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.
_____/

REPLY OF SEMINOLE TRIBE OF FLORIDA D/B/A SEMINOLE INDIAN CASINO – IMMOKALEE TO PLAINTIFF'S RESPONSE TO MOTION TO DISMISS CHALLENGING SEMINOLE TRIBE OF FLORIDA'S STATUS AS A FEDERALLY RECOGNIZED TRIBE

Defendant, Seminole Tribe of Florida d/b/a Seminole Indian Casino – Immokalee, the registered fictitious name recorded by the Seminole Tribe of Florida in the public records and 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, hereby files its reply to plaintiff's response to the Tribe's dispositive motion to dismiss for lack of subject matter jurisdiction with respect to the allegations contained in the amended complaint. These claims purportedly arise under Title VII of the Civil Rights Act of 1964, as amended, and the Florida Civil Rights Act of 1992, Chapter 760.10 et seq., Florida Statutes. The Tribe's pending dispositive jurisdictional motion is based upon the exclusion of Indian tribes from the statutory definition of the term "employer" in 42 USC § 2000-e (b) (1) of Title VII, the jurisdictional bar imposed by the doctrine of tribal sovereign immunity and the lack of a clear, express and

unmistakable waiver of its tribal sovereign immunity with respect to either law forming the basis of plaintiff's claims in the amended complaint.

This is the second case brought by plaintiff's counsel wherein counsel seeks to have the Tribe defend and respond to claims arising under federal and state employment discrimination laws that are clearly inapplicable to it. The first case, Mastro v. Seminole Tribe of Florida, etc. U.S. District Court Middle District of Florida Case No. 2:12-cv-ftm-38-UAM involved virtually identical issues to this case. Like this case, the same presiding Judge was Honorable Sherri Polster Chappel. In Mastro, this Court granted the Tribe's jurisdictional motion and dismissed the action on June 27, 2013 which plaintiff then appealed to the United States Court of Appeals for the Eleventh Circuit, which following the filing of briefs, affirmed the dismissal of the action by the trial Judge August 20, 2014. Faced with this situation and the likely dismissal of the case, plaintiff's counsel, through an apparent flash of insight, now takes the highly questionable, if not frivolous position that the Tribe was not really federally recognized, or that a flaw existed in the federal recognition process. This position is frivolous and is no less expensive to defend against than the two attempts by plaintiff's counsel to force the Tribe to respond to the claims based upon laws that plaintiff's knows are inapplicable to the Tribe.

Plaintiff has asserted that the "Supreme Court of Florida, this Court and the United States Court of Appeals for the Eleventh Circuit have accepted that" the Seminole Tribe of Florida is a federally recognized Indian tribe "without determining how and when the members of the [Seminole Tribe] acquired that apparent legal status" and, for that reason this issue "is a case of first impression for this court."

Federal Recognition

Historically, the present day members of the Seminole Tribe are the descendants of approximately two-hundred Florida Seminoles who were left after the Third Seminole War in 1858 who sought refuge in the Florida swamps rather than be forcibly removed by the U.S. Army along what has come to be known as the "Trail of Tears" over which the tribal members of the Five Civilized Tribes (Cherokee, Choctaw, Creek, Chickasaw and Seminole) were removed on foot from their ancestral and tribal lands in Florida to an area called the Indian territory, which when combined with the Oklahoma territory, now comprise the State of Oklahoma which was admitted into statehood in 1907. The ancestral cultural and tribal heritage of the Seminole Tribe substantially predates colonial America and the acquisition of the Florida territory by the United States which became a state in 1845. After the United States acquired the Florida territory 1821, the government's means of dealing with the Seminoles and other Indians in Florida passed through three major overlapping stages through late 1835:

1. Treaties and councils through 1835;
2. The voluntary removal of tribes from all states east of the Mississippi from early 1825; and
3. Involuntary removal of all Indians east of Mississippi by offensive military force from 1835.

The United States clearly regarded the Seminoles as being under federal jurisdiction when it sought to subject them and other tribes east of the Mississippi to removal under the *Indian Removal Act* which was signed into law by President Andrew Jackson on May 28, 1830. Although the forebearers of the present day members of the Seminole Tribe of Florida did not subscribe to the Treaty of Moultrie Creek in 1823, the United States endeavored to enter into the treaty with all Seminoles and all other Florida tribes. The Seminole delegation to the treaty negotiations was led by Mikasuki Chief Neamathia. The point is that the federal government recognized the Seminoles as a distinct political and sovereign entity. Those Seminoles who entered into the treaty would later be removed to Oklahoma and become the Seminole Nation. Those Seminoles who remained elected to defend their homeland and successfully did so through three Seminole Wars. The recognition of the Seminoles however, was in the negotiation phase of the Treaty which required that those subscribing Indians and tribes would have to give up their land claims. This, the Florida Seminoles refused to do. Instead, they stayed on and maintained their Florida homeland where they remain today on six separate restricted trust properties, most of which are in reservation status.

There is no denying that the Seminole Tribe from the early 1800's and beyond operated as a distinct political and sovereign entity. Between 1835 and 1838 Osceola (Billy Powell) engaged the United States Army in the defense of the Seminole homelands around Lake Okeechobee. The military force of the Seminoles was structured with a military like hierarchy comprised of Seminoles who's Miccosukee and Creek languages were non-alphabetic and non-written and whose adherence to the traditions and heritage of the Seminole culture were absolute. Certainly the United States was aware that it had declared wars against a tribal sovereign prepared to fight to the death to maintain its Florida homeland.

In the end, the United States Army would leave Florida with the Seminole's homelands intact. The two-hundred Seminoles left standing after the Third Seminole War are the progenitors of the present day members of the Seminole Tribe of Florida. Over time the cold and hostile relationship between the United States and the Seminoles would thaw and become a mutually respectful government-to-government relationship. Wickman, Patricia R., Osceola's Legacy, pgs. 27- 63.

As early as the 1890's, Dr. J.E. Bretch, through and on behalf of the Federal Indian Service, began to purchase land in southeast and south central Florida to be titled in the name of the United States of America in perpetual trust for the Seminole Indians. The reservations became known as the Big Cypress Reservation, the Brighton Reservation and the Dania Reservation (now known as the Hollywood Reservation). In 1913, a permanent U.S. Indian Service Agent for the Seminoles was appointed which was the beginning of an ongoing federal agency operation of providing services to the reservation populations. Kersey, Harry A., Southeastern Indians Since The Removal Era, pgs. 184 – 187.

In fact, it was the Seminole Indian Agency that commissioned a Census Roll for all Florida Seminole Indians as of January 1, 1957. The names that appear on that Census Roll would untimely form the nucleus of two federally recognized Indian tribes, the Seminole Tribe of Florida and the Miccosukee Tribe of Florida. The Seminole Tribe of Florida reorganized under the *Indian Reorganization Act* for the common welfare of its tribal members following a Secretarial election to approve its Constitution and By-laws. A number of individuals listed on the Census Roll elected not to seek a government-to-government relationship with the United States and are known as the Independent Seminoles.

On March 1 and 2, 1954, representatives from the Seminole Reservation and representatives from Friends of the Seminoles, the Association of America Indian Affairs, the Florida Federation of Women's Clubs and Sam Tommie resident of the Dania-Hollywood Reservation testified at joint hearings before the Senate and House sub-committees regarding an attempt by Congress to remove and terminate the Seminoles from the list of tribes controlled by the Bureau of Indian Affairs and to end federal responsibility for them. It was under this threat of termination that the Florida Seminoles began to explore options under the *Indian Reorganization Act of 1934*. A young Seminole woman, Laura Mae Osceola, who was fluent in Miccosukee, Creek and English began meeting with Tribal elders to discuss the threat of termination and the potential benefits of adopting a constitution and set of bylaws for the Tribe in order to reorganize under the *Act* and continue to exist as a sovereign tribal government indefinitely into the future. Up until that time, the Florida Seminoles had been recognized as an Indian tribe with a sovereign tribal government, but without a written constitution.

In 1957, the Seminole Tribe formally reorganized for the common welfare of its tribal members in accordance with the provisions of Section 16 of the *Indian Reorganization Act of 1934*, as amended, 25 USC § 476, and has since been federally recognized and designated as an organized Indian tribe. At the time of its formal organization, the Seminole Tribe adopted a Constitution and a set of Bylaws which were ratified by the tribal community and approved by the United States Secretary of Interior in full compliance with the Act. A copy of the Amended Constitution and Bylaws of the Seminole Tribe are attached to the original motion to dismiss.

Pursuant to 25 CFR PART 83, the first list of acknowledged tribes was published in 1979, 44 FR 7325 (Feb 6, 1979). The list used the term "entities" in the preamble and elsewhere to refer to and include all the various anthropological organizations such as bands, pueblos and villages, acknowledged by the Federal Government to constitute tribes with a government-to-government relationship with the United States. The Seminole Tribe was identified as a federally recognized Tribe on the first list published. Attached hereto as composite **Exhibit "A"** is a copy of 44 FR 7325 and 58 FR 202 (referencing when the first list was published.)

In November 2, 1994, Congress enacted the *Federally Recognized Indian Tribe List Act of 1994* (Pub L. 103-454, title 1 §101, Nov. 2, 1994, 108 Stat. 4791) requiring the Secretary to publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians. The Act further required the list to be published within 60 days of November 2, 1994 and annually on or before every January 30 thereafter. The Seminole Tribe has been listed on every Federal Register publication since 1994. A copy of the most current Federal Register list is attached hereto as **Exhibit "B."**

The *Federally Recognized Indian Tribe List Act of 1994* contained the following Congressional findings:

> The Congress finds that:
>
> (1) the Constitution, as interpreted by Federal case law, invests Congress with plenary authority over Indian affairs;
>
> (2) Ancillary to that authority, the United States has a trust responsibility to recognized Indian tribes, maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes;

> (3) Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, or by a decision of a United States Court;
>
> (4) a tribe which has been recognized in one of these manners may not be terminated except be an Act of Congress;
>
> (5) Congress has expressly repudiated the policy of terminating recognized Indian tribes, and has actively sought to restore recognition to tribes that previously have been terminated;
>
> (6) the Secretary of the Interior is charged with the responsibility of keeping a list of all federally recognized tribes;
>
> (7) the list published by the Secretary should be accurate, regularly updated, and regularly published, since it is used by the various departments and agencies of the United States to determine the eligibility of certain groups to receive services from the United States; and
>
> (8) the list of federally recognized tribes which the Secretary publishes should reflect all of the federally recognized Indian tribes in the United States which are eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

By reorganizing under the Act in 1957, the Florida Seminoles did not terminate the recognition as a Tribe that they had enjoyed for approximately 150 years, but became a new tribe as such. They availed themselves of the benefits of the *Indian Reorganization Act* to avoid the Congressional policy of termination and to allow them to continue to function as a tribal sovereign government capable of facing the future with a new name and certainty that the Seminole Tribe of Florida would survive into the future as a sovereign and constitutionally based tribal government.

FEDERALLY "RECOGNIZED" – UNDER "FEDERAL JURISDICTION"

The term recognized Indian tribe has been used in what has been termed the "cognitive" or quasi-anthropological sense. Pursuant to this sense, "federal officials simply 'knew' or

'realized' that an Indian tribe existed, as one would 'recognize.' Felix Cohen Handbook of Federal Indian Law, 268 (1942 ed.) ("The term tribe is commonly used in two senses, "an ethnological sense and a political sense."). It was not until the 1970's that the political and legal sense of the term "federal recognition" or "federal acknowledgement" evolved.

Prior to the Department of the Interior's adoption of the regulations establishing procedures pursuant to which tribal entities could demonstrate their status as an Indian tribe, there was no formal process or method for recognizing an Indian tribe. The determination was made on a case by case basis using standards that were developed in the years after the *Indian Reorganization Act's* enactment.

The term "under federal jurisdiction" was recently addressed in Carcieri v. Salazar, 555 U.S. 379, 391 (2009). In his concurring opinion, Justice Breyer stated:

> "under federal jurisdiction" implied a certain government-to-government relationship with a tribe that could be evidenced by 'a treaty with the United States (1934), a (pre-1934) congressional appropriation, or enrollment (as of 1934) with the [Bureau of Indian Affairs]"
>
> Id. at 399

Attached as **Exhibit "C"** is Memorandum No. M-37029 dated March 12, 2014 from the United States Department of the Interior, Office of the Solicitor which addresses, in detail, the agencies interpretation of the term "Under Federal Jurisdiction."

The leading treatise on Indian law has similarly observed that:

> Any tribe subject to federal plenary power over Indian affairs could be considered "under Federal jurisdiction" especially if the federal government has at any time taken some action, such as treaty negotiations, provision of federal benefits, inclusion in a BIA census, or forcible relocation that reflects and acknowledges federal power and responsibility toward the Tribe.

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 302 (2012)

Pursuant to 25 USC § 465 "the Secretary of the Interior is authorized, in his discretion, to acquire …any interest in lands … for the purpose of providing land for Indians." The plain text of the statute limits the Secretary to acquiring land only 'for Indians" and the *Indian Reorganization Act* defines "Indian" as "all persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction.

Once a federal relationship is established with an Indian tribe, Congress alone has the right to determine when its guardianship shall cease. Grand Traverse Tribe of Ottawa and Chippewa Indians v. Office of the U.S. Attorney for the Western District of Michigan, 369 F.3d 960, 968-69 (6th Cir. 2004) (citing Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370,380 (1st Cir. 1975. See also, United States v. Nice, 241 U.S. 591,598 (1916).

THIS COURT LACKS JURISDICTION TO DETERMINE THE FEDERAL RECOGNITION OF A TRIBE

The decision of the Secretary to recognize or to not recognize a tribe is not subject to review by the Courts. Congress has authorized and charged the Department of the Interior with the responsibility to administer Indian affairs and, under the President of the United States, to clarify and elaborate departmental authority by regulation. 25 U.S.C. §§ 2, 9; 43 U.S.C. § 1457. The authority to recognize Indian tribes therefore lies with Congress and the Executive and is essentially committed to the political branches of the government. United States v. Sandoval, 231 U.S. 28, 46 (1913) ("questions whether, to what extent, and for what time [Indian groups] shall be recognized and dealt with as dependent tribes [by the federal government] . . . are to be determined by Congress, and not by the courts"); see, United States v. Holliday, 70 U.S. 407, 419 (1865) (if executive and other political departments recognize Indians as a tribe, courts must do the same); Cherokee Nation of Okla. v. Babbitt, 117 F.3d 1489, 1496 (D.C. Cir. 1997)

(same) (citing Holliday); cf. Baker v Carr, 369 U.S. 186, 215-217 (1962).

Article I, Section 8, Clause 3 of the U.S. Constitution commits to Congress issues involving Indian affairs: "The Congress shall have Power… To regulate Commerce with the Indian Tribes." Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights." South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343, 118 S.Ct. 789, 139 L.Ed. 2d 773 (1998). Pursuant to its plenary power rooted in the Indian Commerce Clause, "Congress has the power both directly and by delegation to the President to establish the criteria for recognizing a tribe." Miami Nation v. United States Dep't of Interior, 255 F.3d 342 345 (7th Cir. 2001); accord Samish Indian Nation v. U.S., 419 F.3d 1355, 1374 (ed Cir. 2005) (federal acknowledgement has been committed to the coordinated branches).

Recognition "is intended to apply to groups that can establish a substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present." 25 CFR §83.3(a). The Department of the Interior and the federal Bureau of Indian Affairs applies its expertise to this determination and has established the Branch of Acknowledgement and Research ("BAR") which staffs historians and anthropologists to determine whether groups seeking recognition "actually constitute Indian tribes and presumably to determine which tribes have previously obtained federal recognition." Kahawaiolaa v. Norton, 386 F.3d at 1274.

Federal recognition of an Indian tribe - and the creation of a government-to-government relationship - may only be conferred by the political branches of government. Yet plaintiff is asking this court for a judicial determination concerning whether the Seminole Tribe of Florida is a federally recognized Indian tribe entitled to continue the government-to-government relationship that it and its predecessors have had with the United States.

The decision concerning whether an Indian group is a federally recognized Indian tribe within the meaning of federal law is, a quintessentially nonjusticiable political question. The

political question doctrine precludes judicial involvement in determining the tribal status of the Seminole Tribe for the purpose of federal recognition in the first instance. The doctrine "identifies a class of questions that either are not amenable to judicial resolution because the relevant considerations are beyond the courts' capacity to gather and weigh . . . or have been committed the Constitution to the exclusive, unreviewable discretion of the executive and/or legislative -- so-called 'political' branches of the federal government." Miami Nation of Indians v. United States Dep't of the Interior, 255 F.3d 342, 347 (7th Cir. 2001). When a political question is "inextricable from the case at bar," dismissal is warranted. Baker, 369 U.S. at 217.

Federal determination of tribal status has long been regarded a political question inappropriate for judicial decision. "'[T]he action of the federal government in recognizing or failing to recognize a tribe has traditionally been held to be a political one not subject to judicial review." Miami Nation, 255 F.3d at 347-48 (quoting William C. Canby, Jr., American Indian Law in a Nutshell 5 (3d ed. 1998)); see also Holliday, 70 U.S. at 419 ("[I]t is the rule of this court to follow the action of the executive and other political departments . . . whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same. Baker, 369 U.S. at 215–17 (identifying the status of Indian tribes as reflecting familiar attributes of political questions); W. Shoshone Bus. Council v. Babbitt, 1 F.3d 1052, 1057 (10th Cir. 1993) ("The judiciary has historically deferred to executive and legislative determinations of tribal recognition.")

CONCLUSION

Based upon the foregoing, the Tribe would respectfully submit that under the factual proffer contained in this motion and in this reply, the Tribal Sovereign Immunity Ordinance C-01-95, the authority of Kiowa Tribe of Oklahoma Technologies, Inc., 523, U.S. 751 (1998), the

holding of which was recently left intact by the holding in Michigan v. Bay Mills Indian Community, 134 U.S. 2024 (2014) and the plain language of 42 U.S.C.§ 2000e-(b)(1), which excludes and exempts the Indian tribe from being considered as 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 Seminole Tribe of Florida 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 and has not waived its tribal sovereign immunity with respect to plaintiff's claims under the *Florida Civil Rights Act of 1992*. 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 which jurisdictionally bars plaintiff's claims.

With respect to plaintiff's contention that the Seminole Tribe is not a federally recognized tribe such that it is not covered by the exception and exclusion contained in 42 USC § 2000 – e(1)(b), it is respectfully submitted that this contention be rejected. The Seminole Indians have been recognized as a tribal sovereign from the beginning.

The Seminoles participated in Treaty negotiations with the United States in the Treaty of Moultrie Creek in 1823 which the Florida Seminoles ultimately rejected, the were subjected to federal jurisdiction with the enactment of the Indian Removal Act in 1830 and the failed attempt of the U.S. Army to forcibly remove them to the Indian Territory. Additionally, prior to 1900, the United States authorized land acquisitions in Florida for lands placed in trust for the benefit of the

Florida Seminoles. The Secretary has included the Seminole Tribe on each and every annual list of recognized Indian Tribes.

Plaintiff and his counsel know better than to take such a position which at best is barred by the political question doctrine. The Seminoles were recognized when the Florida Territory was acquired by the U.S. in 1821, when Florida became the 27th State in 1845 and remain in the Florida homelands today. The Seminole Tribe of Florida, a federally and constitutionally based sovereign Indian tribe is here to stay. Respectfully, defendants' jurisdictionally motion should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 3, 2015, 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