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' REPLY IN SUPPPORT OF THEIR MOTION TO DISMISS COMPLAINT WITH PREJUDICE FOR LACK OF SUBJECT MATTER JURISDICTION

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"), hereby file their reply in support of their Motion to Dismiss Complaint with Prejudice for Lack of Subject Matter Jurisdiction ("Motion to Dismiss") (ECF No. 14).[1]

I. INTRODUCTION

In its Response in Opposition to the Motion to Dismiss ("Response") (ECF No. 15), Lujen fails to address and, therefore, concedes a number of issues. First, Lujen does not dispute (because it cannot) that the Seminole Tribe of Florida (the "Tribe"), from which STOFI's sovereign immunity is derived, is itself immune from suit. Second, Lujen does not challenge that

[1] As with the Motion to Dismiss (ECF No. 14), in the interest of efficiency, the STOFI Defendants have consolidated their replies into one brief. Accordingly, although this memorandum exceeds the ten (10) page limit for a reply for a single defendant, see L.R. 7.1(c)(2), it is within the thirty (30) pages permitted for a reply on behalf of the three (3) STOFI Defendants.

Tribal Ordinance C-01-95 prescribes that the Tribe's subordinate economic entities, like STOFI, and officials, employees, and authorized agents, such as Messrs. Ulizio and Osceola, are also immune from suit. Third, Lujen does not contest that STOFI's Charter provides that a waiver of its sovereign immunity must be contractual, and that there is no contract waiver in this case.

Against this backdrop of conceded issues, the remaining arguments in Lujen's Response fail to overcome the mountain of prevailing law establishing that the STOFI Defendants are entitled to sovereign immunity. Indeed, although the STOFI Defendants seek dismissal of this lawsuit on the sole ground that Lujen's claims are barred by tribal sovereign immunity, Lujen spends much of its Response engaged in the purposeless exercise of discussing diversity jurisdiction, which the STOFI Defendants do *not* contest.

Even more significant, despite acknowledging that *binding precedent* in this Circuit holds that *STOFI* is immune from suit, Lujen argues in its Response, without citation to any legal authority, that the binding precedent is wrong. Lujen contends, for an unarticulated and unsupportable reason, that the Court should ignore the holding from this Circuit concerning STOFI's immunity and, instead, apply an inapplicable analysis from the Tenth Circuit that does not concern Section 17 entities to find that STOFI -- a Section 17 corporation -- is not entitled to sovereign immunity. Lujen's argument is clearly meritless as the binding precedent controls.

Last, neither the law nor the exhibits to Lujen's Response support its position that Messrs. Ulizio and Osceola acted outside their official capacities for their personal benefit in their dealings with Lujen. In fact, the exhibits, which include affidavits and an email, like the Complaint, show that Messrs. Ulizio and Osceola were acting for STOFI's benefit at all times. Accordingly, the individual Defendants are also entitled to sovereign immunity.

For the reasons set forth herein and in the Motion to Dismiss, the Court should dismiss all claims against the STOFI Defendants for lack of subject matter jurisdiction.

II. ARGUMENT

A. DIVERSITY JURISDICTION IS NOT AT ISSUE IN THIS CASE.

The STOFI Defendants seek dismissal of this lawsuit on the sole ground that Lujen's claims are barred by tribal sovereign immunity. Yet, inexplicably, Lujen devotes one-third of its Response to diversity jurisdiction and policy arguments regarding the same. (ECF No. 15 at 2-6, 11). [2] These assertions are inapt because the STOFI Defendants do *not* challenge diversity jurisdiction. Instead, the dispositive issue is entitlement to sovereign immunity, which divests the Court of its subject matter jurisdiction over the claims asserted herein against STOFI and Messrs. Ulizio and Osceola.

B. PLAINTIFF CONCEDES THAT UNDER BINDING PRECEDENT, THE TRIBE AND STOFI ARE ENTITLED TO SOVEREIGN IMMUNITY, WHICH HAS NOT BEEN WAIVED.

In opposition, Lujen does not dispute that the Tribe is entitled to sovereign immunity nor does it address (and therefore concedes) that the governing documents of STOFI and the Tribe provide for STOFI's sovereign immunity and the manner in which it may be waived. Instead, Lujen claims, without a single citation to legal authority, that STOFI, a Section 17 entity, does not enjoy sovereign immunity. Lujen's contention is contrary to the binding precedent in this Circuit, which holds that *STOFI* (itself) is immune from suit. Indeed, the STOFI Defendants are not unaware of a single case holding that a Section 17 entity is not entitled to share in tribal sovereign immunity. Accordingly, Lujen's argument, an anathema to prevailing law, should be rejected.

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[2] Page numbers cited herein refer to the CM/ECF page numbers reflected in the header of the cited document.

Further, Lujen's contention that the Court should apply a factor-based test that is not the law in this Circuit and that concerns other tribal corporations, but *not* Section 17 corporations, should be rejected. Prevailing law recognizes that Section 17 corporations enjoy the sovereign immunity of tribes. Thus, because binding precedent holds that STOFI enjoys tribal sovereign immunity and Lujen concedes by implication that STOFI has not waived its immunity, the Court should dismiss the claims against STOFI with prejudice.

1. <u>There Is No Legal Basis To Conclude That Binding Precedent Holding That STOFI Is Entitled To Sovereign Immunity Is In Error</u>.

Lujen concedes that *Maryland Cas. Co. v. Citizens Nat'l Bank of West Hollywood*, 361 F.2d 517 (5th Cir. 1966), which is binding precedent in this Circuit, establishes that *STOFI* is entitled to sovereign immunity. *See* (ECF No. 15 at 7). Yet, Lujen asks this Court to disregard *Maryland Cas. Co.* because *Lujen* believes it is wrongly decided. *Id*. Lujen's unsupported argument is meritless.

The reasoning and holding of *Maryland Cas. Co.* are directly on point. In *Maryland Cas. Co*., the Fifth Circuit recognized that 25 U.S.C. § 477 gives no powers to Section 17 corporations and, accordingly, the only powers the corporation has are those conveyed to it by the Secretary of the Interior through the corporation's charter. 361 F.2d at 520-21. Here, Tribe Ordinance C-01-95 (the "Ordinance"), which was approved by the U.S. Secretary of the Interior ("Secretary"), expressly provides that subordinate economic entities of the Seminole Tribe of Florida (the "Tribe"), like STOFI, are immune from suit. *See* (ECF No. 14 at 4-5; ECF No. 14-2 at 4-5).[3] Further, STOFI's Charter, which was also approved by the Secretary, provides that STOFI, acting through its Board of Directors, has the authority to waive the sovereign immunity from

[3] Although Lujen acknowledges that "the Tribe intended to share its tribal immunity with STOFI," (ECF no. 15 at 10), it nevertheless argues, without any legal basis, that STOFI is not entitled to sovereign immunity.

suit it derives from the Tribe, *but only if the waiver is expressly stated by contract.* (ECF No. 14 at 7; ECF No. 14-3 at 5) (emphasis added). STOFI's powers, as reflected in its Charter, including the power to waive its sovereign immunity pursuant to certain conditions, are the *only* powers the Secretary has given to STOFI. *See* (ECF No. 14-3)**;** *Maryland Cas. Co*., 361 F.2d at 520. Thus, pursuant to its Charter, STOFI has sovereign immunity and may only waive it in the manner prescribed therein, which did not occur in this case, as Lujen concedes.

Lujen's contention that the Fifth Circuit erred in *Maryland Cas. Co*. by interpreting Congressional silence in 25 U.S.C. § 477 as abrogating the sovereign immunity of Section 17 corporations, *see* (ECF No. 15 at 7), is contrary to U.S. Supreme Court precedent. Indeed, just this week, the Supreme Court reiterated in *Michigan v. Bay Mills Indian Community*, that:

> The baseline position, we have often held, is tribal immunity; and to abrogate such immunity, Congress must unequivocally express the purpose. . . That rule of construction reflects an enduring principle of Indian law. Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government.

2014 WL 2178337, at *6, ____ S. Ct. ____, 572 U.S. ____ (May 27, 2014) (citations omitted). Further, other courts to consider the issue in the context of 25 U.S.C. § 477 have reached the same conclusion. *See, e.g., Memphis Biofuels, LLC v. Chickasaw Nation Indus*., 585 F.3d 917, 920-21 (6th Cir. 2009) (holding that the statute's silence with respect to sovereign immunity should be interpreted as not waiving sovereign immunity because waiver must be express and clear and the statute does not explicitly waive Section 17 corporations' sovereign immunity); *Cf. American Vintage Co. v. Table Mountain Rancheria*, 292 F.3 1091, 1099 (9th Cir. 2002) ("A tribe that elects to incorporate does not automatically waive its tribal sovereign immunity by doing so") (citations omitted). Accordingly, Congressional silence should not be interpreted as abrogating the sovereign immunity of Section 17 corporations like STOFI. Thus, there is no

basis in precedent (nor does Lujen provide one) to support Lujen's conclusory contention that *Maryland Cas. Co.* is wrongly decided.

2. <u>The Factor-Based Test Is Inapplicable</u>.

Additionally, Lujen's assertion that a factor-based test, instead of binding precedent, should be applied to determine STOFI's entitlement to sovereign immunity is inapt. *See* (ECF No. 15 at 8-10).[4] In *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino and Resort*, the Tenth Circuit applied a factor-based test it derived to determine whether the Chukchansi Gold Resort and Casino ("Casino") and the Chukchansi Economic Development Authority (the "Authority") had a sufficiently close relationship to the Picayune Rancheria of the Chukchansi Indians (the "Tribe") to share in the Tribe's sovereign immunity. 629 F.3d 1173, 1176-77, 1187. However, the Eleventh Circuit has *not* adopted the factor-based test. *See, e.g., Mastro v. Seminole Tribe of Fla*., 2013 WL 335067, at *5, fn. 1 (M.D. Fla. Jul. 2, 2013) (observing that the Eleventh Circuit has not adopted the factor-based test and that neither the Eleventh Circuit nor Florida courts have *ever* declined to extend sovereign immunity to a subordinate arm of a tribe).

Moreover, *Breakthrough Mgmt. Grp.* is distinguishable from this lawsuit because there the Casino and the Authority were tribal corporations, not Section 17 entities like STOFI. *Id*. at 1191-92. As the Tenth Circuit itself observed, "section 17 corporations retain their tribal status – and, accordingly, sovereign immunity in the absence of a 'sue and be sued' waiver [while] the other species of corporations are not imbued automatically with such status." *Id*. at 1185, fn. 8; *see also Memphis Biofuels, LLC*, 585 F.3d at 921 (rejecting multi-factor test to determine

[4] Notably, among other misstatements, Lujen maintains, in arguing for application of the factor-based test, that the STOFI Board of Directors and the Tribal Council share one (1) member in common. In fact, there are two (2) members in common as 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. *See* (ECF No. 14-1 at 3, 10).

whether Section 17 corporation was an "arm" of the tribe because the cases relied upon did not concern Section 17 corporations and Section 17 designates the entity as an "incorporated tribe" suggesting that the entity is an arm of the tribe entitled to automatic sovereign immunity) (citations omitted); *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 685 (8th Cir. 2011) (acknowledging that the language of § 477 calling the entity an "incorporated tribe" suggests that the entity is, in fact, an arm of the tribe) (citation omitted). Accordingly, because STOFI is a Section 17 corporation, the factor-based test, which is not binding in this Circuit anyway, does not apply.[5]

3. <u>STOFI Has Not Waived Its Sovereign Immunity</u>.

Lujen does not address, and therefore impliedly concedes, that STOFI has not waived its sovereign immunity. *See* (ECF No. 14 at 13). Thus, STOFI is entitled to sovereign immunity pursuant to the Fifth Circuit's decision in *Maryland Cas. Co*. Therefore, the Court should dismiss the claims against STOFI with prejudice for lack of subject matter jurisdiction.[6]

C. MESSRS. ULIZIO AND OSCEOLA ACTED IN THEIR OFFICIAL CAPACITIES FOR THE BENEFIT OF STOFI AND PLAINTIFF HAS NOT ALLEGED OR ESTABLISHED OTHERWISE.

Lujen's attempt to make an end run around STOFI's sovereign immunity by suing Messrs. Ulizio and Osceola should fail. The Ordinance and the prevailing law establish that the individual Defendants are entitled to sovereign immunity for acts in their official capacities.

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[5] Further, even if the Court applied the *Breakthrough* test, STOFI is entitled to sovereign immunity. *See, e.g., Inglish Interests, LLC v. Seminole Tribe of Fla., Inc*., 2011 WL 208289, at *6 (M.D. Fla. Jan. 21, 2011) (granting STOFI's motion to dismiss and holding that "there is no dispute" that the relationship between STOFI and the Tribe is sufficiently close to permit STOFI to share in the Tribe's sovereign immunity) (citing *Breakthrough Mgmt. Grp., Inc.*, 2010 WL 5263143)).

[6] Lujen's policy-based arguments do not compel a contrary conclusion. *See* (ECF No. 15 at 11-12). Sovereign immunity bars Lujen's claims against the STOFI Defendants whether they are asserted in state or federal court. Further, Lujen's arguments are misplaced as only Congress can abrogate sovereign immunity. *See Bay Mills Indian Community*, 2014 WL 2178337, at *6.

Moreover, the Complaint as well as the affidavits and email submitted by Lujen in Response demonstrate that at all times, Messrs. Ulizio and Osceola acted in their official capacities as Chief Financial Officer ("CFO") and then-STOFI Board member respectively for the benefit of STOFI in their dealings with Lujen. Accordingly, Messrs. Ulizio and Osceola are entitled to sovereign immunity.

1. Lujen Fails To Refute That The Ordinance And Prevailing Law Establish That Messrs. Ulizio And Osceola Are Entitled To Sovereign Immunity.

Lujen's Response ignores the fact that Ordinance C-01-95 expressly provides that the Tribe's sovereign immunity extends not only to economic units of the Tribe, like STOFI, but also to tribal officials, employees, and authorized agents, such as Messrs. Ulizio and Osceola. (ECF No. 14-2 at 4-5). At all relevant times, Mr. Ulizio was STOFI's CFO and Mr. Osceola was a STOFI Board member.[7] Accordingly, the Ordinance extends sovereign immunity to them. Thus, Lujen's assumption in its Response that Messrs. Ulizio and Osceola's entitlement to sovereign immunity requires interpretation of the law, *see* (ECF No. 15 at 13-14), is faulty.

Nonetheless, even without an ordinance approved by the Secretary extending sovereign immunity to tribal officials, employees, and agents, prevailing law establishes that these officials are, indeed, entitled to share in tribal sovereign immunity. Lujen's attempts to distinguish *Taylor* and *Seminole Police Dep't* are baseless. *See* (ECF No. 15 at 13-14). Both of these cases hold that agents of organizations and entities that derive their sovereign immunity from tribes are also immune from suit. Lujen fails to articulate a meaningful rationale to justify its position that the agents in *Taylor* and *Seminole Police Dep't* should receive sovereign immunity, but the agents of

[7] Lujen asserts that is unclear whether Mr. Osceola was a tribal official at the relevant time. As set forth in Mr. Osceola's declaration, he was a member of STOFI's Board of Directors from June 2011 through June 2, 2013, and has been a member of the Tribal Council since June 3, 2013. (ECF No. 14-9 at ¶ 1).

Section 17 corporations should not. The immunity is the same, flowing from the tribe through another that shares the immunity and then to the agents. *See Taylor v. Alabama Intertribal Council Title IV*, 261 F.3d 1032, 1036 (11th Cir. 2001) (holding that intertribal council's board members were immune from suit); *Seminole Police Dep't Seminole Police Dep't v. Casadella*, 478 So. 2d 470, 471 (Fla. 4th DCA 1985) (police sergeant, as agent of the Seminole Police Department, which, in turn, was a derivative economic organization of the Tribe, is entitled to sovereign immunity); *see also Cook v. AVI Casino Enter., Inc*., 548 F.3d 718, 727 (9th Cir. 2008) (holding that tribal sovereign immunity extends to employees of tribal corporation where the real party in interest is the tribal corporation); *see, generally*, *Samantar v. Yousuf*, 560 U.S. 305, 324 (2010) (where real party in interest is the foreign state, the action is against the state itself, not the official personally) (*citing Kentucky v. Graham*, 473 U.S. 159, 166 (1985)).

Additionally, Lujen fails to cite to a single case to support its position that Messrs. Ulizio and Osceola acted outside their official capacities and, thus, are not entitled to sovereign immunity with respect to Lujen's claims for money damages. Lujen's reliance on *Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165 (1977) in support of *Lujen's* argument is inapt. That case concerned enjoining individual members of the tribe from violating state law by fishing outside of a reservation. *Id*. at 171. Similarly, Lujen's citation to *Tenneco Oil Co. v. Sac and Fox Tribe of Indians of Oklahoma*, 725 F.2d 572, 574 (10th Cir. 1984) is misplaced as that case also involved declarative and injunctive relief sought against individual officers of the tribe acting outside the scope of the authority the tribe could confer on them under the law. Further, *Larson v. Domestic & Foreign Commerce Corp*., does not support Lujen's position because there the Supreme Court affirmed dismissal on sovereign immunity grounds and held that the injunctive relief sought against the War Assets Administrator and his agents was actually relief

sought against the sovereign. 337 U.S. 682, 689 (1949) (recognizing that an officer's actions are ultra vires where he "is not doing business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden"). Here, Lujen has sued Messrs. Osceola and Ulizio for money damages for actions taken in their official capacities for the benefit of STOFI. The prevailing law establishes that Messrs. Osceola and Ulizio are entitled to sovereign immunity.

2. Lujen's Response Underscores That Messrs. Ulizio And Osceola Acted In Their Official Capacities For STOFI"s Benefit.

Lujen's contention that it has adequately alleged that Messrs. Osceola and Ulizio acted outside their official capacities is belied by the Complaint, (ECF No. 14 at 16 (citing Complaint), and the Response (ECF No. 15). In the Response, Lujen claims, without citation to the record, that STOFI benefitted from the actions of Messrs. Ulizio and Osceola because it "received increased revenue and positive publicity" and Messrs. Ulizio and Osceola benefitted by "maintain[ing] their positions of influence and related salaries." (ECF No. 15 at 14). Even this assertion, which is intended to lend support to Lujen's argument, illustrates that the real party in interest is STOFI. Quite simply, if STOFI was not the real party in interest and had not benefitted from Messrs. Ulizio and Osceola's dealings with Lujen, it would not have permitted them to "maintain their positions of influence and related salaries." Put another way, Messrs. Ulizio and Osceola were paid to negotiate with Lujen *as part of their job duties* and, thus, were acting in their official capacities. Any other conclusion is contrary to both the allegations in the Complaint, and the contentions in the Response.

Similarly, the exhibits to the Response fail to demonstrate that Messrs. Ulizio and Osceola benefitted personally from their interactions with Lujen and, instead, show that STOFI is the real party in interest in this case. *See* (ECF Nos. 15-1, 15-2, 15-3, 15-4). Indeed, if Messrs. Ulizio

and Osceola's negotiations with Lujen, as described by the Plaintiff, constituted actions in their individual capacities, employees could not fulfill their job duties without subjecting themselves to liability.

For example, Mr. Iudice states in his declaration that Mr. Ulizio told him that the non-binding Letter of Intent did not require approval by STOFI's Board of Directors *and that the Board would accept Mr. Ulizio's recommendation to move forward with the sponsorship*. (ECF No. 15-1 at ¶ 10) (Emphasis added). *This statement demonstrates that Mr. Ulizio was, in fact, negotiating with Lujen on behalf of the Board, and not on his own behalf*. Similarly, Mr. Iudice states that Mr. Osceola told him that he was only "one vote" with respect to the deal. (*See id*. at ¶ 33). The rest of Mr. Iudice's declaration as well as the declarations of Ms. Diaz and Mr. Mercado (ECF Nos. 15-3, 15-4) also concern negotiations conducted by Messrs. Ulizio and Osceola on behalf of STOFI. Similarly, Mr. Osceola's email to Mr. Iudice reflects that STOFI's Board of Directors must approve the deal before Mr. Ulizio could commit to it, demonstrating that the real party in interest was STOFI, and that Messrs. Ulizio and Osceola did not personally benefit from the deal. *See* (ECF No. 15-2).

As set forth above and in the Motion to Dismiss (ECF No. 14 at 15-17), the proper standard to determine whether this lawsuit can proceed against the individual Defendants is whether they are the real parties in interest who stood to benefit personally from the deal, not whether Messrs. Ulizio and Osceola had actual and/or apparent authority to conduct the negotiations in the manner that they did. Regardless, there are no allegations to suggest that Messrs. Ulizio and Osceola were acting outside the scope of their authority for their own benefit, as opposed to negotiating on behalf of STOFI for STOFI's benefit. In fact, the non-binding Letter of Intent was executed by Mr. Ulizio, *as Chief Financial Officer of STOFI*. *See* (ECF No. 1-1 at 3).

Thus, it is clear that the real party in interest in this lawsuit is STOFI. Accordingly, Lujen's attempt to circumvent sovereign immunity by suing Messrs. Ulizio and Osceola individually should be rebuffed and the claims against the individual Defendants should be dismissed.

III. CONCLUSION

Accordingly, for the reasons set forth above and in the STOFI Defendants' Motion to Dismiss the Complaint with Prejudice for Lack of Subject Matter Jurisdiction (ECF No. 14), the Court lacks subject matter jurisdiction over the claims against all of the STOFI Defendants, and should dismiss them with prejudice. Further, the Court should not grant Lujen leave to replead its claims against the STOFI Defendants because leave would be futile. *See, e.g., Hall v. United Ins. Co.*, 367 F.3d 1255, 1262-63 (11th Cir. 2004) (Leave to amend may be denied under Fed. R. Civ. P. 15(a) when such amendment would be futile) (citation omitted); *Johnson v. Regions Mortgage*, 503 Fed. Appx. 810, 811 (11th Cir. Jan. 10, 2013) (Leave to amend properly denied where Court would lack subject matter jurisdiction over amended pleading).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 29, 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.

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