favor of [STOFI] and all doubtful expressions therein resolved in favor of the Seminole Tribe." *Id.* at 521.

More recently, the Middle District of Florida had occasion to consider whether STOFI was entitled to sovereign immunity. In *Inglish*, 2011 WL 208289, at *1, the contracting plaintiff sued STOFI for breach of contract, imposition of a lien, and unjust enrichment. Noting that STOFI's Charter chartered the Tribe "as a body politic and corporate of the United States of America under the corporate name 'The Seminole Tribe of Florida, Inc.'" and conferred "certain corporate rights, powers, privileges, and **immunities**" upon the Tribe (emphasis in original), the court concluded that STOFI was entitled to sovereign immunity as a "subordinate economic entity" of the Tribe. *Id.* at *6 (citing *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino*

[10] The pre-1981 decisions of the Fifth Circuit Court of Appeals were adopted as binding precedents by the Eleventh Circuit in *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

[11] The version of STOFI's charter in effect at the time still contained in Art. VI, Sec. 9 the "sue or be sued" language, which the court construed as a limited waiver of immunity. *Id.* at 521. Of course, since 1996, the "sue or be sued" language has been deleted in favor of a provision requiring that any contractual waiver be expressly stated and set forth that it is limited to preclude enforcement of judgments against non-pledged, non-collateralized STOFI property.

and Resort, 629 F.3d 1173, 1183 (10th Cir. 2010) ("[I]mmunity for subordinate economic entities directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general.")).

Florida's Fourth District Court of Appeal reached the same conclusion regarding STOFI's immunity from suit in *Askew v. Seminole Tribe of Fla., Inc.*, 474 So. 2d 877 (Fla. 4th DCA 1985). There, the State of Florida attempted to collect taxes from STOFI, but the Fourth District concluded Florida's courts had no jurisdiction over STOFI. *Id.* at 877. Examining the long history of Indian sovereign immunity, the Fourth District concluded:

> Indian nations, as an attribute of their quasi-sovereignty, are immune from suit, either in the federal or state courts, without Congressional authorization. …
> The fact that the Seminole Tribe was engaged in an enterprise private or commercial in character, rather than governmental, is not material. It is in such enterprises and transactions that the Indian tribes and the Indians need protection. The history of intercourse between the Indian tribes and Indians with whites demonstrates such need.

Id. at 880 (quoting *Maryland Cas. Co.*, 361 F.2d at 520-21). *See also Taylor v. Alabama Intertribal Council Title IV*, 261 F.3d 1032, 1036 (11th Cir. 2001); *Memphis Biofuels, LLC v. Chickasaw Nat'l Indus.*, 585 F.3d 917, 918-921 (6th Cir. 2009)(holding that a section 17 tribal corporation of the Chickasaw tribe was entitled to sovereign immunity as "an arm of the Tribe"). Accordingly, it is beyond cavil that STOFI is entitled to sovereign immunity on the facts alleged.

B. STOFI HAS NOT WAIVED ITS SOVEREIGN IMMUNITY, EXPRESSLY OR OTHERWISE.

Because STOFI is immune from suit as an economic entity of the Tribe, the Court cannot exert jurisdiction over it unless STOFI waived its sovereign immunity. Federal decisions are legion holding that any waiver of sovereign immunity by an Indian tribe or its economic entities must be express, unequivocal, and properly authorized. *See, e.g., Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509, (1991); *Santa Clara Pueblo*, 436 U.S. at

58,; *State v. Seminole Tribe of Fla.*, 181 F.3d at 1241 ("A suit against an Indian tribe is . . . barred unless the tribe clearly waived immunity by authorizing the suit); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1038 n. 30 (11th Cir. 1995); *Native Amer. Distr.*, 546 F.3d at 1295 (holding that tribal entity was not equitably estopped from asserting immunity because "misrepresentations of the Tribe's officials or employees cannot affect its immunity from suit"); *Memphis Biofuels, LLC*, 585 F.3d at 921-22 (holding that contractual provision waiving section 17 corporation's tribal immunity was insufficient where corporation's charter required board approval effectuate waiver).

Indeed, recently, in *Furry v. Miccosukee Tribe of Indians of Fla.*, a case involving claims asserted against the Miccosukee Tribe *and its corporate entities*, the Eleventh Circuit rejected the notion that a waiver of tribal sovereign immunity can be implied and held that it must be express. The Court stated:

> As we have recognized on many occasions, '[t]he Supreme Court has made it plain that waivers of tribal sovereign immunity cannot be implied on the basis of a tribe's actions, but must be unequivocally expressed.' [citations omitted]. Thus, Furry plainly must establish that the Miccosukee Tribe 'expressly and unmistakably waived its right to sovereign immunity from suit.'

685 F.3d at 1226, n. 1, 1234 (citations omitted); *see also Askew*, 474 So. 2d at 879-80 ("It is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.") (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)).

Here, it cannot be alleged that STOFI has expressly waived its sovereign immunity. As set forth above, the Ordinance is explicit that any waiver of sovereign immunity as to the Tribe, *and its economic units*, including STOFI, must be effectuated through a resolution of the Tribal Council. Despite the Complaint's allegations concerning purported promises made by Messrs.

Ulizio and Osceola, it is undisputed that the Tribal Council never approved a resolution waiving STOFI's sovereign immunity.

Moreover, consistent with STOFI's own By-Laws, all waivers of STOFI's sovereign immunity and that of its officers, employees and agents must be accomplished through a resolution of STOFI's Board of Directors. *See* Kippenberger Decl., ¶ 7; Exhibit E, Examples of Resolutions Waiving Sovereign Immunity. STOFI has not passed a resolution, ordinance, or any other official document to waive sovereign immunity and subject itself to suit for any claim concerning STOFI's dealings with Lujen or Candlebox. *See id.* Lujen does not allege, nor can it establish, that Board approval of a waiver of sovereign immunity occurred in this case.

Further, because there is no contract between STOFI and Lujen or STOFI and Candlebox, there ipso facto can be no contractual waiver of sovereign immunity. Article VI, Sec. 9 of the Charter unambiguously states that the Board of Directors may "waive its sovereign immunity from suit, but *only* if expressly stated by the contract"

* * *

> a. 'that such is the case [*i.e.*, that sovereign immunity has been waived]'; *and*
> b. 'that such waiver shall not be deemed a consent by the said corporation … to the levy of any judgment, lien or attachment upon the property of [STOFI], other than incomes or chattels especially pledged or assigned pursuant to such contract.'

* * *

Charter, Art. VI, Sec. 9. (emphasis added). Here, there is no contract between the parties and the Letter of Intent between STOFI and Candlebox is both non-binding and devoid of a sovereign immunity waiver. *See* ECF No. 1-1. Without a resolution approving a waiver of sovereign immunity and a contract containing such a waiver, STOFI is immune from suit.

Lastly, there is neither a factual nor a legal basis to *imply* a waiver of STOFI's sovereign immunity. Indeed, federal courts in this circuit and others have routinely refused to recognize

waiver of sovereign immunity based on implication or other equitable doctrines. *See, e.g.*, *Contour Spa at the Hard Rock, Inc.*, 692 F.3d at 1206 (observing that Eleventh Circuit precedent "makes it abundantly clear that a waiver of tribal sovereign immunity cannot be implied on the basis of a tribe's actions; rather, it must be unequivocally expressed"); *State v. Seminole Tribe of Fla.*, 181 F.3d at 1243 n. 8 (recognizing that the "Supreme Court has made it plain that waivers of tribal immunity cannot be implied on the basis of the tribe's actions, but must be unequivocally expressed"); *Furry*, 685 F.3d at 1234-35 (refusing to imply or infer waiver based on the Tribe's conduct); *Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985) (rejecting notion that tribal sovereign immunity "can be waived by implication, in contract actions"); *World Touch Gaming, Inc. v. Massena Mgm't, LLC*, 117 F. Supp. 2d 271, 276 (N.D.N.Y. 2000) (rejecting argument that "acquiescence in carrying out the contract entered into with apparent authority estop the Tribe from claiming sovereign immunity").

Accordingly, based on the aforementioned legal authority, STOFI is immune from the claims asserted against it as an economic arm of the Tribe. Because STOFI has not waived its sovereign immunity, the Court should dismiss the Complaint against STOFI for lack of subject matter jurisdiction with prejudice.

C. MESSRS. ULIZIO AND OSCEOLA, AS OFFICERS, EMPLOYEES, AND AGENTS OF STOFI ARE ALSO IMMUNE FROM SUIT.

Similarly, officers and authorized agents of a section 17 corporation are also entitled to tribal sovereign immunity. Specifically, Mr. Ulizio, as STOFI's CFO and Mr. Osceola, as a then STOFI Board member, are entitled to the protections of tribal immunity. In *Taylor*, a case involving claims of race discrimination directed at members of an inter-tribal council, the Eleventh Circuit concluded:

> AIC is an intertribal consortium, with a Board dominated by tribal chiefs and tribe members, organized to promote business opportunities for and between the tribes; as such, we conclude that it is entitled to the same [sovereign immunity] protections as a tribe itself.
> * * *
> Therefore, we conclude that Taylor's claim against the AIC, *and the individual board members* should have been dismissed, as *Indian sovereign immunity protects them* from claims alleging race discrimination against non-Indian employees *in favor of Indian employees when the employment concerns tribal self-governance, reservation administration and other intramural Indian matters*.

Id. at 1036, 1037 (emphasis added); *see also Tamiami Partners, Ltd. ex rel. Tamiami Development Corp. v. Miccosukee Tribe of Indians of Fla.*, 177 F.3d 1212, 1225 (11th Cir. 1999) (holding that "tribal officers are protected by tribal sovereign immunity when they act in their official capacity and within the scope of their authority"); *Cypress v. Tamiami Partners, Ltd.*, 662 So. 2d 1292 (Fla. 3d DCA 1995) (holding that tribe's sovereign immunity shielded tribe's individual officials).

Because STOFI's sovereign immunity derives from the Tribe and functions in the same manner as Tribal immunity, the same reasoning that extends immunity to the Tribe's officials, employees and agents acting as representatives of the Tribe also extends STOFI's immunity to its officials, employees and agents, such as Messrs. Ulizio and Osceola. *See, e.g.*, *Seminole Police Dep't v. Casadella*, 478 So. 2d 470, 471 (Fla. 4th DCA 1985) (concluding that a Seminole police sergeant, as an agent of a "subordinate economic organization" of the Tribe, was entitled to invoke sovereign immunity from suit). As the Tenth Circuit noted in *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, when considering claims asserted against the officials of an economic arm of the Seneca-Cayuga Tribe, "It is clear that a plaintiff generally may not avoid the operation of tribal immunity by suing tribal officials; 'the interest in preserving the inherent right of self-government in Indian tribes is equally strong when suit is

brought against individual officers of the tribal organization as when brought against the tribe itself.'" 546 F.3d 1288, 1296 (10th Cir. 2008) (quoting *Nero v. Cherokee Nation of Okla*., 892 F.2d 1457, 1462 (10th Cir. 1989)). The Tenth Circuit held that immunity of the Tribe's enterprise extended to former tribal chief, former general manager of the enterprise and former manager of the enterprise where the allegations made against them "individually" "related to decisions made and actions taken by them" in their respective tribal roles. *Id*. at 1296-98.

The key in assessing individual immunity from suit is whether the tribal entity "is the real, substantial party in interest." *Id.* at 1296-97 (quoting *Frazier v. Simmons*, 254 F.3d 1247, 1253 (10th Cir. 2001)). Put another way, the immunity inquiry focuses on whether the "relief sought nominally against an officer is in fact against the sovereign . . ." *Id*. at 1297 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101, 104 S.Ct. 900 (1984).

Here, Mr. Ulizio, STOFI's CFO, and Mr. Osceola, a then member of STOFI's Board of Directors, are immune from suit. *Tamiami Partners, Ltd.*, 177 F.3d at 1225; *Seminole Police Dep't*, 478 So. 2d at 471 (concluding that a Seminole police sergeant, as an agent of a "subordinate economic organization" of the Tribe, was entitled to invoke sovereign immunity from suit); *Cypress* 662 So. 2d 1292 (holding tribe's sovereign immunity shielded tribe's individual officials). As shown below, the Complaint makes clear that the real party in interest is STOFI, not Mr. Ulizio or Mr. Osceola. *See Taylor*, 261 F.3d at 1036 (dismissing claims based on tribal sovereign immunity where the intertribal council, not the individual board members were the real parties in interest as an judgment paid by the individual board members would be drawn from the intertribal fisc).

Specifically, Lujen does not and cannot allege or establish that either Mr. Ulizio or Mr. Osceola engaged in the purported actions to benefit themselves. In fact, Lujen states in the

Complaint that at all times material, Mr. Ulizio "acted in the capacity of a Chief Financial Officer of STOFI" and that Mr. Ulizio's representations were made "so that *STOFI and Hard Rock Café International (USA), Inc.* could obtain the benefit of Candlebox performing at significantly discounted rates, as well as merchandising and other benefits." *See* Complaint, ¶¶ 3, 45 (emphasis added). Further, Lujen's representative, Matt Iudice, expressly conceded in an email to Ulizio that Ulizio is "tasked with looking out for the best financial interests *of the tribe*." (Emphasis added). Additionally, Ulizio told Lujen's representative, Matt Iudice, that he had "no stake" in the deal and was "merely complet[ing] the review" to "give [his] recommendation to the Board." *See* Declaration of Michael Ulizio., ¶¶ 3-4; Exhibit F, Email Correspondence Between Mr. Ulizio and Iudice at p. 2.

Plaintiff also pleads that at all times material, Mr. Osceola was acting in his official capacity as a member of STOFI's Board of Directors. *See* Complaint, ¶4. In short, the Complaint is replete with allegations of how STOFI and Hard Rock Café International (USA) (not Messrs. Ulizio or Osceola) purportedly benefited from the alleged misrepresentations, namely that Candlebox donated an autographed collectible guitar *to Hard Rock Boston* and performed concerts at *Hard Rock Boston* and *Seminole Hard Rock Hotel and Casino* in Hollywood, Florida. *See id.* at ¶¶ 54, 71. The Complaint is devoid of allegations that Mr. Ulizio or Mr. Osceola personally benefitted from their purported actions. Rather, accepting Lujen's allegations as true for purposes of this motion, it is apparent that the purported conduct of Mr. Ulizio and Mr. Osceola was for the sole purpose of furthering the economic interests of STOFI and the Tribe.

Accordingly, the individual defendants are entitled to invoke sovereign immunity. They were acting in their official capacities for STOFI and there is no basis to hold them individually

liable for their alleged actions. *See, e.g., Ransom v. St. Regis Mohawk Education and Community Fund, Inc.*, 658 N.E. 2d 989 (N.Y. 1995) (holding that tribal chiefs, who were also directors of the Fund, were protected by sovereign immunity enjoyed by the Fund because "at most [their acts] involve the erroneous exercise of their delegated duties, their acts are not ultra vires."). Therefore, the Court should dismiss the claims against Messrs. Ulizio and Osceola for lack of subject matter jurisdiction.

CONCLUSION

As set forth herein and supported by the record evidence, STOFI did not waive its sovereign immunity with respect to its dealings Lujen. A waiver of sovereign immunity was not passed by a Board resolution or included in a contract with Lujen (which does not exist). Further, there is no basis in law or fact to imply a waiver of sovereign immunity. Additionally, both Mr. Ulizio and Mr. Osceola were acting in their official capacities in their dealings with Lujen for the benefit of STOFI and the Tribe, and it is undisputed that neither STOFI nor the Tribe waived their sovereign immunity. As a result, this Court lacks subject matter jurisdiction over the claims against all of the STOFI Defendants, and should dismiss them with prejudice.[12]

Respectfully submitted,

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[12] Upon dismissal, the Court should award STOFI and Messrs. Ulizio and Osceola their reasonable attorney's fees and costs in defending against this lawsuit as provided for in the Ordinance, which, as set forth above, was approved by the U.S. Department of Interior. Exh. B, Ordinance at 5.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 2, 2014, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served on this day on all counsel of record or pro se parties identified on the Service List below in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Michael S. Popok
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