UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

STANLEY LONGO, an individual, Plaintiff, v. **SEMINOLE INDIAN CASINO- IMMOKALEE**, Defendant.	**CIVIL ACTION** **Case No. 2:14-cv-334** **Judge: Sheri Polster Chappell** **Mag. Judge: Carol Mirando**

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS AND INCORPORATED MEMORANDUM OF LAW

NOW COMES the Plaintiff, **STANLEY LONGO**, by and through his undersigned attorney, and files Plaintiff's Response to Defendant's Motion to Dismiss and Incorporated Memorandum of Law (Doc. 24), and states as follows:

In his Amended Complaint (Doc. 17)(Ex. A), Plaintiff Stanley Longo has alleged the following facts:

> On or about October 2003 the defendant hired the plaintiff to work as a security guard at the Seminole Casino - Immokalee. The plaintiff was well-qualified for the position for which he was hired and performed his duties well and in a professional manner. Throughout the tenure of his employment, the plaintiff had an essentially unblemished employment record and at no time was plaintiff issued any written discipline for any intentional misconduct of any kind.
>
> On or about January 2013 while working at the Seminole Casino - Immokalee the plaintiff began to be subjected to sexual harassment by a casino patron who made frequent attempts to initiate a sexual relationship with the plaintiff, who stalked the plaintiff, and who subjected the plaintiff to unwanted physical touching.
> When the plaintiff reported the sexual harassment above-described to the defendant, the defendant took no action. When the sexual harassment continued, the plaintiff reported the harassment to personnel in the defendant's Human Resources Department, but the defendant continued to take no action to protect the plaintiff from the harassment.

> On April 23, 2013 the defendant terminated the plaintiff from his employment as a security guard. The defendant told the plaintiff the reason for his termination was that, after ten years of employment, the plaintiff had been "discourteous to team members." But that was not true. The true reason the defendant terminated the plaintiff from his employment was that he had reported the sexual harassment above-described.

Amended Complaint, ¶¶ 10-22, 32, 42. For the purposes of this motion, the court must assume that those factual allegations are true. *Grossman v. Nationsbank, N.A.*, 225 F.3d 1228, 1231 (11th Cir. 2000).[1]

Those facts indicate that when it terminated the Plaintiff from his employment, the Defendant violated section 703 of Title VII of the Civil Rights Act of 1964. But in the instant motion, the Defendant asserts that it cannot be held to account for its violation of section 703. First, because the Seminole Casino - Immokalee is owned by the Seminole Tribe of Florida (STF), the members of the STF are a "federally recognized tribe," federally recognized tribes have sovereign immunity, and the STF has not waived its sovereign immunity. And second, because section 701(b) of Title VII exempts an "Indian tribe" from the definition of the term "employer" in Title VII, and, for the purposes of section 701(b), the members of the STF are an "Indian tribe." But neither of those assertions is meritorious.

MEMORANDUM OF LAW

A. The Members of the Seminole Tribe of Florida Are Not a Federally Recognized Tribe.

The Defendant is correct that a "federally recognized tribe" has sovereign immunity. *See Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998). *Accord Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024 (2014). But are the members of the STF a "federally

[1] A motion to dismiss under Rule 12(b)(1) may assert either a factual attack or a facial attack to jurisdiction. *McElmurray v. Consol. Gov't of Augusta-Richmond County*, 501 F.3d 1244, 1251 (11th Cir. 2007); *Lawrence v. Dunbar*, 919 F.2d 1525, 1528-29 (11th Cir. 1990). A factual attack challenges "the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." *Lawrence*, 919 F.2d at 1529. In a facial attack, on the other hand and as is the case in the Defendant's instant Motion, the court examines whether the complaint has sufficiently alleged subject matter jurisdiction.

recognized tribe"? Whenever the STF has been sued, it has rotely asserted that its members are. And just as rotely the Supreme Court of Florida, this Court, and the U.S. Court of Appeals for the Eleventh Circuit have accepted that assertion without determining how and when the members of the STF acquired that apparent legal status. *See Houghtaling v. Seminole Tribe of Florida*, 611 So.2d 1235 (Fla. 1993); *Inglish Interests, LLC v. Seminole Tribe of Florida*, 2011 WL 208289 (M.D. Fla.); *Mastro v. Seminole Tribe of Florida*, 2013 WL 3350567 (M.D. Fla.), aff'd, 578 Fed. Appx. 801 (11th Cir. 2014); *Contour Spa at the Hard Rock v. Seminole Tribe of Florida*, 692 F.3d 1200 (11th Cir. 2012). For that reason, for this court, whether the members of the STF are a "federally recognized tribe" is a question of first impression.

Insofar as the answer to that question is concerned, as a threshold matter, not every group whose membership is composed of individuals who each have a degree of indigenous blood quantum is a "federally recognized tribe." As Felix Cohen, who remains an authoritative commentator on federal Indian law, long ago cautioned, "The term 'tribe' is commonly used in two senses, an ethnological sense and a political sense," and "[i]t is important to distinguish between these two meanings of the term." Handbook of Federal Indian Law 268 (1942 ed.).[2]

In *Montoya v. United States*, 180 U.S. 261, 266 (1901), the U.S. Supreme Court defined an ethnological tribe as "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." Because the members of the STF are descendants of the Creek Indians who lived in what today is the

[2] Between 1933 and 1948 Felix Cohen was an attorney in the Office of the Solicitor at the Department of the Interior. In 1934 Cohen was a principal draftsman of the bill Commissioner of Indian Affairs John Collier sent to the 73d Congress and the bill the 73d Congress enacted as the Indian Reorganization Act in lieu of the Collier bill. Between 1939 and 1941 Cohen supervised the research for, and then was the principal author of, the Handbook of Federal Indian Law, which the Department of the Interior published in 1941 and the U.S Supreme Court immediately began citing as an authoritative text. *See United States v. Santa Fe Pacific Railway Company*, 314 U.S. 339, 349 n. 5 (1941). *And see generally* Jill E. Martin,"A Year and a Spring of My Existence": Felix S. Cohen and the Handbook of Federal Indian Law, 8 Western Legal History 35, 36 (1995)("he [Felix Cohen] drafted the Wheeler-Howard Act (also known as the Indian Reorganization Act), which was adopted as the premier Indian legislation of the New Deal in 1934").

State of Florida when the United States purchased the territory from Spain in 1821, and because today most members of the STF reside on the Hollywood (originally Dania), Big Cypress, and Brighton reservations, the Plaintiff assumes for the purposes of this motion that the members of STF are an ethnological tribe. But that does not mean the members of the STF have been "recognized" by the United States as a tribe in a political sense. And the STF is a "federally recognized tribe" that possesses sovereign immunity only if its members have been lawfully recognized as a tribe in a political sense.

In that regard, the Committee on Natural Resources, which in the U.S. House of Representatives exercises jurisdiction over Indian-related legislation, has instructed:

> "Recognized" is more than a simple adjective; it is a legal term of art. It means that the government acknowledges as a matter of law that a particular Native American group is a tribe by conferring a specific legal status on that group, thus bringing it within Congress' legislative powers. This federal recognition is no minor step. A formal political act, it permanently establishes a government-to- government relationship between the United States and the recognized tribe as a "domestic dependent nation," and imposes on the government a fiduciary trust relationship to the tribe and its members. Concomitantly, it institutionalizes the tribe's quasi-sovereign status, along with all powers accompanying that status . . . . (emphasis added).

H.R. Rep. No. 103-781, at 2-3 (1994). Accord Cohen's Handbook of Federal Indian Law 133-134 (2012 ed.).[3] What "formal political act" of the government of the United States designated the members of the STF as a "federally recognized tribe?"

The Indian Commerce Clause of the U.S. Constitution, article I, section 8, clause 3, grants Congress "plenary and exclusive power over Indian affairs." (emphasis added). *Washington v. Yakima Indian Nation*, 439 U.S. 463, 470 (1979). As a consequence, there are three ways the members of the STF might have become a "federally recognized tribe": the Senate's ratification of a

[3] In 1942 the Department of the Interior published a second printing of the 1941 edition of the Handbook of Federal Indian Law, and then in 1958 published a revised edition. In 1971 the University of New Mexico Press reprinted the 1941 edition as Felix S. Cohen's Handbook of Federal Indian Law. In 1982, 2005, and 2012 law professors who specialize in federal Indian law published federal Indian law horn books. As a marketing tool the professors titled their books Cohen's Handbook of Federal Indian Law. Subsequent to their publications, federal courts have cited the Cohen's Handbooks as authoritative commentaries. *See most recently Michigan v. Bay Mills Indian Community*, supra at 2038.

treaty that conferred that legal status, Congress's enactment of a statute that conferred that legal status, or the granting by the secretary of the interior, acting pursuant to authority Congress has delegated to the secretary, of a petition requesting recognition that the members of the STF have filed with the secretary pursuant to 25 C.F.R. 83.1 et seq.

1. The Senate Has Not Ratified a Treaty That Designates the Members of the Seminole Tribe of Florida as a Federally Recognized Tribe.

In 1823 and 1832 the Senate ratified treaties that, first William Duval, the governor of the Territory of Florida, and James Gadsden, and then James Gadsden on his own, negotiated with two groups of Seminole headmen who Duval and Gadsden recruited to represent all Seminole Indians who were living in the territory. In the Treaty of Moultrie Creek, 7 Stat. 224, all Seminoles in Florida purportedly agreed to move onto a reservation the United States established for their occupation. In the Treaty of Payne's Landing, 7 Stat. 368, all Seminoles in Florida purportedly agreed to move to the Indian Territory west of the Mississippi River. When the Seminoles refused to move to the Indian Territory the army, by force of arms, compelled them to move. Today, the 17,000 descendants of those Seminoles are a federally recognized tribe known as the Seminole Nation of Oklahoma. *See* http://sno-nsn.gov/.

According to University of Tampa professor James W. Covington, a leading scholar on the history of the Seminole Indians, after three years of military operations during which most Seminoles were captured by the army, loaded onto ships, and sent to the Indian Territory, "[o]n May 8 [1858] Colonel [Gustaus] Loomis [the commander of the army detachment at Fort Myers] issued an order proclaiming the end of hostilities for he and the other whites believed that there were only 100 Seminoles remaining in Florida, and they had not committed any hostile acts for some time." *The*

Seminoles of Florida 143 (1993)[hereinafter "Covington"].[4] The members of the STF are the descendants of those 100 Seminole Indians.

Except in one consequential particular, the legal status of the members of the STF is identical to the legal status of the members of the Tonto Apache Tribe in Arizona. The San Carlos Apache Tribe is a federally recognized tribe whose members live on the San Carlos Apache Reservation that President Ulysses S. Grant established in 1872 in southeastern Arizona. *See* 1 *Indian Affairs: Laws and Treaties* 812-813 (1904), available at http://digital.library. okstate.edu/kappler/index.htm.

In 1889 several families whose members were members of the San Carlos Apache Tribe left the San Carlos Apache Reservation and established an encampment on the East Verde River six miles north of Payson, a ranching and mining town west of the reservation.

By 1968, 64 individuals who were descendants of members of the families that left the San Carlos Apache Reservation in 1889 were living near Payson squatting on land in the Tonto National Forest. To provide those individuals a location at which to build a permanent community, in 1968 Representative Sam Steiger, whose congressional district included Payson, introduced a bill in the U.S. House of Representatives whose enactment by Congress would authorize the "Payson Band of Yavapai-Apache Indians" to select 85 acres of land in the forest as a site for a village. The bill also "recognized" the Band "as a tribe of Indians within the purview of the [Indian Reorganization Act of 1934]." *See* H.R. 18565, 90th Cong. (1968).

In 1971 when the House Committee on Interior and Insular Affairs favorably reported Representative Steiger's bill, before it did so the Committee rewrote the bill to remove the Band's "recognition" as a federally recognized tribe because the Department of the Interior had informed the Committee that "we do not now recognize this group and believe that we should not now recognize

[4] The pages of *The Seminoles of Florida* cited in this memorandum have been reprinted in Plaintiff's Exhibit B. Pursuant to Federal Rule of Evidence 803(16), The Seminoles of Florida is admissible as evidence of the truth of the facts contained therein.

them. If this group wishes to avail itself of Indian services, they need only to remove themselves to the San Carlos Indian Reservation, which they have refused to do for a number of reasons." *See* H.R. Rep. No. 92-635, at 6 (1971)(letter from Harrison Loesch, assistant secretary of the interior, to the Honorable Wayne Aspinall, September 20, 1971).

In the end, because they apparently wanted to ensure that the members of the Payson Band could receive services from the Bureau of Indian Affairs (BIA) and the Indian Health Service without having to move to the San Carlos Apache Reservation, the members of the House-Senate Conference Committee who wrote the version of Representative Steiger's bill that Congress enacted into law explicitly designated the members of the Band - which later was renamed the Tonto Apache Tribe - as a federally recognized tribe. *See* Pub. L. No. 92-470, 86 Stat. 783 (1972).

Just as the members of the Payson Band are a splinter group of the San Carlos Apache Tribe, the members of the STF are a splinter group of the Seminole Nation of Oklahoma. *See* Covington, at 238 (reporting that the BIA area director in Oklahoma "had administrative control over the [BIA] Florida agency . . . ."). *And see accord* Plaintiff's Exhibit C (superintendent of the BIA Seminole Indian Agency in Florida reporting to BIA area director in Oklahoma).

But unlike the members of the Payson Band, the members of the STF are not a "federally recognized tribe" because Congress has not ever enacted a statute in which it conferred that legal status.

2. Congress Has Not Enacted a Statute That Designates the Members of the Seminole Tribe of Florida as a Federally Recognized Tribe.

In 1871, Congress directed the president to stop negotiating treaties with ethnological tribes. *See* 16 Stat. 544, 566. From that date to 1978, the only way the members of an ethnological tribe or a group of descendants of members of an ethnological tribe could become a "federally recognized tribe" was by Congress conferring that legal status in a statute. The statute in which Congress

designated the descendants of members of the original Payson Band as a federally recognized tribe has been discussed, but Congress has enacted other statutes in which it has created new federally recognized tribes. *See e.g.*, Mashantucket Pequot Indian Claims Settlement Act, Pub. L. No. 98-134, Section 9(a), 97 Stat. 851 (1983) ("Notwithstanding any other provision of law, Federal recognition is extended to the Tribe"); Auburn Indian Restoration Act, Pub. L. No. 103-434, Title II, Section 202(a), 108 Stat. 4526, 4533 ("Notwithstanding any other provision of law, Federal recognition is hereby extended to the Tribe"); Paskenta Band Restoration Act, Pub. L. No. 103-454, Title III, Section 303(a), 108 Stat. 4791, 4793 (1994)("Federal recognition is hereby extended to the Tribe").

But Congress has not enacted a statute that designates the members of the STF as a "federally recognized tribe."

3. The Secretary of the Interior Has Not Designated the Members of the Seminole Tribe of Florida as a Federally Recognized Tribe.

In 1978, the BIA decided that Congress intended 5 U.S.C. 301 and 25 U.S.C. 2 and 9 to delegate the secretary of the interior authority to create new "federally recognized tribes" without congressional involvement. Exercising that authority, the BIA promulgated regulations that create a process for a group composed of individuals who are descendants of members of an ethnological tribe to petition the secretary to designate the group as a "federally recognized tribe." *See* 43 *Fed. Reg.* 39,361 (1978). Amended in 1994 - *see* 59 *Fed. Reg.* 9280 (1994), those regulations are codified at 25 C.F.R. 83.1 *et seq*. The members of the STF have never petitioned the secretary of the interior for recognition.

4. The Reason the Seminole Tribe of Florida Wrongly Believes Its Members Are a Federally Recognized Tribe.

If no treaty or act of Congress has designated the members of the STF as a federally recognized tribe, and if the members of the STF have not petitioned the secretary of the interior to confer that

legal status, why has the STF represented to this and other courts that its members have that legal status?

The timeline documenting the history of the Seminole Indians that the STF has posted on its website (http://www.semtribe.com/History/ Timeline.aspx) is instructive. *See* Plaintiff's Exhibit D. The timeline states: in 1957 "Seminole Tribe of Florida formed."

In other words, in both its timeline and the instant motion the STF admits that the members of the STF did not become a "federally recognized tribe" until July 11, 1957 when Assistant Secretary of the Interior Roger Ernst approved a constitution for the members of the STF pursuant to authority Congress had delegated to the secretary of the interior in section 16 of the Indian Reorganization Act (IRA), Pub. L. 73-383, 48 Stat. 984 (1934). *See* Motion to Dismiss Amended Complaint, at 6-7 ("By adoption of its [IRA] constitution, the [Seminole] Tribe [of Florida] became a fully recognized sovereign and constitutionally constituted Indian tribe under the laws of the United States of America").

Professor Covington has described the events that culminated in Assistant Secretary Ernst's approval of the STF's constitution. *See* Covington 236-245.

In summary, early in the nineteenth century, Congress decided that it had a responsibility for the welfare of the nation's indigenous inhabitants and their descendants. To supervise the administration of programs Congress created and funded to discharge that responsibility, in 1832 Congress authorized the president to appoint a commissioner of Indian affairs whose agency, the BIA, was located in the War Department. 4 Stat. 564. In 1849 Congress transferred the commissioner and the BIA to the Department of the Interior. 9 Stat. 395.

For some groups of indigenous inhabitants and their descendants Congress, the president, and the secretary of the interior withdrew or purchased land for the groups' occupation.[5] For other groups no land was withdrawn or purchased. But even if land was withdrawn or purchased for a group, the withdrawal or purchase did not, in and of itself, have the legal consequence of transforming the members of the group into a "federally recognized tribe."

For example, in 1884 Congress directed the secretary of the interior to begin providing, first education - see section 13, 23 Stat. 24, 27, and then other services to Alaska Natives. And beginning in 1912 the president and the secretary made a number of land withdrawals for Alaska Natives. *See* e.g., Executive Order No. 1555 (June 19, 1912); 43 Fed. Reg. 9242-45, 9892 (1943). Nevertheless, after surveying the history of Congress's enactments subsequent to the Senate's ratification in 1867 of the Treaty of Cession in which the United States purchased Alaska, the Alaska Supreme Court concluded:

> In a series of enactments following the Treaty of Cession and extending into the first third of this century, Congress has demonstrated its intent that Alaska Native communities not be accorded sovereign tribal status. The historical accuracy of this conclusion was expressly recognized in the proviso to the Alaska Indian Reorganization Act [of 1936] . . . No enactment subsequent to the Alaska Indian Reorganization Act granted or recognized tribal sovereign authority in Alaska.

Native Village of Stevens v. Alaska Management & Planning, 757 P.2d 32, 41 (Alaska 1988). The history of Congress's policy regarding Indians in the state of California is similar to the history of Congress's policy regarding Alaska Natives.

In 1852, the Senate decided not to ratify treaties with ethnological tribes in California whose ratification would have designated the ethnological tribes as "federally recognized tribes." *See The Legal Status of the California Indian*, 14 California L. Rev. 83, 95-96 (1926); 8 *Journal of the Executive Proceedings of the Senate of the United States of America* 717-420 (1852). And in 1917 the

[5] The Brighton reservation west of Lake Okeechobee on which members of the STF today reside is land the BIA purchased. *See* Covington 209-210.

California Supreme Court concluded regarding an Indian who resided with other Indians on land the BIA had purchased for their occupation that "The plaintiff and the groups of Indians with whom he associates do not belong to any tribe that was ever known or recognized as such by the United States as a distinct political entity," and "the establishment of a school by the federal government for the use of these Indians and the purchase of land for allotment to them does not constitute a recognition of them as a distinct tribe with independent self-government, ..." *Anderson v. Mathews*, 163 P. 902, 905-906 (Cal. 1917).

If, prior to 1957, the Seminole Indians who lived in Florida received services from the BIA but, like Alaska Natives and Indians in California, they had not been designated in a treaty or statute as a "federally recognized tribe," how were the reservations the BIA established at Hollywood, Big Cypress, and Brighton governed?

In 1935 the BIA directed an anthropologist in the agency's employ named Gene Stirling to study the Seminole Indians. *See* Covington 217. In the report he submitted in 1936 Stirling advised the BIA that "[t]here have been no Seminole Chiefs for a number of years. Political power is now vested in what might be termed Councils, though largely composed of Medicine Men. Important decisions, however, require a general meeting of the whole group." Stirling then recommended that "The Seminoles should be organized with the three divisions, Cow Creek, Miami, and Big Cypress, as the fundamental units. Each of these could have a council to govern its internal affairs and, also, perhaps, to serve as members of a general Seminole Tribal Council." *See* Plaintiff's Exhibit F.

In the 1950s, Kenneth Marmon was superintendent of the BIA Seminole Indian Agency in Florida (from which location he was supervised by the BIA Seminole area director in Oklahoma). Covington 237. In 1953, Superintendent Marmon informed Florida Senator George Smathers that seventeen years after Gene Stirling submitted his recommendation the Seminole Indians had no government. Superintendent Marmon told the senator:

> The two bands [Cow Creeks and Miccosukais] for all practical purposes have always been referred to as the Seminole Tribe. The Seminoles of Florida do not have a recognized tribal organization, but each of the two bands have what they call a Green Corn Dance Council. Each of these councils continue to carry on their Seminole tribal customs such as their Green Corn Dances, etc. This Agency has never interfered with their dances or tribal customs, or when it came to setting up certain rules or standards for their people providing these rules did not conflict with Bureau policy or county and state laws. Some effort has been made to have the tribe organize under a simple constitution and by-laws for the purpose of setting up a Business Committee or Board of Directors to represent the Seminole Tribe in all of their tribal affairs, but because of friction between the bands for various reasons little headway has been made. (emphases added).

Plaintiff's Exhibit C. From 1880 to 1977, the objective of Congress's Indian policy was to encourage, first Indians who in the nineteenth century had been confined on reservations, and then their descendants, to assimilate themselves economically and socially into the larger society. To that end, in 1953 Congress passed House Concurrent Resolution No. 108. 67 Stat. B132. The resolution "declared [it] to be the sense of Congress that, at the earliest possible time, all of the Indian tribes and the individual members thereof located within the states of California, Florida, New York, and Texas . . . should be freed from Federal supervision and control and from all disabilities and limitations specifically applicable to Indians." (emphasis added).

To implement House Concurrent Resolution No. 108 in Florida, in 1954, the BIA sent Congress a bill that, had it been enacted, would have ended the BIA's supervision of the Seminole Indians and terminated the programs and services the BIA had been providing to them. *See* S. 2747, 83d Cong. (1954); H.R. 7321, 83d Cong. (1954). In March 1954 the Subcommittees on Indian Affairs of the Senate and House Committees on Interior and Insular Affairs held a joint hearing on the BIA's bill at the conclusion of which Senator Smathers and the other members of the Subcommittees decided that the Seminole Indians were too dependent on the programs and services the BIA was providing for Congress to direct the BIA to stop providing them. *See generally Termination of Federal Supervision Over Certain Tribes of Indians: Joint Hearing on S. 2747 and H.R. 7321 before the Subcommittees of the Senate and House Committees on Interior and Insular Affairs*, 83d Cong. (1954).

The Seminole Indians having dodged the termination bullet, in April 1957, Colonel Max Denton, the state of Florida's commissioner of Florida Seminole affairs, met in Washington, D.C., with Commissioner of Indian Affairs Glenn Emmons and at that meeting (and with no Seminole Indians in attendance) Denton and Emmons decided between themselves "that the Seminole Indians of Florida should be organized under a constitution and charters as soon as possible." *See* Covington 240-241.

Commissioner Emmons then sent Rex Quinn, a BIA employee who worked in the Washington, D.C., headquarters office, to Florida to write a constitution for the organization that became the STF. Id. 243-244. And later in 1957, first Assistant Secretary Ernst, on behalf of the secretary of the interior and acting pursuant to authority Congress had delegated to the secretary in section 16 of the IRA, and then the members of the STF approved Rex Quinn's work product. *See* Plaintiff's Exhibit E (1957 STF Constitution).

As both the timeline on its website and the memorandum it has filed in support of the instant motion indicate, the STF believes Assistant Secretary Ernst's approval of the constitution Rex Quinn wrote for the members of the STF had the legal consequence of transforming the members of the STF into a "federally recognized tribe." However, the 73d Congress that enacted the IRA intended Assistant Secretary Ernst's approval of Rex Quinn's constitution to have no such legal consequence.

5. The 73d Congress Did Not Intend Section 16 of the Indian Reorganization Act to Delegate the Secretary of the Interior Authority to Create New Federally Recognized Tribes.

In *Chrysler Corporation v. Brown*, 441 U.S. 281, 302 (1979), the U.S. Supreme Court described the principle on which the doctrine of separation of powers is based as follows: "The legislative power of the United States is vested in the Congress, and the exercise of quasi- legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes." And in *Lyng v. Payne*, 476 U.S. 926, 937

(1986), the Court instructed that the authority of a federal agency is "no greater than that delegated . . . by Congress."

Applying those fundamental constitutional principles, to determine the scope of the legislative authority, the 73d Congress intended section 16 of the IRA to delegate to the secretary of the interior, this court must "start, as always, with the language of the statute" - *see Williams v. Taylor*, 529 U.S. 420, 431 (2000), because the court must presume Congress "says in a statute what it means and means in a statute what it says there." *Connecticut National Bank v. Germain*, 503 U.S. 249, 254 (1992). Nothing in the text of section 16 or in the text of any other section of the IRA delegates the secretary of the interior authority to create new federally recognized tribes.

It also should be noted that the U.S. Supreme Court has further instructed that the intent of the Congress that enacted a statutory text must be construed "with reference to the circumstances existing at the time of the passage." *United States v. Wise*, 370 U.S. 405, 411 (1962). *Accord MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 228 (1994); *Carcieri v. Salazar*, 555 U.S. 379 (2009)(phrase "now under Federal jurisdiction" in section 19 of the IRA held to mean what the 73d Congress intended it to mean when it enacted the IRA in 1934, rather than the meaning the BIA adopted more than fifty years later).

The 73d Congress enacted the IRA in 1934. The text of the bill Commissioner of Indian Affairs John Collier sent to the 73d Congress, Commissioner Collier's explanation of that text, the discussion that preceded the rejection of Commissioner Collier's bill by the members of the Senate and House Committees on Indian Affairs, and the members' explanations of the texts of the bills the Committees reported to the Senate and House in lieu of Commissioner Collier's bill are set out in *To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing on S. 2755 before the Senate Committee on Indian*

Affairs, 73d Cong. (1934)[hereinafter "1934 Senate Hearing"] and Readjustment of Indian Affairs: Hearings on H.R. 7902 before the House Committee on Indian Affairs, 73d Cong. (1934).

That hearing record documents that, to the man and single woman, the members of both Committees were assimilationists who had no interest in the secretary of the interior creating new "federally recognized tribes."

Two examples:

First, section 13(b) of Title I of the bill Commissioner Collier sent to the 73d Congress defined the term "Indian" as all "persons of one fourth or more Indian blood." *See* 1934 Senate Hearing, at 6. When, after rejecting Commissioner Collier's bill, the Senate Committee on Indian Affairs wrote its own bill (which Felix Cohen participated in drafting), Montana Senator Burton Wheeler, the chairman of the Committee, amended the "Indian" definition to increase the blood quantum requirement to "one-half or more Indian blood" because, as Chairman Wheeler explained to the other members, "What we are trying to do is to get rid of the Indian problem rather than add to it." *See* 1934 Senate Hearing, at 264. Senator Wheeler's amendment is codified in section 19 of the IRA.

Second, here is the colloquy Oklahoma Senator Elmer Thomas had with Commissioner Collier when Senator Thomas explained why he opposed the Commissioner's bill:

> Senator Thomas: Here is the defect in this bill. This bill proposes to take these Indians from the community life, and from citizenship in my State, and put them off into reservations, where you will have a gate, with an admission charge of so much to see the Indian zoo.
>
> Commissioner Collier: Senator, it does not propose that.
>
> Senator Thomas: That is what the effect would be.
>
> Commissioner Collier: No; I do not think that would be the effect. I think the effect would be the opposite. I think it is more a matter of tracing out the consequences of this bill.
>
> Senator Thomas: You can see the same thing down at Miami, Fla. The committee went down to Miami, and went down to the Indian zoo, and I think we received passes. Anyway, we got into this enclosure, and on the inside we saw the Seminoles portrayed there and exhibited for

> a fee to the tourists of Florida. That is what you are preparing to have done in every section of the Nation, in my judgment.
>
> Commissioner Collier: It is not in this bill, and it is not in our minds.
>
> Senator Thomas: That would be the result of it in my judgment.
>
> 1934 Senate Hearing, at 98.

Those are two representative examples of the many similar examples in a hearing record that in its entirety documents that Senators Wheeler and Thomas and the other members of the Senate and House Committees on Indian Affairs included section 16 in the IRA to allow Indians living on reservations to escape the not infrequently despotic control of the BIA by granting reservation residents a modicum of local self-government.

The members of both Committees would be astounded to learn that in the memorandum it has filed in support of the instant motion the STF has represented to this court that, rather than that narrow purpose, the members of the Senate and House Committees on Indian Affairs intended section 16 of the IRA to delegate the secretary of the interior authority to create new "federally recognized tribes" in Congress's stead by approving constitutions that BIA employees wrote for groups whose members did not have that legal status. Not only did the members of the Senate and House Committees on Indian Affairs and the other members of the 73d Congress intend no such result, the BIA agrees they intended no such result.

6. The Bureau of Indian Affairs Agrees That the 73d Congress Did Not Intend the Indian Reorganization Act to Delegate the Secretary of the Interior Authority to Create New Federally Recognized Tribes.

As described above, in 1978 the BIA published a final rule in which the agency promulgated regulations that establish a procedure for a group such as the members of the STF to petition the secretary of the interior to designate the group as a "federally recognized tribe." *See* 43 *Fed. Reg.* 39,361 (1978). In that rule the BIA identified the statutes in which Congress delegated the BIA

authority to promulgate the regulations. The rule states: "Authority: 5 U.S.C. 301; and sections 463 and 465 of the revised statutes 25 U.S.C. 2 and 9; and 230 DM [Departmental Manual] 1 and 2." *See id*. 39,363. The rule does not list the IRA as one of the statutes in which the BIA believes Congress delegated the secretary of the interior authority to create new "federally recognized tribes."

Similarly, in 1994 the BIA published a final rule in which it amended the regulations it promulgated in 1978. *See* 59 *Fed. Reg.* 9280 (1994). That rule states: "Authority: 5 U.S.C. 301; 25 U.S.C. 2 and 9; 43 U.S.C. 1457; and 209 Departmental Manual 8." *See id*. 9293. The rule does not list the IRA as one of the statutes in which the BIA believes Congress delegated the secretary of the interior authority to create new "federally recognized tribes."

B. The Members of the Seminole Tribe of Florida Are Not an "Indian Tribe" for the Purposes of Title VII of the Civil Rights Act of 1964.

Section 703 of Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) prohibits an "employer" from engaging in certain employment practices. However, in section 701(b) of Title VII (42 U.S.C. 42 U.S.C. 2000e(b)) Congress excluded an "Indian tribe" from its definition of the term "employer."

In the instant motion, the Defendant asserts that, if *arguendo*, the STF does not have sovereign immunity because its members are not a "federally recognized tribe," the members of the STF still are an "Indian tribe" within the meaning of the definition of that term in section 701(b). But the Defendant is mistaken because the 88th Congress that enacted the Civil Rights Act of 1964 intended the term "Indian tribe" in section 701(b) to mean "federally recognized tribe." And for the reasons above-stated, the members of the STF are not a "federally recognized tribe."

In section 701(b), the 88th Congress did not define the term "Indian tribe." And elsewhere in the U.S. Code the term has no single generic meaning. Instead, different Congresses intend the term "Indian tribe" to have different meanings in different statutes. For example, compare the "Indian

tribe" definition in the Violence Against Women Act (42 U.S.C. 13925(a)(16)) with the "Indian tribe" definition in the Indian Gaming Regulatory Act (25 U.S.C. 2703(5)).

A particular Congress in a particular statute also may intend the undefined term "Indian tribe" to have one meaning, while another Congress in another statute may intend the same undefined term to have a different meaning. For example, in 1790 in section 4 of the Indian Nonintercourse Act, 1 Stat. 137, 138, the 1st Congress invalidated all land sales made by any "tribe of Indians" unless the sales had been approved by the government of the United States. In *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649 (D. Maine 1975), the secretary of the interior argued that the 1st Congress intended the undefined term "tribe of Indians" in section 4 to mean only those ethnological tribes whose members had been "federally recognized." *Id*. 654-655. The district court rejected that interpretation and concluded that the 1st Congress intended the term "tribe of Indians" to include within its purview ethnological tribes whose members had not been "federally recognized." But the court reasoned to its result by analyzing the legislative history of the statute and considering the policy objective the 1st Congress enacted section 4 of the Indian Nonintercourse Act in order to achieve.

In the case of the undefined term "Indian tribe" in the definition of the term "employer" in section 701(b), the legislative history of Title VII indicates that the 88th Congress intended "Indian tribe" to mean "federally recognized tribe." The text of the Civil Rights Act of 1964 that the 88th Congress enacted into law is the text of H.R. 7152 that was written in the Senate, *see* 110 *Cong. Rec.* 14,511 (1964), and with which the U.S. House of Representatives concurred. *See id*. 15,897.

During the debate on H.R. 7152 on the Senate floor, South Dakota Senator Karl Mundt offered an amendment that the members of the Senate accepted after no discussion or debate and on an unrecorded voice vote. The Mundt amendment added "Indian tribe" to the list of exceptions in the definition of the term "employer" in section 701(b) of Title VIII. *See id*. 13,702. Because the

explanation of his amendment by the maker of an amendment is "clearly probative", the U.S. Supreme Court has instructed that the maker's explanation is "entitled to weight" when a district court is required to discern the intent of the Congress that accepted the amendment. *Simpson v. United States*, 435 U.S. 6, 13 (1978). *Accord Galvan v. Press*, 347 U.S. 522, 526-527 (1954).

With respect to the Mundt amendment, before the members voted to accept his amendment Senator Mundt explained to the Senate that "This amendment would provide to American Indian tribes in their capacity as a political entity, the same privileges accorded to the U.S. Government and its political subdivisions, to conduct their own affairs and economic activities without consideration of the provisions of the bill." (emphasis added). 110 Cong. Rec. 13,702 (1964). As has been explained above, the only American Indian tribes that are "political entities" are ethnological tribes whose members have been lawfully designated as "federally recognized tribes." And as also has been explained above, the members of the STF are not a "federally recognized tribe." And because they are not, the STF is not an "Indian tribe" within Senator Mundt's intended meaning of that term.

CONCLUSION

Because the legal arguments the defendant has offered in support of the instant motion are not meritorious the motion should be denied. When it is, the STF will have a remedy: it can ask Congress to enact a statute that designates the members of the STF as a "federally recognized tribe." Congress then can do so or not as it wishes. And Congress's policy choice will be an interesting one.

On the one hand, the court's denial of the instant motion will unsettle the STF's long-held, but unanalyzed, assumption about its legal status. But on the other hand, pursuant to Federal Rule of Evidence 201(b)(1) and (c)(1), the Court may take judicial notice that in addition to its casino in Immokalee, the STF owns and operates casinos in Hollywood, Tampa, Coconut Creek, and Brighton, and that it also owns a bank and Hard Rock Café International, Inc., a multinational corporation headquartered in Orlando that owns casinos, hotels, and restaurants in sixty countries. In those and its

other businesses, the STF employs thousands of Florida residents who are not members of the STF. In the second decade of the twenty-first century should Congress deprive those employees of the protections Title VII of the Civil Rights Act of 1964, which provides protection to tens of millions of other employees throughout the United States who work for businesses that are not owned by a federally recognized tribe?

It also merits mention that in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, *supra*, after noting that it was the U.S. Supreme Court, rather than Congress, that invented the rule that federally recognized tribes have sovereign immunity and that the Court did so "almost by accident," three dissenting justices condemned the rule as "unjust," *id*. 760, and pondered why federally recognized tribes should "enjoy broader immunity than the States, the Federal Government, and foreign nations?" *Id*. at 765-766. While the six other justices decided that the doctrine of *stare decisis* required the Court to continue to adhere to the rule, they settled on that result begrudgingly and only after noting that "There are reasons to doubt the wisdom of perpetuating the doctrine," and that those reasons "might suggest a need to abrogate tribal immunity, at least as an overarching rule." *Id*. at 758. Despite their misgivings, in the end those justices decided that, rather than the Court abrogating tribal immunity as an overarching rule, the Court would "defer to the role Congress may wish to exercise in this important judgment." *Id*. That forbearance is of consequence here because, as Chief Justice Roberts recently noted in *Department of Homeland Security v. MacLean*, 574 U.S. ___, 2015 WL 248560 (2015), it is not the role of the U.S. Supreme Court, or of this court, to usurp Congress's authority to make its own policy choices. Because it is not, this court should deny the instant motion and advise the STF that if its members wish to be designated as a "federally recognized tribe," the STF should request Congress to enact a statute that confers that legal status.

Respectfully submitted,

Dated: March 16, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2015, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system. I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants: None.

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