

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 14-CV-60679-JAL

LUJEN BRANDS, LLC,
Plaintiff

vs.

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

**PLAINTIFF'S RESPONSE IN OPPOSITION TO STOFI DEFENDANTS'
MOTION FOR RECONSIDERATION**

COMES NOW, Lujen Brands, LLC (hereinafter "Lujen" or "Plaintiff"), by and through the undersigned counsel, pursuant to Fed. R. Civ. P. 60(b)(1), (6) and Local Rule 7.1, and hereby files this Response in Opposition to STOFI Defendants' Motion for Reconsideration and in support thereof states as follows.

BACKGROUND

Plaintiff Lujen filed the instant action pursuant to 28 U.S.C. §1332, based on diversity jurisdiction. STOFI Defendants did not attack the Complaint for a lack of diversity jurisdiction, but allege that the STOFI Defendants all have sovereign immunity from suit and therefore the Court is precluded from adjudicating the matter based upon subject matter jurisdiction. *See* ECF No. 14. Lujen contends that STOFI, a §17 federally chartered corporation established under 25 U.S.C. §477, is not entitled to an extension of the Seminole Tribe of Florida's (hereinafter "the Tribe") sovereign immunity; and that the individual STOFI Defendants acted outside the scope of their respective authority,

and therefore, are likewise not entitled to an extension of the Tribe's sovereign immunity. *See* ECF No. 15. The STOFI Defendants filed a Reply indicating that they do not challenge diversity jurisdiction and expounding upon the same sovereign immunity arguments presented in the instant motion for reconsideration. *See* ECF No. 18. The Court entered and Endorsed Order Denying Without Prejudice the STOFI Defendants' Motion to Dismiss. *See* ECF No. 33. The Endorsed Order permitted Plaintiff "forty-five (45) days to conduct jurisdictional discovery narrowly tailored to the subject matter jurisdiction issue implicated by the STOFI Defendants' motion to dismiss." *Id.* As such, Plaintiff propounded written discovery which is directly related to the issue of whether the sovereign immunity enjoyed by the Seminole Tribe of Florida extends to its §17 federally chartered corporation- STOFI, its non-Tribal Member CFO Defendant Ulizio and Board Member Defendant Chris Osceola when they act outside the scope of their respective authority.

ARGUMENT

A close reading of the relevant case-law in this Circuit reveals that the reasoning utilized by the Fifth Circuit in 1966 to extend the Tribe's sovereign immunity to its federally chartered corporation may no longer apply to the modern day STOFI. *Maryland Cas. Co. v. Citizens Nat. Bank of West Hollywood*, 361 F.2d 517 (5th Cir. 1966), was a garnishment proceeding in which property of STOFI was sought for the purpose of satisfying a judgment obtained against the corporation. The court held that under the corporate charter, the funds were immune from garnishment. Remarkably, it was not until forty-five years later, in *Inglish Interests. LLC v. Seminole Tribe of Florida, Inc.*, 2011 WL 208289 (M.D. Fla. Jan. 21, 2011), that the court noted "the

Amended Charter both *presumed* that the corporation had sovereign immunity and allowed the corporation to waive sovereign immunity...” *Id.* at 6. The reasoning and analysis in *English Interests* will be discussed in detail below.

Drawing the court’s attention back to *Maryland Cas.*, in that case, the court was persuaded by the policy decision of Congress to “protect the interests and property of the tribes.” *Maryland Cas.* at 521. Lujen contends- and seeks jurisdictional discovery to confirm- that the financial relationship between the Tribe and STOFI is such that any judgment obtained by Lujen in the instant matter would not touch the tribal treasury. Indeed, the STOFI Defendants have admitted that the Tribe is insulated from the corporate debts and obligations of STOFI. *See* ECF No. 14-3 at 3. Lujen propounded written discovery directly related to the financial relationship of the Tribe and STOFI in its Requests for Production Nos. 1-6, Requests for Admission Nos. 7, 12, and 13, as well as Interrogatory Nos. 4-6 and 8-12. *See* ECF No. 38-1.

Moreover, Lujen contends that the most significant part of the Tribe’s revenue comes from gaming and hospitality which the Tribe conducts through a separate economic entity- the Hard Rock Hotel and Casino. In 1966, the court could not have imagined the advent and proliferation of Seminole Gaming or how that commercial activity would impact the interests and property of the Tribe. Yet, there is no attempt to extend the Tribe’s sovereign immunity to Defendant HRCL. Nor is there any sound reason to extend such immunity to STOFI in the case at bar.

In *English Interests*, the court mentioned Eleventh Circuit case-law which extended Indian sovereign immunity to entities other than the literal “tribe.” *English Interests*, at 6. The court went on to note the standard by which tribal sovereign immunity

may extend to subdivisions of a tribe, including those engaged in economic activities: “provided that the relationship between the tribe and the entity is sufficiently close to properly permit the entity to share in the tribe’s immunity.” *Id.* (citing to *Breakthrough Mgmt. Grp., Inc. v. Chukansi Gold Casino and Resort*, 629 F.3d 1173 (10th Cir. 2010)). The court in *English Interests* summarily concluded that STOFI “qualifies under the standard”- without conducting an analysis of the factors enumerated in *Breakthrough Mgmt.* to determine whether the Tribe’s sovereign immunity should, in fact, be extended to STOFI under the facts of that case. Lujen contends- and again, seeks jurisdictional discovery to confirm- that the relationship between the Tribe and STOFI is not sufficiently close to properly permit STOFI to share in the Tribe’s sovereign immunity under the facts of this case.

Lujen would remind the court of the following as evidenced by STOFI’s own pleading: STOFI is a separate and distinct commercial entity from the Tribe. *See* ECF No. 14 at 7. STOFI operates in accordance with a corporate charter and by-laws, rather than the Tribe’s constitution. *Id.* STOFI is governed by a Board of Directors that is different from the elected members of the Tribal Council who govern the Tribe, despite two members in common. *See* ECF No. 14 at 4 and 7. And, the Tribe conducts business separate and apart from the commercial business enterprises associated with STOFI- particularly through Defendant HRCI. Accordingly, STOFI is a separate and distinct economic entity- both in creation and practice- from the Tribe, and as such, should not be entitled to an extension of the Tribe’s sovereign immunity protection in this case.

As Defendant HRCI does not enjoy sovereign immunity protection, it is clear that not every entity owned by a tribe has sovereign immunity. Although the Eleventh Circuit

has not adopted specific criteria for determining whether an entity is entitled to an extension of tribal sovereign immunity, it has considered whether an entity serves as an “arm of the tribe.” Put simply, the question is whether STOFI is “the kind of tribal entity, analogous to a governmental agency, which should benefit from the defense of sovereign immunity, or whether it is more like ... commercial business enterprise, instituted solely for the purpose of generating profits for its private owners.” *See* William V. Vetter, *Doing Business with Indians and the Three “S” es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 Ariz. L.Rev. 169, 174 (1994); *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 293 (Minn.1996) (courts should determine “whether federal policies intended to promote Indian tribal autonomy are furthered by the extension of immunity to the business entity”). Lujen contends that STOFI is the latter; and as such, propounded written discovery directly related to this issue in the form of Requests for Production Nos. 1-6, Request for Admissions Nos. 1-6, 8 and 9-11, and Interrogatory Nos. 2, 3, 7, 10 and 12. *See* ECF No. 38-1.

In sum, Lujen responds in opposition to the STOFI Defendants motion for reconsideration because STOFI is a separate and distinct corporate entity with a nongovernmental character that was created and serves the purpose of generating profits- not to promote the goals of Indian self- government or tribal self-sufficiency- the policies which Congress clearly intended the doctrine of tribal sovereign immunity to support. As such, Lujen seeks jurisdictional discovery to confirm its contentions. Lujen concurs with the STOFI Defendants that the forty-five day jurisdictional discovery period should begin upon the issuance of the court’s order regarding the pending motion for reconsideration and that merits discovery should not begin until the court rules on the pending motion for

reconsideration.

WHEREFORE, Plaintiff Lujen respectfully requests that this honorable court deny STOFI Defendants' Motion for Reconsideration and allow jurisdictional discovery to proceed with leave for Plaintiff to amend its Complaint as necessary.

Dated: September 16, 2014

Respectfully submitted,

s/ Stefanie C. Moon, Esq.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was electronically filed with the Clerk of Court and served on all counsel or parties of record via CM/ECF on September 16, 2014, pursuant to the attached Service List.

s/ Stefanie C. Moon, Esq.

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