UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

CASE NO. 2:14-cv-334-FtM-38 CM

STANLEY LONGO, an individual,

Plaintiff,

v.

SEMINOLE INDIAN CASINO - IMMOKALEE,

Defendant.
_____/

MOTION OF DEFENDANT SEMINOLE INDIAN CASINO – IMMOKALEE (SEMINOLE TRIBE OF FLORIDA) TO DISMISS AMENDED COMPLAINT UNDER RULE 12(b)(1) AND (6) FED. R. CIV. P. FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR FAILURE TO STATE A CLAIM FOR RELIEF AND MEMORANDUM OF SUPPORTING POINTS AND AUTHORITIES
(Dispositive Motion)

Defendant, Seminole Indian Casino – Immokalee, the registered fictitious name owned and utilized by the Seminole Tribe of Florida , a federally recognized and sovereign Indian tribe (Tribe) for the operation of the Casino located on the Tribe's Immokalee Indian Reservation, moves pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure for the entry of an order dismissing the claims asserted by Plaintiff, Stanley Longo, as set forth in the amended complaint, for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted under Title VII of the Civil Rights Act of 1964, as amended, or the Florida Civil Rights Act of 1992, Chapter 760.10 et seq., Florida Statutes based upon the doctrine of tribal sovereign immunity. As grounds for this motion, the substantial matters to be argued and the Tribe's factual proffer are as follows.

I. FACTUAL PROFFER

(a) Plaintiff's employment discrimination claims for sexual harassment/gender discrimination by a gaming customer and for retaliation have been asserted against Seminole Indian Casino - Immokalee as the alleged owner of the Casino. Seminole Indian Casino - Immokalee is not an entity that employed Plaintiff. Seminole Indian Casino Immokalee is merely a registered fictitious name for the Tribe's Immokalee casino. It is owned and operated as an integral part of the Tribe.

(b) At all times material hereto, Plaintiff was employed by the Seminole Tribe of Florida d/b/a Seminole Indian Casino-Immokalee. Seminole Indian Casino – Immokalee is owned and operated by the Tribe pursuant to the *Indian Gaming Regulatory Act of 1988* (the IGRA), 25 U.S.C.§2701, et. seq., on its Immokalee Reservation, which is owned by the United States of America in trust for the Tribe and its members and is located within the geographical confines of Collier County, Florida. Attached hereto as **Exhibit "A"** is a genuine copy of the fictitious name filing for Seminole Indian Casino -- Immokalee identifying the Tribe as the owner. In addition, the Gaming Compact for the operation of all of the Tribe's casinos is between the State of Florida and the Seminole Tribe of Florida which was approved by the Secretary of the Interior on that basis in 75 Fed. Reg. 38833-38834 (July 6, 2010) (*See*, **Exhibit B**).

(c) In view of the fact that Plaintiff was employed by the Tribe, d/b/a Seminole Indian Casino-Immokalee, Title VII does not apply to any of Plaintiff's claims since subsection (b)(1) of Section 2000e of Title 42 of the United States Code expressly excludes and exempts Indian tribes from the definition of the term "employer" under Title VII of the *Civil Rights Act of 1964*, as amended.42 U.S.C. § 2000e-(b)(i). Moreover, under the IGRA. set forth in provisions of 25 U.S.C.

§ 2710(b)(2)(A), the Tribe, and the Tribe alone is required to hold the sole proprietary ownership interest in and assume full responsibility for the conduct of gaming activity on its tribal trust lands, which it does.

(d) In addition to the foregoing, under the doctrine of tribal sovereign immunity the Tribe is immune from suit with respect to each of Plaintiff's claims, including those claims which Plaintiff contends arise under the *Florida Civil Rights Act of 1992* since the Tribe, through its elected Tribal Council, has not enacted a resolution in legal session waiving its immunity under Title VII (which expressly excludes and exempts the Tribe), and Congress has not unmistakably abrogated tribal sovereign immunity in connection with any enabling legislation which would serve to render the Tribe subject to such enforcement under such a state law.

(e) The Tribe is a constitutionally constituted and sovereign tribal government pursuant to 25 U.S.C § 476. It is governed by a written constitution and a set of bylaws. Its governmental operations are overseen by an elected Tribal Council, as it's constitutionally constituted governing body. The enumerated powers of the Tribal Council are set forth in Article V of the Tribe's Constitution and each of its official governmental actions must be embodied in either an ordinance or a resolution duly enacted by the Tribal Council in legal session. Article IV, §§ (1) and (2) of the Amended Tribal Bylaws. A genuine copy of the Amended Constitution and Bylaws of the Seminole Tribe of Florida are attached hereto as **Exhibit "C"** and are incorporated herein by reference.

(f) Further, pursuant to the Tribal Sovereign Immunity Ordinance of the Seminole Tribe of Florida, Ordinance C-01-95, which was duly enacted in legal session by the Tribal Council of the Tribe on March 16, 1995 and was thereafter approved on April 19, 1995, by the Acting Area Director (now called the Regional Director) of the Eastern Area of the Bureau of

Indian Affairs, United States Department of the Interior, as the delegated signature authority for the United States Secretary of the Interior. The Ordinance contains the exclusive method which must be followed for a valid and enforceable voluntary and limited waiver of tribal sovereign immunity by the Tribal Council as the Tribe's governing body. The Ordinance reads, in pertinent part, as follows:

> BE IT FURTHER ORDAINED: that the consent of the Seminole Tribe of Florida to waive its immunity from suit in any state or federal court may only be accomplished through the clear, express and unequivocal consent of the Seminole Tribe of Florida pursuant to a resolution duly enacted by the Tribal Council of the Seminole Tribe of Florida sitting in legal session. Any such resolution purporting to waive sovereign immunity as to the Seminole Tribe of Florida, any of its subordinate economic or governmental units or any of its tribal officials, employees or authorized agents shall specifically acknowledge that the Seminole Tribe of Florida is waiving its sovereign immunity on a limited basis and describe the purpose and extent to which such waiver applies. The failure of the Tribal Council resolution to contain such language shall render it ineffective to constitute a waiver of tribal sovereign immunity;

A genuine copy of the Tribal Sovereign Immunity Ordinance of the Seminole Tribe of Florida, Ordinance C-01-95, is attached hereto as **Exhibit "D"** and is incorporated herein by reference. At no time did the Tribal Council duly enact any resolution, or take any other action in conformity with the Tribal Sovereign Immunity Ordinance, to waive the Tribe's tribal sovereign immunity from suit with respect to the claim of any employee arising under Title VII or the *Florida Civil Rights Act*, Florida Statutes, § 760.10 in favor of Plaintiff or in favor of any other person or party purporting to have an employment discrimination or retaliation claim against the Tribe.

(g) In paragraph 3 of the amended complaint plaintiff contends that the Immokalee casino is not the Tribe which is untrue. It is an integral part of the Tribe and always has been.

The Immokalee casino operating one of its casino businesses pursuant to the Gaming Compact under a registered fictitious name, nothing more, nothing less.

(h) Plaintiff further contends in paragraph 3 of the amended complaint that the Tribe has unequivocally waived its tribal sovereign immunity with respect to plaintiff's employment discrimination claims. This is also untrue. While Part VI. D of the Gaming Compact does contain a limited waiver of tribal sovereign immunity, the Gaming Compact at part Part VI D clearly states that the limited waiver of tribal sovereign immunity is solely with respect to tort claims of gaming patrons. There is no limited waiver of tribal sovereign immunity as to tribal employees. It simply does not exist. Since plaintiff is a former employee and not a patron, there is no limited waiver of sovereign immunity.

II. PROCEDURAL BACKGROUND

On June 18, 2014, Plaintiff, Stanley Longo filed a complaint against Seminole Indian Casino – Immokalee in the above-captioned civil action seeking to recover damages for alleged unlawful employment practices which Plaintiff asserts arise under Title VII of the *Civil Rights Act of 1964*, as amended, and under Section 760.10 of the *Florida Civil Rights Act of 1992* based upon allegations of sexual harassment/gender discrimination by a gaming customer and for alleged retaliatory discharge.

Plaintiff has filed suit against Seminole Indian Casino – Immokalee, which is a fictitious name owned by and registered to the Tribe in accordance with the *Florida Fictitious Name Act*, Section 865.09, Florida Statutes. Relative to casino operations which are owned and operated by the Tribal government and in which the Tribe holds the sole proprietary interest as required by IGRA.

III. THE DISTRICT COURT LACKS SUBJECT MATTER JURISDICTION BASED UPON EXCLUSION IN TITLE VII AND THE DOCTRINE OF TRIBAL SOVEREIGN IMMUNITY.

As a sovereign tribal government which owns and operates the subject casino under the IGRA, neither the Tribe, nor any of its subordinate economic units, are subject to the jurisdiction of state or federal courts absent the express, unmistakable consent of the Tribe or the clear, express and unmistakable consent of Congress. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998), Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505 (1991); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978); Sanderlin v. Seminole Tribe of Florida, 243 F. 3d 1282 (11th Cir. 2001), Houghtaling v. Seminole Tribe of Florida 611 So.2d 1235 (Fla. 1993). *See also,* Mastro v. Seminole Tribe of Florida, Case No. 13866 (11th Cir. 8/20/2014) (copy of order attached) which was favorably decided for the Tribe on virtually identical facts and issues.

A. Tribal Sovereign Immunity-Background.

As a federally recognized sovereign Indian tribe, the Tribe is entitled to sovereign immunity. As Chief Justice Marshall stated nearly 200 years ago in Worchester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832), Indian tribes are:

> ...distinct political communities, having territorial boundaries within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.

Section 16 of the *Indian Reorganization Act of 1934*, as amended, 25 USC § 476, clearly establishes the right of an Indian tribe to organize for its common welfare and that of its members by adopting a written constitution and a set of by-laws in accordance with the provisions of the Act. By adoption of its constitution, the Tribe became a fully recognized sovereign and constitutionally

constituted Indian tribe under the laws of the United States of America. As such, this recognition vested in the tribal government certain powers in addition to its pre-existing sovereign powers. One of the long standing powers that the Tribe has always had and retained is its right as a sovereign tribal government to tribal sovereign immunity from suit. The federally recognized tribal sovereignty of Indian tribes lies at the heart of the special and unique relationship that exists between the United States of America and its resident Indian tribes: that of a dominant sovereign to a dependent sovereign. This relationship has been defined as being most akin to that of guardian and ward, as described, once again, by Chief Justice Marshall in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831):

> ... they are in a state of pupilage; their relationship to the United States resembles that of a ward to his guardian.

Fifty years later, the United States Supreme Court clarified the relationship between the United States and its resident Indian tribes, thusly:

> These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States, --dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of treaties in which it has been promised, there arises the duty of protection, and within it the power. This has always been recognized by the executive, and by Congress, and by this court, whenever the question has arisen. (emphasis added).

United States v. Kagama, 118 U.S. 375, 384-385 (1886); see also, United States v. Sandoval, 231 U.S. 28 (1913).

It is firmly established that Indian tribes are regarded by the United States as dependent political sovereign governments which possess all aspects and attributes of sovereignty. except

where they have been expressly taken away by Congressional action. As an aspect of their sovereignty, Indian tribes and all of their governmental subdivisions and agencies are immune from suit, either in federal or state courts, without express and unmistakable Congressional authorization. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978). Indian tribes have always been considered to have immunity from suit similar to that enjoyed by the federal government. Namekagon Development Company v. Bois Forte Reservation Housing Authority, 517 F.2d 508 (8th Cir. 1975). Moreover, since an Indian tribe's sovereign immunity is co-extensive with that of the United States, a party cannot maintain a claim against an Indian tribe or any of its subordinate economic or governmental units absent a firm showing of an effective waiver by the Tribe's governing body which is unequivocally expressed. Ramey Construction Company, Inc. v. Apache Tribe of Mescalero Reservation, 673 F.2d 315 (10th Cir. 1982). A waiver of tribal sovereign immunity must be unmistakable and may never arise by inference or by implication. Santa Clara Pueblo v. Martinez, 426 U.S. 49, 58-59 (1978).

In American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe, 780 F.2d 1374 (8th Cir. 1985), the court was clear in its recognition of an Indian tribe's right to sovereign immunity absent an express waiver:

> Indian tribes long have structured their many commercial dealings upon the justified expectation that absent an express waiver, their sovereign immunity stood fast. Relaxation of the settled standard invites challenge to virtually every activity undertaken by a tribe on the basis that tribal immunity had been implicitly waived. Moreover, a waiver of immunity by tribal action represents a substantial surrender of sovereign power and, therefore, merits no less scrutiny than a waiver based on Congressional action. As the Fifth Circuit stated, [T]o construe the immunity to suit as not applying to suits on liability as arising out of private transactions would defeat the very purpose of Congress in not relaxing the immunity, namely, the protection of the interests and the property of tribes.

Id. at 1378.

Thus, it is well settled that the Tribe, as a federally recognized Indian tribe, is a dependent sovereign tribal government which is not subject to the civil jurisdiction of state or federal courts absent an **unmistakable** expression of its consent or the consent of Congress, neither of which exist in this case.

In assessing the Tribe's entitlement to immunity from suit under the doctrine of trial sovereign immunity, courts have refused to distinguish whether the Tribe was engaged in a private enterprise or governmental function or whether the conduct in question arose on or off of reservation land. Kiowa, *supra.*

Sovereign immunity is the right of a sovereign. The doctrine goes to the power of the court and not to the subject matter of the dispute. As the Ninth Circuit stated in State of California v. Queschan Tribe of Indians, 595 F.2d 1153 (9th Cir. 1979), "Sovereign immunity involves a right which courts have no choice, in the absence of a waiver, but to recognize. It is not a remedy..." Id. at 1155.

The law is clear that Title VII does not apply to Indian tribes. In fact, the language of 42 USC §2000e (b)(1), specifically excludes Indian tribes from the definition of an "employer" under the Act which applies to the employer – employee relationship. It reads, in pertinent part, as follows:

> (b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, **but such term does not include (1) ...an Indian tribe**...

Title VII of the *Civil Rights Act of 1964*, as amended, 42 USC §2000 e - 2000 e-17 is the broadest and most frequently litigated anti-discrimination measure. It prohibits discrimination by employers,

employment agencies and labor organizations on the basis of race, color, religion, sex, pregnancy and national origin. While Title VII applies to most employers, Indian tribes are specifically exempted and excluded by Congress from that definition. Accordingly, it is clear that Congress did not intend Title VII to apply to Indian tribes such that an Indian tribe may not be properly sued under Title VII or any similar statute. *See, e.g.* In Re: Prairie Island Dakota Sioux, 21 F.3d 302 (8th Cir. 1994); Dille v. Council of Energy Resource Tribes, 801 F.2d 373 (10th Cir. 1986); Wardle v. Ute Indian Tribe, 623 F.2d 670 (10th Cir. 1980). Plaintiff's efforts to circumvent the clear jurisdictional bar served by sovereign immunity from suit, for the reasons hereafter set forth is not only frivolous and unwarranted—it is an abusive and expensive litigation tactic which has no place in this case, particularly where, as here, a quick check of the Secretary of State's website would have informed Plaintiff and his counsel that the Tribe and the Tribe alone operates the Immokalee Casino under a fictitious name registered to the Tribe more than 12 years ago. A copy of the fictitious name documentation information showing the Tribe as the real party in interest is attached as Exhibit "1."

In the Mastro case, this court under virtually identical facts and issues dismissed the case on tribal sovereign immunity grounds. This dismissal was affirmed by the United States Court of Appeals for the Eleventh Circuit. In view of this, it now appears that Plaintiff and his counsel are committed to a course of conduct which attempts, in vein, to subject the Tribe to laws that plaintiff and his counsel know are inapplicable to the Tribe – a costly course of conduct for the Tribe who has no choice but to defend. If plaintiff and his counsel feel that the exclusion and exemption contained in Title VII is somehow inappropriate, plaintiff and his counsel should appeal to Congress under its plenary power over Indian tribes and not to this Court.

In passing Title VII of the *Civil Rights Act of 1964*, as amended, Congress could have easily expressed an intention to permit federal and state courts to assume jurisdiction over all resident Indian tribes in civil disputes arising under the Act. It chose not to do so and instead expressly excluded Indian tribes from the reach of the statute. Accordingly, this Court lacks jurisdiction over plaintiff's claims against the Tribe under the Title VII.

One of the most important Supreme Court cases considering the issue of tribal sovereign immunity is Oklahoma Tax Commission v. Citizen Bank Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, (1991). In Potawatomi, the Supreme Court reiterated:

> Indian tribes are "domestic dependent nations," which exercise inherent sovereign authority over their members and territories. (citation omitted)... Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or Congressional abrogation. (citation omitted).

The Potawatomi Court was confronted with the opportunity to narrow or eliminate altogether the doctrine of tribal sovereign immunity. As the court noted:

> Oklahoma offers an alternative, and more far-reaching, basis for reversing the court of appeals' dismissal of its counterclaims. It urges this court to construe more narrowly, or abandon entirely, the doctrine of tribal sovereign immunity.

In reaching its decision to allow tribal sovereign immunity to stand undiminished as a jurisdictional bar to civil actions against sovereign tribal governments, the Court stated:

> The doctrine of Indian tribal sovereign immunity was originally enunciated by this court, and has been reaffirmed in a number of cases. Turner v. United States, 248 U.S. 354, 39 S.Ct. 109, 110, 63 L.Ed. 291 (1919); Santa Clara Pueblo v. Martinez, 436 U.S., at 58, 98 S.Ct., at 1677. Congress has always been at liberty to dispense with such tribal immunity or to limit it. Although Congress has occasionally authorized limited classes of suits against Indian tribes, it has never authorized suits to enforce tax assessments. Instead,

> Congress has consistently reiterated its approval of the immunity doctrine. See, e.g., Indian Financing Act of 1974, 88 Stat, 77, 25 U.S.C. §1451 et. seq., and the Indian Self-Determination and Education Assistance Act, 88 Stat, 2303, 25 U.S.C. §459 et.seq. These Acts reflect Congress' desire to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." California v. Cabazon Bank of Mission Indians, 480 U.S. 202, 216, 107 S.Ct. 1083, 1092, 94 L.Ed. 244 (1987). Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity.

Thus, in a unanimous decision, the Supreme Court reiterated, without qualification, the continued viability of the doctrine of tribal sovereign immunity.

What plaintiff really seeks in this case -- jurisdiction over a civil dispute brought by a former by a former tribal employee against a tribal employer is something that could only be viable through an express and unequivocal Congressional abrogation or an express and unequivocal tribal waiver by governmental fiat of its duly elected and constitutionally constituted governing body of the Tribe while in legal session -- in this case, the Tribal Council of the Tribe. Neither exists in this case. The only limited waiver contained in the Gaming Compact is for tort claims for gaming patrons and not for tribal employees.

IV. FURTHER ARGUMENT

A. Title VII Claim Against Seminole Indian Casino - Immokalee:

Indian tribes have been specifically excluded from the statutory definition of an employer under Title VII of the *Civil Rights Act of 1964*, 42 U.S.C. § 2000e (b)(1), thereby reflecting the clear intent of Congress that Tribes not be governed by Title VII, and related employment discrimination statutes. Courts have consistently held that "Congress did not abrogate tribal immunity with regard to Title VII." Nanomantube v. Kickapoo Tribe in

Kansas, 631 F.3d 1150, 1152 (10th Cir. 2011); see also Dawavendewa v. Salt River Project Agr. Imp. and Power Dist., 276 F.3d 1150, 1159 (9th Cir. 2002).

Following the enactment of Ordinance C-01-95, the Tribal Sovereign Immunity Ordinance of the Tribe, signed and approved in writing on April 19, 1995 by Franklin Keel, the Area Director of the United States Department of the Interior, Bureau of Indian Affairs, Eastern Area Office, as the delegated signature authority for the Secretary of the Interior pursuant to the government--to--government relationship that exists between the United States of America and the Tribe.

It is the Tribe's position that the Tribal Sovereign Immunity Ordinance of the Tribe, Ordinance C-01-95, is applicable to and dispositive of the issue of the Tribe's entitlement to tribal sovereign immunity from suit and any alleged waiver thereof regarding each of Longo's claims. In view of the fact that there is no evidence of any kind that a waiver of the tribal sovereign immunity of the Tribe was authorized in any manner by the Tribal Council or effectuated in conformity with the requirements of the exclusive procedure contained in the Ordinance, the tribal sovereign immunity of the Tribe and the jurisdictional bar flowing from it remain intact and each and every one of Plaintiff's claims for relief are jurisdictionally barred under the doctrine of tribal sovereign immunity.

Tribal sovereign immunity is necessary to promote federal policies, as well as the economic and cultural autonomy of Indian tribes. Its purpose, in part, is to protect the Tribe and its members against the improvident governmental action taken by tribal officials and agents which exceeds or oversteps their authority. The doctrine of tribal sovereign immunity is created and governed exclusively by federal law and is not subject to diminution by nuances

of state law. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 756 (1998).

Under governing federal law construing the doctrine of tribal sovereign immunity, courts are required, as a matter of federal law, to follow any tribal law addressing the subject and in the absence of any such tribal law concerning the application and waiver of tribal sovereign immunity, the federal common law, rather than state law, will govern. Memphis Biofuels v. Chickasaw Nation Industries, Inc., 583 F.3d 917, 921-922 (6th Cir. 2009). Indian tribes enjoy the type of immunity that they do because they are governmental entities with pre-existing sovereign powers which predate the ratification of the U.S. Constitution. U.S v. United States Fidelity & Guaranty Company, 309 U.S. 506, 512-513 (1940).

The law is clear and well settled that tribal sovereign immunity of a sovereign tribal government may only be surrendered by an express and unmistakable waiver of the Tribe only at its highest level. Price v. United States and Osage Indians, 174 U.S. 373, 375-376 (1899), Beers v. Arkansas, 61 U.S. (20 How.) 527, 529 (1857). ***Crucial to the outcome of this case and also of ancient pedigree is the time honored principle that since a waiver of sovereign immunity, including a waiver of tribal sovereign immunity by a sovereign tribal government is entirely voluntary, it follows that the tribe alone may prescribe the terms and conditions under which it consents to be sued.*** Id.; see also, Mader v. United States, 654 F.3d 794 (8th Cir. 2011). What the Tribe prescribed for itself in Ordinance C-01-95 was that waivers of tribal

sovereign immunity would need to be in strict compliance with the exclusive procedure set forth in the Ordinance.

What Plaintiff seeks to do here is to circumvent or remove altogether the sovereign prerogatives of the Tribe. In this case, there is no waiver or even a competent suggestion of an existing waiver of tribal sovereign immunity by the Tribe that complies with the exclusive procedure prescribed by Ordinance C-01-95 and hence, there can be no tribal waiver of immunity. In analyzing the applicability of Ordinance C-01-95, the following considerations are important: (a) the fact that a waiver of tribal sovereign immunity is a voluntary act; (b) the Tribe and not Longo is entitled to prescribe the terms and conditions of any such immunity waiver; and (c) the failure of any alleged waiver of tribal immunity claimed by Longo to strictly comply with requirements prescribed by the Tribe for a valid and effective waiver. These considerations will and must result in the claims asserted against the Tribe being jurisdictionally barred by the doctrine of tribal sovereign immunity.

B. Kiowa as Dicta?

The Tribe anticipates that Longo will attempt to suggest that the holding in Kiowa amounts to mere dicta which this Court should disregard. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998) is significant for its definition of the applicable scope of the doctrine of tribal sovereign immunity. In Kiowa, the Tribe refused to pay a bank lender on a promissory note and asserted tribal sovereign immunity as a jurisdictional bar to the action. A lawsuit in Oklahoma state court followed which resulted in a judgment being rendered against the Tribe. The judgment was affirmed by the Oklahoma Supreme Court.

The United State Supreme Court reversed. In doing so, the Supreme Court declined to restrict the doctrine of tribal sovereign immunity and instead deferred to Congress to take the lead in "drawing the bounds of tribal immunity." Id. at 759. The Supreme Court held that tribal sovereign immunity would apply and would operate as a jurisdictional bar to an action brought against a tribe that had not clearly and expressly waived its immunity **regardless of whether the tribe's actions involved governmental or commercial activity or whether such activities occurred on or off of a reservation.** Id. at 760. In addition, the Court also held also held that since tribal sovereign immunity is governed by federal law, tribal immunity was not subject to being diminished by nuances of state law or by state statute.

Under Kiowa, the fact that Longo worked as a security guard in the Tribe's Immokalee Casino makes no difference in the Tribe's entitlement to tribal sovereign immunity with respect to the claims asserted by Longo. As the record owner and operator of the Casino and the real party-in-interest, the Tribe, by definition, was not an employer under Title VII. Under Kiowa, the fact that the Tribe's activity was commercial and arose on the reservation, will make no difference in the sovereign immunity analysis since the Court is not required to draw such distinctions as a condition to the Tribe's entitlement to tribal sovereign immunity from suit. The Tribe is entitled to tribal sovereign immunity as a jurisdictional bar to Plaintiff's claims because there is no clear, express and unmistakable tribal waiver or Congressional abrogation of tribal sovereign immunity in this case with respect to any of Plaintiff's claims.

CONCLUSION

Based upon the foregoing, the Tribe would respectfully submit that under the factual proffer, Ordinance C-01-95, the authority of Kiowa and the plain language of 42 U.S.C.§ 2000e-

(b)(1), which excludes and exempts the Tribe from being considered an "employer" under Title VII, Longo's claims against the Tribe are jurisdictionally barred under the doctrine of tribal sovereign immunity. Based upon a complete lack of anything which suggests a clear, express and unmistakable tribal waiver or Congressional abrogation of tribal sovereign immunity, it is respectfully submitted that the amended complaint should be dismissed. The plaintiff's actual employer, the Tribe d/b/a Seminole Indian Casino-Immokalee is not subject to suit under Title VII which excludes Indian tribes as being employers under the Act. The Tribe, as the Plaintiff's actual employer and real party-in-interest is likewise immune from all of Plaintiff's claims under the doctrine of tribal sovereign immunity.

Respectfully submitted,

s/ Donald A. Orlovsky
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 28, 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 this day on all counsel of record or pro se parties identified on the attached Service List 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/ Donald A. Orlovsky

DONALD A. ORLOVSKY

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 13-13886
Non-Argument Calendar

D.C. Docket No. 2:12-cv-00411-SPC-UAM

STEPHANIE MASTRO,
an individual,

Plaintiff – Appellant,

versus

SEMINOLE TRIBE OF FLORIDA,
d/b/a Seminole Indian Casino-Immokalee

Defendant – Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(August 20, 2014)

Before PRYOR, MARTIN, and JORDAN, Circuit Judges.

PER CURIAM:

Stephanie Mastro appeals the district court's dismissal of her amended complaint for lack of subject – matter jurisdiction and failure to state a claim. Having considered the parties' briefs and the record, we affirm.

I

Because we write for the parties, we assume familiarity with the underlying facts of the case and recite only what is necessary to resolve this appeal.

Ms. Mastro, formerly employed as a card dealer at Seminole Indian Casino – Immokalee, sued the Seminole Tribe of Florida, d/b/a Seminole Indian Casino – Immokalee, for gender discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964 and the Florida Civil Rights Act. The Tribe moved to dismiss, arguing that Ms. Mastro failed to state a claim and that the district court lacked subject – matter jurisdiction because the Tribe and Casino are entitled to tribal immunity.

The district court agreed and granted the Tribe's motion. It held that, because Congress did not abrogate tribal immunity with regard to Title VII, sovereign immunity barred Ms. Mastro's claims against the Tribe. It likewise extended this logic to shield the Casino; it concluded that because it is wholly-owned, operated by the Tribe, and formed pursuant to the Indian Gaming Regulatory Act, the Casino constitutes a subordinate arm of the Tribe and is therefore immune from suit. Ms. Mastro appeals.

II

We review *de novo* a district court's dismissal of a complaint on grounds of sovereign immunity. *See Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla.*, 692 F.3d 1200, 1203 (11th Cir. 2012). We likewise review questions of subject matter jurisdiction *de novo*. *See Palmer v. Braun*, 376 F.3d 1254, 1257 (11th Cir. 2004).

We may affirm the district court on any ground supported by the record, "regardless of whether that ground was relied upon or even considered by the district court." *Kernel Records Oy v. Mosley*, 694 F.3d 1294, 1309 (11th Cir. 2012).

III

On appeal, Ms. Mastro contends that the district court erred in concluding that the Tribe and Casino should be afforded tribal sovereign immunity and hence are not subject to suit under Title VII. These arguments do not carry the day.

A

Because Indian tribes are exempt from the purview of Title VII, we need not reach the applicability of sovereign immunity to the Tribe.

The Supreme Court has held that "an Indian Tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). As a means of "promot[ing] the ability of sovereign Indian tribes to control their own

economic enterprises," *Dille v. Council of Energy Res. Tribes*, 801 F.2d 373, 375 (10th Cir. 1986), Congress chose to expressly exempt Indian tribes from Title VII's definition of "employer." 42 U.S.C. § 2000e(b) ("The term 'employer' . . . does not include . . . an Indian Tribe . . ."). See also *Taylor v. Ala. Intertribal Council Title IV J.T.P.A.*, 261 F.3d 1032, 1035 (11th Cir. 2001) ("Congress expressly exempts Indian tribes from the definition of employer under Title VII."). Because Title VII, by its own terms, does not apply to the Tribe, Congress did not authorize suits against the Tribe under the Act, and the district court therefore lacked subject – matter jurisdiction as to the Tribe.

B

Because the Casino, as named in Ms. Mastro's complaint, is not an independent legal entity, we need not analyze whether it too falls under Title VII's tribal exemption or is entitled to tribal immunity.

Ms. Mastro identifies the defendant as "Seminole Tribe of Florida, d/b/a Seminole Indian Casino – Immokalee." Because the Tribe is merely "doing business as" Seminole Indian Casino – Immokalee, however, the Casino itself is not a separate legal entity, but instead merely a fictitious name with no independent existence under which the Tribe conducts business. *See Osmo Tec SACV Co. v. Crane Envtl., Inc.*, 884 So. 2d 324, 327 (Fla. 2d DCA 2004) (observing that a fictitious name had "no independent existence" and "any

reference to [the fictitious name] was simply a reference to [the real party in interest]."); *Riverwalk Apartments, L.P. v. RTM Gen. Contractors, Inc.*, 779 So. 2d 537, 539 (Fla. 2d DCA 2000) (finding that a "fictitious name is just that—a fiction involving the name of the real party in interest, and nothing more"). *See also Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 634 n.2 (4th Cir. 2002) (concluding that a trade name is "not a separate legal entity capable of being sued.") 8 Fletcher Cyc. Corp. § 3831 ("[U]sing d/b/a or doing business so as to associate an assumed or fictitious name with a corporation does not, without more, create a separate legal entity different from the corporation.") (citations omitted). Therefore, the only legal entity properly named as a defendant in this case is the Tribe, which, as discussed above, is not subject to suit under Title VII. *See Thomas v. Choctaw Mgmt./Servs. Enter.*, 313 F.3d 910, 911 (5th Cir. 2002) (affirming dismissal of Title VII claim against an entity that is "not a corporation at all and is, in fact, a direct proprietary enterprise of the Choctaw Nation, from which it is legally inseparable").

IV

The district court's dismissal of Ms. Mastro's complaint is affirmed.

AFFIRMED.