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IN THE FOURTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO. 4D15-0235

MMMG, LLC and MOBILE MIKE PROMOTIONS, INC,

Appellants,

v.

SEMINOLE TRIBE OF FLORIDA, INC.,

Appellee.

ANSWER BRIEF
OF SEMINOLE TRIBE OF FLORIDA, INC.

ON APPEAL FROM A FINAL JUDGMENT OF DISMISSAL ENTERED IN THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

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RECORD REFERENCE ABBREVIATIONS USED IN THIS BRIEF

References to plaintiffs/appellants will appear, collectively, as "Mobile Mike." References to MMMG, LLC, will appear as "MMMG", while references to Mobile Mike Promotions, Inc. will appear as "MMP." References to MMP's principal, Mike Wax, will appear as "Wax."

References to defendant, Seminole Tribe of Florida, Inc., will appear as "STOFI."

References to the Seminole Tribe of Florida will appear as the "Tribe."

References to the individual defendants and witnesses shall be by use of their last names, except that Steven Osceola will be referred to as "Steve Osceola" and Chris Osceola will be referred to as "Chris Osceola." The individual defendants collectively will be referred to as the "STOFI Officials."

References to appellants' initial brief will appear as "IB."

References to the record on appeal will appear as "R."

References to the transcript from the evidentiary hearing will appear as "T."[1]

References to defense exhibits from the evidentiary hearing will appear as "D.E."

[1] Because the record on appeal contains a condensed hearing transcript, with multiple pages appearing on a single page of the record, for clarity of reference, STOFI will refer to the page numeration of the actual transcript.

INTRODUCTION

This appeal arises from a final order of the trial court granting STOFI's motion to dismiss the amended complaint on sovereign immunity grounds (the "Immunity Order"). *See* R. 1029-1055.

STATEMENT OF THE CASE AND FACTS

A. Statement of the case.

On January 7, 2014, Mobile Mike commenced this action by filing suit against STOFI and the STOFI Officials.[2] After amendment of the original complaint a week later, Mobile Mike asserted the following purported causes of action: Count I (breach of fiduciary and common law duties; against STOFI and the STOFI Officials), Count II (tortious inference; against Howard), Count III (fraud in the inducement; against Sanchez), Count IV (civil RICO; against STOFI and STOFI Officials), Count V (Goods Sold and Delivered; against STOFI), Count VI (Breach of Operating Agreement; against STOFI), Count VII (Breach of E-Cig Agreement; against STOFI), Count VIII (Injunction; against STOFI and Sanchez), Count IX (Accounting; against STOFI), and Count X (Tortious Interference; against Tommie). R. 96-105.

The amended complaint generally asserted that STOFI and MMP had entered into an operating agreement with respect to MMMG (the "Operating

[2] Mobile Mike also sued Sallie Tommie ("Tommie") and Andrew Bowers ("Bowers"). Tommie is not a party to this appeal, nor was she a party to the jurisdictional hearing below. Bowers was voluntarily dismissed from the action at the commencement of the evidentiary hearing. R. 590-591.

Agreement"). R. 90 at ¶ 26. MMMG, in turn, would "provide promotional, advertising and marketing services" to STOFI. R. 109. In the broadest sense, Mobile Mike contended that despite the existence of the Operating Agreement, the STOFI Officials, acting individually and in concert, had taken steps to take business away from newly created MMMG and direct it to a business owned by fellow Tribe member, Tommie.[3] R. 97 at ¶¶ 63-67, R. 99 at ¶¶ 74-80. Wax, who owns MMP, is not a tribe member.

STOFI and the STOFI Officials filed a motion to dismiss, asserting respectively that as a federally recognized tribal entity, under section 17 of the Act, and as tribal officials of that entity acting within the scope of their authority, they were entitled to sovereign immunity from suit. R. 176-268. Mobile Mike sought and obtained leave to conduct extensive discovery related to the defendants' ability to invoke sovereign immunity. R. 341. Multiple depositions were taken and extensive documentation was produced. Before the evidentiary hearing, no party raised an objection that it had been precluded from conducting meaningful discovery or sought a continuance of the hearing to allow for further discovery.

The trial court conducted an evidentiary hearing on the motion to dismiss from October 20 to October 24, 2014. T. 699-1028. At the conclusion of the hearing, the trial court requested that the parties submit proposed findings of fact and conclusions of law. T. 978-80. After considering the parties' submissions, the

[3] The Tribe is federally recognized pursuant to section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 476 (hereafter, the "Act").

trial court entered the Immunity Order, granting in part and denying in part defendants' motion to dismiss based on sovereign immunity. R. 1029-1055. Specifically, the trial court concluded that STOFI enjoyed sovereign immunity from suit and had not waived such immunity, and therefore, dismissed all counts against STOFI with prejudice.[4] R. 1053-1054 at ¶ 52. The trial court also dismissed with prejudice the claims asserted against the STOFI Officials in Counts I and VIII of the Amended Complaint.[5] R. 1053-1054 at ¶¶ 53-54. The trial court denied the motion to dismiss with respect to Counts II, III, and IV against the STOFI Officials. R. 1053-1054 at ¶ 55. The trial court found that there were factual issues concerning whether the STOFI Officials were acting within the scope of their duties with respect to the allegations in the Amended Complaint.[6] *See id.*

Mobile Mike appealed the dismissal with prejudice of the counts asserted against STOFI. R. 1056-1083.

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[4] In actuality, the trial court dismissed Count IV against STOFI without prejudice and gave leave to Mobile Mike to amend the complaint within 20 days. R. 1054 at ¶ 55. Mobile Mike opted not to amend the complaint, choosing instead to file the instant appeal of the trial court's order.

[5] Mobile Mike has not appealed this ruling as to the STOFI Officials.

[6] The STOFI Officials appealed this ruling, but the Court dismissed the appeal, ostensibly on jurisdictional grounds.

B. Statement of the Facts.[7]

(1) STOFI and its President's authority.

The trial court found that STOFI is a federal corporation chartered and approved by the U.S. Department of the Interior (the "Department"), pursuant to section 17 of the Act. R. 1030 at ¶ 1(b) (citing defense exhibit ("D.E.") 15). STOFI came into existence on July 11, 1957, upon the request of the Tribe, when the Department approved STOFI's corporate charter and by-laws. D.E. 15.[8] Ownership of STOFI is vested in the registered members of the Tribe, so every Tribe member is a shareholder of STOFI. STOFI's operations are controlled by its Board of Directors. D.E. 15 at Art. IV, Sec. 1; Art. V, Sec. 1.

STOFI's by-laws govern how its Board of Directors may operate:

> The act of a majority of the directors present at a meeting at which a quorum is present shall constitute the act of the Board. Acts of the Board may be by motion duly carried, except that any delegation of authority to any official, agent or agents of the corporation to act for or on behalf of the Board shall be by written resolution and shall specify the nature of the authority granted and the limitations, if any, imposed….

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[7] STOFI includes its own statement of the facts in order to delineate the salient facts for this appeal and to correct mischaracterizations in Mobile Mike's factual recitation.

[8] The record does not support Mobile Mike assertion that "STOFI exists to create business opportunities for itself with non-Seminoles." IB at 3. Instead, the record evidence establishes that STOFI may engage in any business that furthers the economic well-being of STOFI's shareholders, who are the members of the Seminole Tribe. T. 330-332.

D.E. 15, Art. II, Sec. 5. The by-laws similarly provide that STOFI's Board may authorize an officer to "enter into any contract or execute and deliver any instrument on behalf of the corporation," but only in a manner "not inconsistent with the Corporate Powers" and "all such authority shall be specifically defined in the Board's resolution." D.E. 15, Art. II, Sec. 7; T. 619.

These same by-laws describe, among the powers of STOFI's president, that he "shall operate and conduct the business affairs of the corporation in accordance with the orders and Resolutions of the Board of Directors." Significantly, in matters which have not been specifically ordered by the Board, the president shall call the Board's attention to these matters so that they shall have the opportunity to decide the issues, or set the policy or establish the procedure the corporation is to follow. D.E. 15, Art. IV, Sec. 3(h). In other words, STOFI's president is never to act in a vacuum of authority. If specific authority has not been addressed by the Board of Directors, the president is obliged to bring the matter to the Board's attention for determination. T. 628-629.

At all times material to this appeal, Sanchez was President of STOFI and Vice-Chairman of the Tribe's governing body, the Tribal Council. R. 1030 at ¶ 1(c); T. 618. His authority as president of STOFI is defined by STOFI's charter and bylaws. D.E. 15; T. 619. He became STOFI's president in June 2011. T. 618.

During the evidentiary hearing, Sanchez gave factually uncontroverted testimony, consistent with the language of the charter and by-laws, that he does not have the authority to waive sovereign immunity absent explicit authorization from STOFI's Board. T. 620. No document was presented to the Court that would

permit even an inference that Sanchez enjoyed such broad authority as to waive sovereign immunity of his own volition. Mobile Mike offered no example of another instance where STOFI's sovereign immunity was authorized absent explicit approval by the Board.

STOFI's charter, as amended in 1996, addresses the question of waiver of sovereign immunity. D.E. 15. It provides that the Board of Directors has the authority:

> to waive its sovereign immunity from suit, but only if expressly stated by the contract and that such waiver shall not be deemed a consent by the said corporation or the United States to the levy of any judgment, lien or attachment upon the property of [STOFI,] other than income or chattels especially pledged or assigned pursuant to such contract.

D.E. 15, Art. VI, Sec. 9. Prior to its amendment in 1996, the STOFI charter contained broader language that allowed STOFI to "sue or be sued."[9] That language was removed in favor of the current waiver provision. R. 266-68.

At the hearing, more than one witness (including Sanchez, STOFI's former general counsel, Allan Lerner ("Lerner"), and the Tribal Secretary, LaVonne Kippenberger ("Kippenberger")) testified without rebuttal that STOFI's procedures require that any waiver of sovereign immunity be explicitly set forth in a written resolution of the Board of Directors, wherein the subject is addressed not only in the body of resolution, but also the heading. D.E. 16; T. 115-17, 323-24, 650, 655.

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[9] For a discussion of the history of the STOFI charter, *see Inglish, LLC v. Seminole Tribe of Fla., Inc.*, 2011 WL 208289, *2 (M.D. Fla. 2011).

(2) The Tribe.[10]

The Tribe was formally organized for the common welfare of its tribal members in accordance with the provisions of section 16 of the Act and has since been federally recognized and designated as an organized Indian tribe. The Tribe, with the consent and approval of the Department of the Interior, adopted its Amended Constitution and By-Laws on August 21, 1957. D.E. 13.

The Tribe is governed by the Tribal Council, consisting of five members of the Tribe. D.E. 13., Art. III, Sec. 1. Although the Tribe and STOFI are independent entities, their governing bodies share two common members. The Chairman of the Tribal Council also sits as Vice-President of the STOFI Board of Directors, and the President of the STOFI Board (Sanchez) sits as Vice-Chairman of the Tribal Council. D.E. 13, Art. III, Sec. 2; D.E. 15, Art. I, Sec. 1.

The record reflects the continuing significance of sovereign immunity to the Tribe. In 1995, the Tribe enacted Ordinance C-01-95 (the "Ordinance") to address specifically the issue of sovereign immunity and how such immunity could

[10] The facts relating to the Tribe are included for two limited purposes: (1) to establish the relationship between the Tribe and STOFI; and (2) as background to the Tribe's operations, in light of the amended complaint's focus on MMMG being awarded a contract with respect to the Tribe's gaming operations. The evidence at the hearing unequivocally established that the Tribal Council, rather than STOFI, controls all aspects of Seminole gaming. T. 254-55, 340, 639, 640.

lawfully be waived on behalf of the Tribe and "its subordinate economic and governmental units, its tribal officials, employees and authorized agents."[11] T. 316.

The Ordinance, which was approved by the Department, provides:

> One of the longstanding powers that the [Tribe] has always had and retained is its rights as a sovereign government to tribal sovereign immunity for itself, its subordinate economic and governmental units, its tribal officials, employees and authorized agents….
>
> [T]he economic security and general welfare of the [Tribe] and its members are largely dependent upon the careful protection of scarce tribal assets and resources….
>
> [T]he [Tribe], as an aspect of its sovereignty, is entitled to immunity from suit in all state and federal courts absent the clear, express and unequivocal consent of the [Tribe] or the clear, express and unequivocal consent of the United States Congress….

D.E. 14.

The Ordinance also provides as follows:

> [T]he [Tribe], its subordinate economic and governmental units, its tribal officials, employees and authorized agents are immune from suit brought by any third-party in any state or federal court absent the clear, express and unequivocal consent of the [Tribe] or the clear, express and unequivocal consent of the United States Congress. This immunity shall apply whether the Tribe or any subordinate economic or governmental unit is engaged in a private enterprise or governmental function.

Id.

[11] Section 16 of the Act, 25 U.S.C. § 476(h)(1), states, in relevant part, that "each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section…."

Finally, on the subject of how the Tribe's sovereign immunity may be waived, the Ordinance provides:

> [T]he [Tribe] desires to make clear to all persons having business or otherwise dealing with the [Tribe], its subordinate economic and governmental units, its tribal officials, employees and authorized agents that the [Tribe] does not under any circumstances intend to voluntarily waive its entitlement to immunity from suit in state and federal courts under the doctrine of tribal sovereign immunity absent strict compliance with the procedures set forth below which shall be the exclusive method for effecting a voluntary tribal waiver of sovereign immunity....
>
> [T]he consent of the [Tribe] 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 [Tribe] pursuant to a resolution duly enacted by the Tribal Council of the [Tribe] sitting in legal session. Any such resolution purporting to waive sovereign immunity … shall specifically acknowledge that the [Tribe] 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….

Id.

To be clear, it was not below and is not here the contention of STOFI that the Ordinance, *per se*, governs the mechanism for waiver of STOFI's sovereign immunity. However, the Ordinance is included here, as it was in the hearing, to demonstrate the singular importance of sovereign immunity to the Tribe (which incorporated STOFI and whose members are the shareholders of STOFI) and to parallel the unrebutted testimony of witnesses that STOFI has adopted the same Board requirements for waiver of its immunity.

(3) The joint venture between Mobile Mike and STOFI.

In either November or early December 2011, Wax (on behalf of Mobile Mike) and Sanchez signed a letter of intent (the "LOI").[12] D.E. 8; T. 347. On its face, the LOI is non-binding and reflects an intention, on the part of Sanchez and Wax, to formalize a later written agreement with respect to a business venture between Mobile Mike and STOFI. *Id.* Even as contemplated by Wax and signed by Wax, the LOI does not state that STOFI would waive sovereign immunity as part of the enterprise, though it contains a provision that the subsequent agreement to be drafted would be governed by the laws of the State of Florida and that venue would be in Broward County. *Id.*

Soon after the LOI was signed, the question of its ratification was brought before STOFI's Board of Directors. Lerner, as STOFI's counsel, prepared a board resolution to ratify the LOI that Sanchez had previously signed (the "LOI Resolution"). T. 266-67; D.E. 11. Lerner testified that he prepared the LOI Resolution and "summarized the significant issues in the transaction" so that "the board understood exactly what it was they were approving or disapproving."[13] T. 269. He also presented the LOI Resolution to the board. T. 274. In the summary of significant issues, Lerner did not include a reference to the waiver of sovereign

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[12] The parties appear to dispute the actual date the LOI was signed. T. 103. The actual date of the signing is not relevant for the purposes of this appeal.

[13] Lerner's testimony regarding the preparation of the LOI Resolution and its purpose was unrebutted during the hearing.

immunity "because there was never a proposal or an intention to waive sovereign immunity in this transaction."[14] *Id.*; *see also* T. 272.

Lerner further testified (and was not contradicted) that the LOI Resolution would not have been effective to authorize a waiver of sovereign immunity because it did not comply with STOFI's requirements for such a waiver. T. 269-70. Moreover, because of the way the Operating Agreement was later written – specifically, to the extent it purported to reach the Tribe's gaming operations – it would have required a waiver from the Tribal Council as well. T. 271.

The LOI Resolution, which was unanimously approved by the STOFI board, authorized Sanchez "to take all actions and steps and to execute the Definitive Agreement *containing the essential terms set forth in this Resolution*, and any and all other instruments, documents, and certificates necessary to effectuate the above…." D.E. 11 (emphasis added). Lerner testified that the "essential terms" of the LOI were those enumerated in the fifth "whereas" clause of the LOI Resolution. T. 273-74. This provision was added so that Sanchez would know what the parameters of the deal were. T. 273. Lerner contemplated that he would draft the subsequent agreement. T. 274. As it turns out, however, the draft of the Operating Agreement relied upon by Mobile Mike was drafted by Mobile Mike's counsel. T. 348, 355-356, 405-406, 410-412

[14] The LOI Resolution, along with its attachment, was admitted in evidence without objection. T. 268

The evidence was undisputed that following ratification of the LOI, the Operating Agreement for MMMG was signed on January 5, 2012, at STOFI's offices. During the evidentiary hearing, STOFI presented evidence to establish that the version of the Operating Agreement that is attached to the Amended Complaint and contains a purported waiver of STOFI's sovereign immunity, R. 109-120, is a fraudulent document. *See* D.E. 1, T. 164-165, 167-172, 249-253, 257-258, 741-757, 770-774. Instead, STOFI asserted at the hearing that a different version of the Operating Agreement – one lacking the sovereign immunity waiver provision in Article VIII, Section 1 – was actually executed by the parties. D.E. 1. Notably, there is no resolution or other STOFI document or record that contains or references a waiver of sovereign immunity with respect to the venture. T. 325.

However, the trial court correctly found that the determination as to which version of the Operating Agreement is valid is a factual issue, which the trial court declined to address on a motion to dismiss. R. 1045. Instead, the trial court assumed that Mobile Mike's version of the Operating Agreement (the one containing the waiver provision) was the operative version and analyzed the waiver itself.[15] *Id*.

[15] Accordingly, contrary to Mobile Mike's assertions in its brief, the factual issue of which version of the Operating Agreement was actually executed by the parties is not yet before this Court, nor does it form a part of this appeal.

(4) The trial court proceeding.

Following the evidentiary hearing, the trial court entered an order granting STOFI's Motion to Dismiss on sovereign immunity grounds. In concluding that STOFI had not waived its sovereign immunity, the trial court found:

> STOFI's charter and by-laws make it abundantly clear that STOFI may act only pursuant to the direction of the Board of Directors as reflected in a duly enacted resolution. The LOI Resolution, which authorized the creation of an agreement between STOFI and Mobile Mike, permitted Sanchez to execute an agreement consistent with the "essential terms" of the LOI. Nothing in the LOI indicates the Board's consent to waive sovereign immunity. [footnote omitted]. Consequently, any agreement executed by Sanchez that was not consistent with the LOI's essential terms would be unenforceable insofar as waiver of sovereign immunity was concerned.
>
> That same charter and by-laws also make clear that Sanchez does not have the authority to act on behalf of STOFI except as explicitly directed by STOFI's Board of Directors. Any doubts as to the exercise of authority are to be resolved by Sanchez returning to the Board of Directors and allowing the Board to decide whether or not to grant additional authority. That did not occur in this instance. In the absence of explicit authority in the LOI Resolution to execute an agreement that waived sovereign immunity, Sanchez did not return to the board to obtain clarification or further authority.

R. 1046.

Moreover, in rejecting Mobile Mike's contention that STOFI waived its sovereign immunity based on a theory of apparent authority, the trial court found:

> Clearly STOFI has a specific procedure in place for a waiver of sovereign immunity that was not followed and which every TRIBE and STOFI member or attorney testified they knew: a Board Resolution was needed that expressly defined the authority to waive sovereign immunity … The STOFI Charter required a Board of Directors specific Resolution authorizing waiver of sovereign

> immunity. The LOI which was approved by resolution did not authorize waiver of sovereign immunity.

R. 1047-1048. The trial court correctly recognized that under prevailing law, the "[a]uthority to waive sovereign immunity does not arise merely from the happenstance that Sanchez is the president of STOFI." R. 1050.

Importantly, in reaching its holding that STOFI is entitled to sovereign immunity, the trial court concluded that the waiver in the version of the Operating Agreement attached to the Amended Complaint "would be insufficient to waive sovereign immunity in that it violates the express requirements of STOFI's charter for a valid waiver." R. 1051. The trial court held:

> As this Court has already found, STOFI's charter allows for a waiver of sovereign immunity, but only if two conditions are met: (i) the contract must expressly state that sovereign immunity is being waived, and (ii) the waiver must be limited such that it is not deemed a consent by STOFI to the levy of any judgment, lien or attachment upon STOFI's property, other than income or chattels especially pledged or assigned pursuant to such contract. D.E. 15, Art. II, Sec. 5. Assuming for the sake of argument that the first condition is met by a statement that the "parties waive any rights pursuant to any available sovereign or governmental immunity," the second condition is clearly not met, for the phrase purports to grant a waiver broader than is permitted by STOFI's charter. [footnote omitted]. STOFI may be sued only to the extent its Charter so permits.

R. 1051.

Thereafter, Mobile Mike appealed the Immunity Order as a partial final judgment which disposed of the case as to STOFI. R. 1056-1084.

SUMMARY OF ARGUMENT

Mobile Mike's appeal is dependent entirely upon the Court's acceptance of his false premises about what the trial court ruled. In an attempt to circumvent abundant and unfavorable case law on the subject of sovereign immunity, Mobile Mike has mischaracterized the trial court's ruling on sovereign immunity. To be clear, the trial court dismissed the amended complaint against STOFI on sovereign immunity grounds because it concluded that STOFI *had not waived* its sovereign immunity. It reached this conclusion because the waiver provision in the contract that *Mobile Mike* contended was genuine did not comply with the requirements in STOFI's charter and by-laws for a valid waiver of sovereign immunity. *At no time* did the trial court rely upon the Tribe's ordinances or constitution in upholding STOFI's claim of immunity. For this reason, Mobile Mike's lead argument (IB at 16-20) is an exercise in misdirection.

STOFI's charter and by-laws require (1) that STOFI act pursuant to Board resolution; and (2) that any delegation of authority to Sanchez to execute a contract must specifically and expressly set forth his authority. At no time did the Board expressly authorize a waiver of STOFI's sovereign immunity. The one resolution it did approve – the LOI Resolution – which required the Operating Agreement to conform to its "essential terms," did *not* include in those essential terms a waiver of sovereign immunity. In light of abundant Florida and federal case law holding that a waiver of sovereign immunity cannot be by implication or inference, the absence of express action by the Board on the issue of sovereign immunity in this transaction is dispositive. Additionally, the waiver provision in the Operating

Agreement – even if not fraudulent – did not comply with the STOFI charter's requirements for a valid waiver.

Mobile Mike's central contention that issues of disputed fact as to "whether STOFI signed the Operating Agreement containing the waiver of sovereign immunity provision and whether Sanchez had apparent authority to waive sovereign immunity" (IB at 15) precluded the trial court from concluding that STOFI was entitled to sovereign immunity similarly mischaracterizes the trial court's ruling. What the trial court correctly concluded, as a *matter of law*, was (1) the waiver provision in the Operating Agreement was not a valid waiver of STOFI's immunity, and (2) any claim of Sanchez's apparent authority was insufficient to waive STOFI's immunity. These were *legal* determinations, not factual ones. *At no time* did the trial court, for purposes of its ruling, question that Sanchez *had* signed Mobile Mike's version of the Operating Agreement. Instead, the trial court proceeded from the assumption that Mobile Mike's version was the operative agreement, yet nonetheless concluded that STOFI's immunity had not been properly waived.

Mobile Mike was afforded the opportunity to engage in substantial jurisdictional discovery and then presented evidence over several days in an attempt to rebut STOFI's entitlement to sovereign immunity. At no time did Mobile Mike complain that it was precluded from obtaining or presenting evidence that would have related to the validity of the waiver provision in its version of the Operating Agreement. For these reasons, Mobile Mike's request that this Court reverse based on a purported factual dispute should be rejected.

ARGUMENT

I. THE STANDARD OF REVIEW AND BURDEN OF PROOF.

A. Standard of review.

STOFI concurs that review of the trial court's dismissal is *de novo* and that the trial court properly considered the evidence presented during the jurisdictional evidentiary hearing in determining whether STOFI was entitled to sovereign immunity as a matter of law. *See* IB at 15-16; *see also Seminole Police Dep't v. Casadella*, 478 So. 2d 470 (Fla. 4th DCA 1985) (deciding sovereign immunity on motion to dismiss); *Seminole Tribe of Fla. v. McCor*, 903 So. 2d 353, 357 (Fla. 2d DCA 2005) ("The question of whether a court lacks subject matter jurisdiction over a claim because that claim is barred by tribal sovereign immunity is a threshold question that is properly presented by way of a motion to dismiss …. A motion to dismiss for lack of subject matter jurisdiction is analogous to a motion to dismiss for lack of personal jurisdiction. In considering a motion to dismiss challenging subject matter jurisdiction, a trial court may properly go beyond the four corners of the complaint and consider affidavits.") (internal quotation marks omitted; quoting *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla. 1989) and *Barnes v. Ostrander*, 450 So. 2d 1253, 1254 (Fla. 2d DCA 1984)).[16]

[16] In this instance, the trial court did considerably more than simply rely on affidavits. Instead, the trial court permitted extensive jurisdictional discovery and held a multi-day evidentiary hearing to allow both sides to set forth all evidence required to determine whether sovereign immunity applied, and if so, whether it had been lawfully waived.

B. Burden of proof.

Because it was and remains undisputed that STOFI is a Section 17 entity, organized pursuant to the Act, and enjoys sovereign immunity (*see infra* at 21-23), the burden of proof that sovereign immunity has been waived rests with Mobile Mike. *Cupo v. Seminole Tribe*, 860 So. 2d 1078, 1079 (Fla. 1st DCA 2003) (affirming dismissal for lack of subject matter jurisdiction where plaintiff "failed to show a clear, express and unmistakable waiver of sovereign immunity"); *McCor*, 903 So. 2d at 358, 360 ("Once the Tribe submitted affidavits showing that it was a sovereignly-immune entity and had not waived its immunity, the burden was on McCor to rebut the Tribe's affidavits … McCor failed to meet this burden."). Federal courts have similarly assigned the burden of proof to the non-movant. *See, e.g.*, *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 685 (8th Cir. 2011) ("The plaintiffs bear the burden of proving that either Congress or Amerind [a section 17 corporation] has expressly and unequivocally waived tribal sovereign immunity."); *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 84 (2d Cir. 2001) ("On a motion invoking sovereign immunity to dismiss for lack of subject matter jurisdiction, the plaintiff bears the burden of proving by a preponderance of evidence that jurisdiction exists.").

II. AS A SECTION 17 ENTITY, STOFI IS ENTITLED TO SOVEREIGN IMMUNITY FROM SUIT ABSENT A CLEAR AND LEGALLY VALID WAIVER OF SUCH IMMUNITY.

A. Sovereign immunity generally.

Florida and federal courts have long recognized that the Tribe enjoys sovereign immunity from suit in state and federal courts. "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754, 118 S.Ct. 1700 (1998). The United States Supreme Court has clearly stated that "[a]bsent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe." *Puyallup Tribe, Inc. v. Dep't of Game of State of Wash.*, 433 U.S. 165, 172, 97 S.Ct. 2616 (1977). As the Supreme Court held in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670 (1978):

> Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But without congressional authorization, the Indian Nations are exempt from suit.

Id. at 58, 98 S.Ct at 1677 (internal quotation marks omitted).

It is well settled that laws are to be construed liberally in favor of Indian tribes invoking sovereign immunity. *See, e.g., White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980) (holding ambiguities should be construed generously to comport with "traditional notions of sovereign immunity and with the federal policy of encouraging tribal independence"); *Sanderlin v. Seminole*

Tribe of Fla., 243 F.3d 1282, 1285 (11th Cir. 2001); *State of Fla. v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1242 (11th Cir. 1999).

Florida courts have reached the same conclusion as the U.S. Supreme Court, including with respect to Section 17 entities like STOFI.[17] In *Houghtaling v. Seminole Tribe of Fla.*, 611 So. 2d 1235 (1993), the Florida Supreme Court stated:

> [W]e hold that the Seminole Tribe is immune from suit and that Florida courts lack subject matter jurisdiction unless (1) the Seminole Tribe has consented to suit in its section 16 charter, or (2) the organization owning the Bingo Hall is *a section 17 corporate entity whose corporate charter allows it to be sued*.

Id. at 1239 (emphasis added; citing *Maryland Casualty Co. v. Citizens Nat'l Bank*, 361 F.2d 517 (5th Cir. 1966)). The Florida Supreme Court's holding makes no sense if STOFI, as a section 17 entity, is not presumptively entitled to invoke sovereign immunity.

Other Florida courts have similarly concluded that they lack subject matter jurisdiction over disputes involving tribal entities. *See McCor*, 903 So. 2d at 358 (citing *Puyallup Tribe, Inc.*, 433 U.S. at 172); *Cupo*, 860 So. 2d at 1079 (affirming dismissal of workers' compensation claim based on lack of subject matter jurisdiction over tribe where claimant "failed to show a clear, express and

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[17] Indian sovereign immunity is a matter of federal law. *McCor*, 903 So. 2d at 358. Florida courts, including the Florida Supreme Court and this Court, routinely cite to federal precedents in deciding questions of Indian sovereign immunity. *Id.*; *see also Houghtaling*, 611 So. 2d at 1239; *Casadella*, 478 So. 2d at 471.

unmistakable waiver of sovereign immunity by the Tribe, or any Act of Congress abrogating the Tribe's sovereign immunity").[18]

B. STOFI's sovereign immunity specifically.

STOFI's sovereign immunity from suit is derivative of and flows from the Tribe's sovereign immunity. As such, in *Maryland Cas. Co. v. Citizens Nat'l Bank of West Hollywood*, 361 F.2d 517 (5th Cir. 1966), the predecessor court to the Eleventh Circuit considered the sovereign immunity of STOFI when it was subjected to garnishment proceedings. *Id.* at 518. The Fifth Circuit concluded that STOFI was immune from the proceedings by virtue of its Charter, which limited the circumstances under which immunity could be waived,[19] and held that the

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[18] While Mobile Mike argues against the trial court's purported application of the Tribe's constitution and ordinance in its ruling (IB at 16-20) – something that did not occur – it all but ignores that the amended complaint was predominantly concerned about obtaining *gaming* business that was controlled entirely by the Tribe, rather than STOFI. To the extent Mobile Mike might have expected to come into court to enforce provisions of the Operating Agreement relating to the Tribe's gaming operations, such relief would have been entirely unavailable absent a waiver of sovereign immunity from the Tribe, itself. Mobile Mike has not asserted that the Tribal Council approved a waiver of the Tribe's sovereign immunity in accordance with the requirements of the Ordinance. *See McCor*, 903 So. 2d at 358-59 ("Tribal Ordinance C-01-95 – which was adopted under the governing structure established by the constitution – sets forth the exclusive means of accomplishing a waiver of the Tribe's immunity: a resolution of the Tribal Council 'specifically acknowledg[ing] that the [Tribe] is waiving its sovereign immunity on a limited basis and describ[ing] the purpose and extent to which such waiver applies.' … [T]he record shows that the Tribe has established … a specific procedure which must be followed to accomplish a waiver of the Tribe's sovereign immunity.).

[19] The version of STOFI's charter at that time still contained in Art. VI, Sec. 9 the "sue or be sued" language, which the court construed as a limited waiver of (continued . . .)

Charter had to be "liberally construed in favor of [STOFI] and all doubtful expressions therein resolved in favor of the Seminole Tribe." *Id.* at 521. *Maryland Cas. Co.* has been cited approvingly by both the Florida Supreme Court in *Houghtaling* and this Court in *Askew v. Seminole Tribe of Fla., Inc.*, 474 So. 2d 877 (Fla. 4th DCA 1985).

The Middle District of Florida also had occasion to consider whether STOFI was entitled to sovereign immunity. In *Inglish Interests, LLC v. Seminole Tribe of Florida, Inc.*, 2011 WL 208289 (M.D. Fla. Jan. 21, 2011), the contracting plaintiff sued STOFI for breach of contract, imposition of a lien and unjust enrichment. 2011 WL 208289, *1. Noting that STOFI's charter formed the Tribe "as a body politic and corporate of the United States of America under the corporate name 'The Seminole Tribe of Florida, Inc.'" and conferred "certain corporate rights, powers, privileges, and **immunities**" upon the Tribe (emphasis in original), the court concluded that STOFI was entitled to sovereign immunity as a "subordinate economic entity" of the Tribe. *Id.* at *6 (citing *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1183 (10th Cir. 2010) ("[I]mmunity for subordinate economic entities directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general."). The Middle District specifically noted that STOFI had amended its

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(. . . continued)
immunity. *Id.* at 521. Since 1996, the "sue or be sued" language has been deleted in favor of a provision requiring that any contractual waiver be expressly stated and be limited to preclude enforcement of judgments against non-pledged assets.

charter in 1996 to eliminate the "sue or be sued" language of the original charter. *Id.* at *2.

Only last September, the Southern District of Florida in *Lujen Brands, LLC v. Seminole Tribe of Fla., Inc., et al.*, Case No. 14-60679-CIV-Leonard/Goodman (Sept. 18, 2014), agreed with the Middle District and made the following ruling as to STOFI's sovereign immunity: "STOFI argues that, because it has sovereign immunity unless it waives such immunity in its Charter or by contract, the only proper jurisdictional discovery against it concerning sovereign immunity goes to waiver, not to whether it is a subordinate economic entity of the Seminole Tribe of Florida. (See D.E. 38 at 8). The Court agrees. In accordance with binding precedent, *STOFI is entitled to sovereign immunity unless and until it waives such immunity*. *Maryland Cas. Co. v. Citizens Nat. Bank of W. Hollywood*, 361 F.2d 517, 520-22 (5th Cir. 1966); *see also Inglish Interests, LLC v. Seminole Tribe of Florida, Inc.*, 2011 WL 208289, at *5-6 (M.D. Fla. Jan. 21, 2011). (emphasis added)." R. 1042-43, ¶ 35.

This Court has also concluded that STOFI is entitled to sovereign immunity. In *Askew*, 474 So. 2d 877, the State of Florida attempted to collect taxes from STOFI, but the Fourth District concluded that Florida's courts had no jurisdiction over STOFI. *Id.* at 877. Examining the long history of Indian sovereign immunity, the Fourth District concluded:

> Indian nations, as an attribute of their quasi-sovereignty, are immune from suit, either in the federal or state courts, without Congressional authorization . . .

> The fact that the Seminole Tribe was engaged in an enterprise private or commercial in character, rather than governmental, is not material. It is in such enterprises and transactions that the Indian tribes and the Indians need protection. The history of intercourse between the Indian tribes and Indians with whites demonstrates such need.

Id. at 880 (quoting *Maryland Cas. Co.*, 361 F.2d at 520-21). Remarkably, Mobile Mike does not even disclose the existence of *Askew* to this Court.[20]

Mobile Mike relies upon a series of inapposite and not controlling decisions to argue that it is "well established" that "tribal entities" have no "inherent immunity of their own." IB at 17-19. More troubling still, Mobile Mike invariably misstates the holding in the cited cases or omits critical information from the decisions. For example, Mobile Mike cites *Trudgeon v. Fantasy Springs Casino,* 71 Cal.App.4th 632, 639 (1999), but somehow neglects to inform the Court that *Trudgeon* did not involve a Section 17 entity like STOFI, but rather a business

[20] *See State v. Cregan*, 908 So. 2d 387, 389 n. 1 (Fla. 2005) ("We remind counsel of their obligation to disclose controlling legal authority, even if it is 'directly adverse to the position of the client and not disclosed by opposing counsel.' R. Regulating Fla. Bar 4.3-3(a)(3). We remind counsel as well of their duty to 'act with reasonable diligence' in locating controlling authority. R. Regulating Fla. Bar 4-1.3. If attorneys arguing before this Court believe that seemingly controlling authority is distinguishable, then they should explain the distinction, not ignore the authority."). At the trial court, Mobile Mike attempted, unpersuasively, to distinguish *Askew* by claiming that its holding was limited to activities occurring solely on tribal lands. However, the Court's analysis in *Askew* does not turn on the location of the activities in question or the nature of the activities, but rather on the *status* of STOFI as a tribal entity. In failing to cite *Askew*, perhaps Mobile Mike has acknowledged the weakness of its prior attempt at distinguishing the case.

enterprise (a casino).[21] *Id.* Mobile Mike also cites this Court's decision in *Mancher v. Seminole Tribe of Fla., Inc.*, 708 So. 2d 327 (Fla. 4th DCA 1998) to assert that this Court did not find STOFI entitled to "automatic sovereign immunity," IB at 17, but neglects to point out that STOFI did not assert its own immunity in that case but rather that the real party in interest – the *Tribe*, which was not before the Court – was entitled to sovereign immunity. *Id.* at 328.

In those cited decisions *actually* involving Section 17 entities, Mobile Mike neglects to point out that in each instance, the Section 17 entity had a "sued or be sued" provision in its charter, a provision STOFI deleted from its charter almost two decades ago.[22] *See Veeder v. Omaha Tribe of Neb.*, 864 F.Supp. 889, 900 (N.D. Iowa 1994) ("Courts of this district have held that a Section 17 corporation waives sovereign immunity. … In the Blackbird Bend litigation, the court also *held that a "sue or be sued" clause in the corporate charter of the Omaha Tribe "operates as a general waiver of sovereign immunity in lawsuits* between the Tribe and non-tribal entities or persons.") (emphasis added); *Investment Finance Management Co., Inc. v. Schmit Industries, Inc.*, 1991 WL 635929, *6 (N.D. Iowa

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[21] Even so, the California court concluded the casino and its employees were entitled to sovereign immunity. *Id.* at 644. The same may be said of Mobile Mike's reliance on *GNS, Inc. v. Winnebago Tribe of Nebraska*, 866 F.Supp. 1185 (N.D. Iowa 1994). The case did not involve a Section 17 entity, but rather the Section 16 tribe acting through a business enterprise. *Id.* at 1189.

[22] For a discussion of the history of the STOFI charter, *see Inglish*, 2011 WL 208289 at *2.

1991) (noting Section 17 charter contained "sued or be sued" language);[23] *Wippert v. Blackfeet Tribe*, 859 P.2d 420, 427 (Mont. 1993) ("[T]he Tribe's corporate charter, approved pursuant to section 17 of the Indian Reorganization Act, assigns to the Tribal Council corporate powers that include the authority to borrow money from the Indian Credit Fund and loan it to tribal members, *as well as the power to sue and be sued in courts of competent jurisdiction*.")[24] (emphasis added).

There is ample Florida and federal precedent supporting the conclusion that a Section 17 entity, like STOFI, is presumptively entitled to sovereign immunity from suit. It is only upon Mobile Mike's carrying of his burden to show that such immunity was clearly and lawfully waived that its lawsuit may proceed. For the reasons elaborated below, Mobile Mike failed to meet its burden.

III. STOFI DID NOT WAIVE SOVEREIGN IMMUNITY BECAUSE (1) THE WAIVER PROVISION IN THE OPERATING AGREEMENT WAS NOT VALID AS A MATTER OF LAW, AND (2) SANCHEZ LACKED APPARENT AUTHORITY TO WAIVE SOVEREIGN IMMUNITY ABSENT EXPLICIT AUTHORIZATION TO DO SO FROM STOFI'S BOARD.

The "waiver" provision in Mobile Mike's version of the Operating Agreement was insufficient, as a matter of law, to waive STOFI's immunity.

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[23] Ironically, the district court in that case cited approvingly to the Fifth Circuit's decision in *Maryland Cas. Co.*, the very case that found that STOFI *was* entitled to sovereign immunity. *Id.* at *5.

[24] Additionally, the language quoted by Mobile Mile is dicta taken out of context, because the issue before the Montana Supreme Court was not the immunity of the section 17 entity, but rather that of the section 16 tribe. *Id.* at 427-28.

Moreover, Sanchez's status as president of STOFI was insufficient, by itself, to lend apparent authority for the waiver. Sanchez was never instructed, as required by STOFI's charter and by-laws, to waive STOFI's sovereign immunity.

A. The waiver provision in the Operating Agreement is legally insufficient.

The inclusion in the Operating Agreement of the phrase, "The parties waive any rights pursuant to any available sovereign or governmental immunity," is insufficient to effectuate a waiver because (i) its insertion in the Operating Agreement was never authorized by STOFI's Board of Directors, and (ii) it fails to comply with the STOFI Charter's requirements.

(1) The waiver provision in the Operating Agreement does not comply with the requirements of STOFI's charter for a valid waiver of sovereign immunity.

On more than one occasion, Mobile Mike asserts that the "only requirement for a valid waiver in this instance is that the waiver must be clearly and unequivocally expressed." IB at 32 (emphasis in original); *see also* IB at 30. In each instance, Mobile Mike ignores that the requirement for a valid waiver in STOFI's charter actually consists of *two* components. The Board of Directors (not Sanchez) has the authority "to waive sovereign immunity from suit," but only

> if expressly stated by the contract ***and*** that such waiver shall not be deemed a consent by the said corporation or the United States to the levy of any judgment, lien or attachment upon the property of [STOFI,] other than income or chattels especially pledged or assigned pursuant to such contract.

D.E. 15, Art. V, Sec. 9 (emphasis added). Mobile Mike never once addresses the second component for a valid waiver. The contractual waiver must be limited in nature, not a general waiver, such that it is not deemed a consent by STOFI to the levy of any judgment, lien or attachment upon STOFI's property, other than income or chattels especially pledged or assigned pursuant to such contract. T. 270-272, 322-323.

Assuming *arguendo* that the first condition of Art. V, Sec. 9 were met by a statement that the "*parties* waive any rights pursuant to any available sovereign or governmental immunity," the second condition is clearly not met, since the Operating Agreement purports to grant a waiver broader than is permitted by STOFI's charter.[25] As the Florida Supreme Court has noted, STOFI may be sued only to the extent its Charter so permits. *Houghtaling*, 611 So. 2d at 1239. Therefore, as a matter of law, divorced of any purported factual dispute, the contractual provision is insufficient.

Even though the trial court articulated this argument as an independent basis for concluding that the waiver provision in the Operating Agreement was ineffectual – R. 1051, ¶ 48 – Mobile Mike has not addressed the argument. Having failed to do so in its initial brief, Mobile Mike has effectively conceded the issue

[25] It is not immediately apparent that the contractual provision satisfies the first condition either. One can readily imagine a clearer and more express statement of waiver than one that lumps the "parties" together to waive purported immunities that at least two of the parties to the Operating Agreement (Mobile Mike and MMMG) do not and cannot enjoy.

and waived any challenge to the trial court's ruling. *Emiddio v. Fla. Office of Fin. Reg.*, 147 So. 3d 587, 591-92 (Fla. 4th DCA 2014) ("It is a well-established maxim of appellate practice that '[c]laims for which an appellant has not presented any argument ... are insufficiently presented for review and are waived. … [A]n issue not raised in an initial brief is deemed abandoned and may not be raised for the first time in a reply brief.") (quoting *Hammond v. State*, 34 So. 3d 58, 59 (Fla. 4th DCA 2010) and *J.A.B. Enters. v. Gibbons*, 596 So. 2d 1247, 1250 (Fla. 4th DCA 1992)).

(2) The absence of Board approval for waiver of sovereign immunity defeats the contractual provision.

STOFI's charter and by-laws make it abundantly clear that STOFI may act only pursuant to the direction of the Board of Directors as reflected in a duly enacted resolution. The LOI Resolution, which authorized entry into an agreement between STOFI and Mobile Mike, permitted Sanchez to execute a future agreement consistent with the "essential terms" of the LOI. Nothing in the LOI indicates the Board's consent to waive sovereign immunity.[26] Thus, any agreement executed by Sanchez that was not consistent with the LOI's essential

[26] As more fully explained below, the Board authorizing a future agreement that provided for a choice of Florida law or venue is insufficient to communicate an express and unequivocal intent to waive immunity.

terms would be unenforceable insofar as waiver of sovereign immunity was concerned.[27]

That same charter and by-laws also make clear that Sanchez does not have the authority to act on behalf of STOFI except as explicitly directed by STOFI's Board of Directors. Any doubts as to the exercise of authority are to be resolved by Sanchez returning to the Board of Directors and allowing the Board to decide whether or not to grant additional authority. That did not occur in this instance. In the absence of explicit authority in the LOI Resolution to execute an agreement that waived sovereign immunity, Sanchez did not return to the board to obtain clarification or further authority.[28]

A proper and enforceable waiver of sovereign immunity is dependent on compliance with the sovereign entity's rules for waiving immunity. *See, e.g.*, *Seminole Tribe of Fla. v. Ariz*, 67 So. 3d 229, 231-32 (Fla. 2d DCA 2010) (holding

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[27] Mobile Mike cites *Mastro v. Seminole Tribe of Fla.*, 2013 WL 3350567 (M.D. Fla. 2013) for the proposition that "magic words" are not required for a waiver of immunity (IB at 21), but neglects to point out that the Court was not considering STOFI's immunity, which is governed by its charter and by-laws, but rather the immunity of a Tribe casino. The question of whether the waiver was properly authorized in the first instance is not addressed in *Mastro*.

[28] While Mobile Mike insists that the Charter does not require a Board Resolution to waive STOFI's sovereign immunity (IB at 24), it ignores the other provisions of the Charter, which *affirmatively require* that delegated contractual authority must be explicit in nature and ambiguities must be resolved by returning to the Board for clarification. Mobile Mike also ignores the unrebutted evidence presented at the hearing regarding the Board's procedures for waiving sovereign immunity, none of which were observed in connection with the Operating Agreement. D.E. 16; T. 115-17, 323-24, 650, 655.

waiver of immunity "may only be established through a resolution duly enacted by the Tribal Council of the Seminole Tribe of Florida sitting in legal session. Any resolution purporting to waive sovereign immunity must include the purpose for the waiver and the extent to which the waiver applies."); *McCor*, 903 So. 2d at 359 ("[T]he record shows that the Tribe has established, pursuant to its constitution, *a specific procedure which must be followed to accomplish a waiver of the Tribe's sovereign immunity*. Under that procedure, the purchase of liability insurance by the Tribe would result in a waiver of the Tribe's immunity *only if the Tribal Council adopted a resolution specifically acknowledging the waiver* in conjunction with the purchase of the liability insurance.") (emphasis added). While these cases involve waivers of the Tribe's immunity, rather than STOFI's, they stand for the proposition that enforceable waiver must comply with whatever organizational procedures are in place for their implementation.[29]

Mobile Mike erroneously suggests that the choice of law and venue provision in the Board's approval of the LOI constitutes an explicit waiver of

[29] Mobile Mike mistakenly relies on *Bates Associates, L.L.C. v. 132 Associates, LLC*, 799 N.W. 2d 177 (Mich. App. 2010) to suggest that compliance with the charter or by-laws is not required (IB at 25-26). In *Bates Associates*, a settlement agreement among the Sault Ste. Marie Tribe of Chippewa Indians, tribal corporation 132 Associates, and Bates Associates *expressly* incorporated the tribe's waiver of sovereign immunity contained in an Agreement for Sale entered into by the parties. *Id*. at 179-80, 184. Unlike here, the tribe *conceded* in *Bates Associates* that the sovereign immunity waiver in the Agreement for Sale was valid and that a tribal resolution authorized the sovereign immunity waiver in the Agreement for Sale. *Id*. at 184. Here, there is no resolution authorizing a waiver of sovereign immunity, despite the requirements in the STOFI charter and by-laws.

sovereign immunity. IB at 6.[30] This assertion is legally incorrect. At a minimum, it flies in the face of the STOFI charter's explicit requirement that the waiver be "expressly" stated. *See Houghtaling*, 611 So. 2d at 1239 (recognizing that Section 17 entity may be sued as permitted by its charter).

Additionally, the inclusion of a "choice of law or venue" sentence providing for interpretation of the agreement in accordance with the laws of the State of Florida is insufficient to waive sovereign immunity for a number of reasons. As previously noted, Florida law – which of necessity includes case law[31] – recognizes the sovereign immunity of the Tribe and its economic entities, including STOFI. *See, e.g., Houghtaling*, 611 So. 2d at 1239; *Miccosukee Tribe of Indians v.*

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[30] Mobile Mike also points out that Sanchez indicated that when he signed the Operating Agreement, "he intended to have disputes resolved in Broward County, Florida, in the courts of the State of Florida, and under the laws of Florida." IB at 6. First of all, whatever Sanchez individually may have thought is irrelevant; what matters is what the Board wanted and directed him to do. Second, Mobile Mike's citation of the record is incomplete. Sanchez also testified, "I think we wanted to establish a form [sic] where if there was an issue that needed to be resolved, that we would have a forum, but, again, no way of waiving our sovereignty, and, again, I also recognize that Florida recognizes that a Section 17 corporation had sovereignty." T. 696.

[31] Judicial decisions clearly form part of the law of the State of Florida. *See, e.g., Crocker v. Pleasant*, 778 So. 2d 978, 986-87 (Fla. 2001) ("Similar to the statutes and case law in the cases that have found a constitutionally protected right…, *Florida law also contains a number of indicia, both in its statutes and case law*, that recognize the rights of the next of kin….") (emphasis added); *Enfinger v. Enfinger*, 566 So. 2d 261, 264 (Fla. 1st DCA 1990) ("We note that *Florida law requires both trial and appellate courts to take judicial notice of certain decisional*, constitutional, and public statutory *law of the state of Florida*.") (emphasis added).

Napoleoni, 890 So. 2d 1152, 1153 (Fla. 1st DCA 2004) ("*Under Florida law*, it is well settled that … the Tribe and its agents are immune from suit in federal or state court….") (emphasis added); *Askew*, 474 So. 2d at 881. As such, requiring interpretation of the Operating Agreement in accordance with the laws of Florida encompasses consideration of sovereign immunity principles.[32]

Moreover, even if the Court were to assume that "Florida law" does not include Florida case law, Mobile Mike's argument regarding the choice of law provision in the Operating Agreement requires the Court to draw an "inference" that immunity has been waived, contrary to unambiguous Florida and U.S. Supreme Court case law holding that a waiver must be *explicit* and unequivocal and cannot be implied. As this Court observed in *Askew*, "It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." 474 So. 2d at 879-80 (citing *United States v. Testan*, 424 U.S. 392, 399, 96 S.Ct. 948 (1976)). *See also McCor*, 903 So. 2d at 358 ("[A]brogation of tribal sovereign immunity *must be unequivocal and does not arise by implication*.") (emphasis added); *Napoleoni*, 890 So. 2d at 1153 ("As such, *the Tribe and its agents are immune from suit in federal or state court* without … a *clear, explicit, and*

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[32] This conclusion is bolstered by the very fact that, as previously noted, Mobile Mike felt it necessary to insert an additional sentence in Article VIII, Section 1 of his version of the Operating Agreement to attempt to effectuate a waiver of STOFI's sovereign immunity. If the parties had *actually* agreed that a reference to compliance with the laws of the State of Florida was sufficient to waive immunity (which it is not as a matter of law), there would have been no need to include the second sentence in that section of the agreement.

unmistakable waiver of tribal sovereign immunity….") (emphasis added); *Santa Clara Pueblo*, 436 U.S. at 58 ("It is settled that *a waiver of sovereign immunity cannot be implied* but must be unequivocally expressed."); *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Florida*, 692 F.3d 1200, 1206 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 843, 184 L. Ed. 2d 654 (2013) ("Our precedents make it abundantly clear that a waiver of tribal sovereign immunity cannot be implied on the basis of a tribe's actions; rather, it must be unequivocally expressed.").

Both the Eleventh Circuit Court of Appeals and the Middle District of Florida have concluded that a contractual provision requiring compliance with Florida statutes does not constitute a waiver of sovereign immunity. In *Furry v. Miccosukee Tribe of Indians of Fla.*, 685 F.3d 1224 (11th Cir. 2013), the Eleventh Circuit refused to equate a contractual obligation to comply with a Florida dram shop statute with an unequivocal waiver of tribal immunity. The court reasoned that at most, the contract requires the tribe to acquiesce to the authority of state regulators by allowing law enforcement to inspect and search its premises for violations of Florida liquor laws, but that the obligation in no way constitutes an express waiver.[33] *Id.* at 1234, 1235. Similarly, in *Mastro v. Seminole Tribe of Fla.*, 2013 WL 3350567 (M.D. Fla. 2013), the court concluded that a provision requiring

[33] As it does with many of its citations to precedent, Mobile Mike relies on *Furry* for the proposition that sovereign immunity can be contractually waived, but neglects to set forth the court's entire ruling. IB at 21.

the Tribe to "comply with all federal and state labor laws" does not constitute an express and unequivocal waiver of immunity. *Id.* at *6. *See also American Indian Agric. Credit Consort., Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1380-81 (8th Cir. 1985) (rejecting waiver of immunity based on "choice of law" provision); *Danka Funding Co., LLC v. Sky City Casino*, 747 A.2d 837, 841 (N.J. Super. Ct. Law Div. 1999) (rejecting waiver based on forum selection clause in contract and noting, "The requirement that the waiver be 'clear' and 'unequivocally expressed' is not something that may be flexibly applied or even disregarded based on the parties or the specific facts involved") (quoting *Ute Distrib. Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998)).

To avoid these precedents that actually address the issue of waiver of sovereign immunity, Mobile Mike relies on *Hobbs Const. & Development, Inc. v. Colonial Concrete Co.*, 461 So. 2d 255 (Fla. 1st DCA 1984) – a case having nothing to do with Indian sovereign immunity (or immunity of any kind) – to argue that Sanchez had actual authority to waive sovereign immunity as an agent of STOFI. IB at 26. Such reliance is unwarranted, where the undisputed evidence before the trial court was that (1) any delegated authority to Sanchez had to be explicit (T. 620, 628-629; D.E. 15, Art. IV, Sec. 3(h)); (2) the Board-approved LOI makes no mention of sovereign immunity or its waiver (D.E. 8); (3) Sanchez sought no clarification or further authorization from the Board (T. 624-625); and (4) waiver of sovereign immunity was such a critical issue to STOFI that it would have been specifically identified as an "essential term" of the LOI (T. 655-656). Consequently, even if general Florida law relating to agency applied here, the

evidence established that the scope of Sanchez's alleged agency did not extend to waiving sovereign immunity. Sanchez lacked "apparent authority" to waive STOFI's sovereign immunity.

Mobile Mike erroneously contends that a factual dispute as to Sanchez's apparent authority to waive STOFI's sovereign immunity precluded the trial court from dismissing the amended complaint. IB at 15, 26-35. This argument misapprehends prevailing appellate precedent that has examined the question of apparent authority in the tribal sovereign immunity context, including at least one case that has squarely addressed the Seminole Tribe.

In *Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282 (11th Cir. 2001), the Eleventh Circuit had occasion to address this very issue concerning the Tribe and rejected the application of apparent authority:

> Chief Billie *did not have actual or apparent authority to waive voluntarily the Tribe's sovereign immunity* …. Chief Billie did not somehow become vested with the power to waive that immunity simply because he had the actual or apparent authority to sign applications on behalf of the Tribe for federal funding. Such a finding would be *directly contrary to the explicit provisions of the Tribal Constitution and Tribal Ordinance C–01–95 which expressly set forth how, when, through whom, and under what circumstances the Seminole Tribe may voluntarily waive its immunity*. … Extending authority to waive sovereign immunity to a single individual, at least in this context, would be directly contrary to the Supreme Court's clear statement that "a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.

243 F.3d at 1288 (emphasis added). Similarly here, STOFI has enacted its charter and by-laws, which explicitly state that STOFI may be bound solely pursuant to

action authorized by its Board of Directors, and its president may act only consistent with the authority *expressly* granted to him by the Board.

The Sixth Circuit's analysis in *Memphis Biofuels, LLC v. Chickasaw Nat'l Indus.*, 585 F.3d 917 (6th Cir. 2009) on the subject of implied waivers and apparent authority is also illuminating.[34] In that case, ***which specifically dealt with a section 17 tribal entity***, the court held:

> Here, the parties agree that *the board of directors did not pass a resolution waiving sovereign immunity*. The *parties did, however, sign a waiver provision whereby both parties waived all immunities*. MBF believed that CNI obtained the required approval for this waiver provision – *but regardless of what MBF may have thought, board approval was not obtained*, and CNI's charter controls. In short, without board approval, CNI's sovereign immunity remains intact.
>
> 3. Equitable Doctrines
>
> MBF also argues that even without board approval, CNI waived sovereign immunity based on equitable doctrines because CNI signed the agreement representing that it waived sovereign immunity. We disagree. *Courts have held that unauthorized acts of tribal officials are insufficient to waive tribal sovereign immunity.* [citations omitted].
>
> *This result may seem unfair, but that is the reality of sovereign immunity*: "[I]mmunity can harm those who ... are dealing with a tribe....." [citation omitted].

585 F.3d at 922 (emphasis added; quoting *Kiowa*, 523 U.S. at 758, 118 S.Ct. 1700). The general fairness of invoking sovereign immunity is a concern beyond the scope of this Court's inquiry. *See also Stillaguamish Tribe of Indians v.*

[34] Mobile Mike entirely ignores this on-point decision in its brief, even though the trial court expressly relied on it. R. 1049-50, ¶ 46.

Pilchuck Group II, LLC, 2011 WL 4001088 (W.D. Wash. Sept. 7, 2011) (holding, in case involving contract signed with express waiver of sovereign immunity absent formal tribal approval of same, "Whether this is a case in which the Tribe unfairly used sovereign immunity to back out of an agreement is not a question properly before the court. The question before the court is whether the Tribe waived its sovereign immunity for disputes arising out of the RV park project. The court holds it did not, *as a matter of law*.").

Multiple U.S. Courts of Appeals have recognized that the authority to waive immunity does not arise merely from the happenstance that a high-ranking tribal official signed the agreement.[35] *See Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 688 (8th Cir. 2011) ("The plaintiffs have provided no evidence that Amerind's Board of Directors ever adopted a resolution waiving Amerind's immunity as to the plaintiffs' pending suit, and absent such a resolution, we cannot say that Amerind unequivocally waived its sovereign immunity when it generally assumed ARMC's obligations and liabilities."); *Native Amer. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1295 (10th Cir. 2008) (holding tribal *entity* was not equitably estopped from asserting immunity because "misrepresentations of the Tribe's officials or employees cannot affect its immunity from suit"); *Memphis Biofuels*, 585 F.3d at 922 (in case involving a section 17 entity, holding "[h]ere, the parties agree that the Board of Directors did not pass a resolution

[35] Mobile Mike ignores all of these cases as well in its brief, even though the trial court relied on them. Order at ¶ 47.

waiving sovereign immunity. The parties did, however, sign a waiver provision whereby both parties waived all immunities. MBF believed that CNI obtained the required approval for this waiver provision – but regardless of what MBF may have thought, board approval was not obtained, and CNI's charter controls. In short, without board approval, CNI's sovereign immunity remains intact."). The same conclusions have been reached by U.S. District Courts. *See, e.g.*, *ERTC, LLC v. Los Coyotes Band of Cahuilla and Cupeno Indians*, 2011 WL 5118772 (S.D. Cal. Oct. 28, 2011) (refusing to find waiver where lease signed by tribal chairperson contained express waiver of sovereign immunity because record did not establish chairperson had been authorized to waive immunity); *World Touch Gaming, Inc. v. Massena Mgm't, LLC*, 117 F. Supp.2d 271 (N.D.N.Y. 2000) (rejecting contractual waiver provision where authorization of tribal council not obtained, despite apparent authority of signing individual).

Mobile Mike attempts to distinguish *Sanderlin* but fails. IB at 33-34. It conflates the question of apparent authority with the question of whether the waiver provision in the Operating Agreement was legally sufficient, when it points out that *Sanderlin* did not involve a contract containing an express waiver. IB at 34. Whether the waiver provision in the Operating Agreement is a valid waiver under STOFI's charter and by-laws is distinct from whether Sanchez had apparent authority to bind STOFI by waiving sovereign immunity, when the Board-approved LOI made no mention of sovereign immunity at all (much less a waiver of it). Mobile Mike's other attempt to distinguish *Sanderlin* by pointing out that it did not involve a choice of law provision, IB at 34, falls prey to the same analytical

defect. Whether a choice of law provision is sufficient to constitute a waiver of sovereign immunity – it is not, *see supra* at pp. 31-35 – has nothing to do with the question of whether apparent authority may overcome sovereign immunity in the absence of clear authorization from STOFI's Board.

Mobile Mike devotes considerable effort to attempting to distinguish *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla.*, 692 F.3d 1200 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 843, 184 L. Ed. 2d 654 (2013), but the effort misses the mark. In *Contour Spa*, the Eleventh Circuit concluded that the Tribe was not estopped from asserting the invalidity of a lease agreement entered into by the parties, including the invalidity of the sovereign immunity waiver set forth therein. *Id.* at 1210. The lease provided that it was conditioned on approval by the Secretary of the Interior. *Id*. at 1202. Accordingly, the Eleventh Circuit held that regardless of the Tribe's purported misrepresentations about the status of the lease, none of the lease's provisions were enforceable, including the sovereign immunity waiver. *Id*. at 1210. Similarly, here, a waiver of STOFI's sovereign immunity may be accomplished only by approval of the Board of Directors through a resolution.[36] The fact that a sovereign immunity waiver is included in a contract

[36] This was established by unrebutted testimony during the hearing, and Mobile Mike, despite extensive discovery, offered no evidence of STOFI ever waiving sovereign immunity except through a duly enacted Board resolution. Mobile Mike insists in its brief – albeit incompletely – that STOFI's charter merely requires that the waiver be clearly set forth in the Operating Agreement, regardless of how it made its way into the document. This is self-evidently incorrect. If the Board-approved LOI had specifically prohibited the inclusion of a waiver provision in the Operating Agreement, and the drafters had ignored that (continued . . .)

merely begs the question whether its inclusion was authorized, just as the mere inclusion of a waiver in the *Contour Spa* lease begged the question whether conditions precedent for effectiveness of the lease had been met so as to waive the Tribe's sovereign immunity.

The fact that *Contour Spa* concerns the Tribe rather than STOFI has no legal significance; the sovereign immunity waiver analysis is the same whether dealing with a Section 16 entity or a Section 17 entity (and Mobile Mike has not cited any case law to suggest otherwise). Further, Mobile Mike's contention that unlike in *Contour Spa,* Florida law applies to the instant case and recognizes that a president of a corporation is vested with apparent authority misapprehends the law. First, Florida law incorporates and recognizes tribal sovereign immunity, including Section 17 entity immunity.[37] *See, e.g., Houghtaling, supra* and *Askew, supra.* Second, in *Contour Spa*, the Tribe's Chairman submitted the lease for approval to the Secretary of the Interior, and the Tribe represented to Contour that "all paperwork needed for the Lease had been submitted and approved," but the

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(. . . continued)
requirement and included one, there would be little doubt the waiver would be ineffectual. For purposes of sovereign immunity analysis, there is no difference between an explicit refusal to include a waiver provision and a failure to explicitly require one, since case law clearly establishes that waivers of immunity cannot be implied or inferred.

[37] It is dubious that Florida courts or even the Florida Legislature could disregard U.S. Supreme Court precedent and vitiate tribal sovereign immunity. *See Kiowa Tribe* 523 U.S. at 754 ("As a matter of federal law, an Indian tribe is subject to suit *only where Congress has authorized the suit* or the tribe has waived its immunity.") (emphasis added).

Eleventh Circuit held that without the actual approval, the lease, including the sovereign immunity waiver, was unenforceable. *Id*. at 1202, 1210.

Mobile Mike also relies on a series of Florida cases that address apparent authority completely outside the context of tribal sovereign immunity. IB at 27-28. Such reliance is unwarranted, however, because underlying the governing principles of tribal sovereign immunity as set forth by Florida and federal courts, is the consistently applied rule that any waiver of sovereign immunity must be clear and unequivocal and *cannot arise by implication or inference*. *See Santa Clara Pueblo*, 436 U.S. at 58 ("It is settled that *a waiver of sovereign immunity cannot be implied* but must be unequivocally expressed."); *McCor*, 903 So. 2d at 358 ("[A]brogation of tribal sovereign immunity *must be unequivocal and does not arise by implication*.") (emphasis added); *Napoleoni*, 890 So. 2d at 1153 ("As such, *the Tribe and its agents are immune from suit in federal or state court* without … a *clear, explicit, and unmistakable waiver* of tribal sovereign immunity….") (emphasis added); *Cupo*, 860 So. 2d at 1079 (requiring "a clear, express and unmistakable waiver of sovereign immunity"); *Contour Spa*, 692 F.3d at 1206 ("Our precedents make it abundantly clear that a waiver of tribal sovereign immunity *cannot be implied* on the basis of a tribe's actions; rather, it must be unequivocally expressed.") (emphasis added); *Amerind Risk Mgmt. Corp.*, 633 F.3d at 685 (requiring proof that Section 17 "has *expressly* and *unequivocally* waived" sovereign immunity) (emphasis added).

If the concept of apparent authority were sufficient to permit a waiver absent explicit compliance with the tribal entity's requirements for a valid waiver, then

none of the foregoing cases would have any meaning. Mobile Mike cites two cases – one from Colorado and one from Nebraska – that disagree with the idea that apparent authority cannot override the requirement of an express waiver that does not arise from implication or inference. IB at 29-30, citing *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402 (Colo. Ct. App. 2004) and *StoreVisions, Inc. v. Omaha Tribe of Nebraska*, 795 N.W.2d 271, 278–80 (Neb. 2011), *modified on denial of rehearing*, 281 Neb. 978, 802 N.W.2d 420, *cert. denied* ___ U.S. ___, 132 S.Ct. 1016 (2012). Neither decision carries the day here.

In *Rush Creek*, the tribal entity relied solely on a 2000 U.S. district court decision from New York in support of its contention that apparent authority could not overcome the requirement that a waiver be express and not by implication. 107 P.3d at 406-07. The absence of other authority led the Colorado court to depart from the correct governing principle. *Id.* at 407 ("We do not read *Merrion* and *Santa Clara Pueblo* to mean that, because waivers of sovereign immunity must be express, the authority to sign admitted waivers cannot be established by apparent authority. *Moreover, the Tribe has not cited, nor are we aware of, any other published cases that so state*. Instead, in part because *nothing in the Tribe's Constitution* expressly speaks to the issue or refutes or prohibits it, we conclude that the general laws of agency govern here.") (emphasis added). Apparently, the tribe in *Rush Creek* neglected to bring to the court's attention the Eleventh Circuit's decision in *Sanderlin*, which expressly addressed the issue of apparent authority. And, of course, the *Rush Creek* court could not have been aware of *Memphis Bio-Fuels*, decided by the Sixth Circuit in 2009, *Amerind Risk Mgm't*

Corp., decided by the Eight Circuit in 2011, *Native American Distributing*, decided by the Tenth Circuit in 2010, or *Contour Spa*, decided by the Eleventh Circuit in 2012. Clearly, the trend developed by federal appellate courts since *Rush Creek* (and even before, with respect to *Sanderlin*) has been to require explicit authorization from a tribal entity's governing body before sovereign immunity may be waived.

Additionally, as the trial court correctly pointed out (R. 1047-48, ¶ 44), the *Rush Creek* court did not have before it express requirements of the tribal entity for an enforceable waiver of sovereign immunity. *Rush Creek*, 107 P.3d at 406 ("Rush Creek asserts that, because the Tribe's Constitution *is silent as to the requisite procedures for waiving sovereign immunity*, it was justified in relying on the CFO's apparent authority to agree to such a waiver. … Instead, in part *because nothing in the Tribe's Constitution expressly speaks to the issue or refutes or prohibits it*, we conclude that the general laws of agency govern here.") (emphasis added). That this information was critical to the *Rush Creek* court is apparent from its subsequent distinguishing of the tribe's reliance on *World Touch Gaming*. *Id.* at 407 ("In *World Touch*, … [t]he tribe's constitution expressly stated that only the tribal council could waive sovereign immunity. The court held that, despite any authority, express or otherwise, that the third party had to bind the tribe to a contract, it was insufficient to authorize the third party to waive the tribe's sovereign immunity.").

As for *Storevisions*, which Mobile Mike did not bring to the trial court's attention, it, too, does not control the issue of apparent authority here. The

Nebraska Supreme Court's decision was based *entirely* on *Rush Creek*, a decision it (respectfully) misread. The court in *Storevisions* asserts that the tribe's constitution and by-laws in that case were similar to those in *Rush Creek*. 795 N.W. 2d at 278. The court did not, however, cite to any portion of the *Rush Creek* decision in support of this conclusion. *Id.* In fact, even the most careful examination of *Rush Creek* fails to reveal what the provisions of the constitution and by-laws of the Ute Tribe were that led the Colorado court to rule as it did. On the contrary, the *Rush Creek* court noted that the tribe's constitution was "silent as to the requisite procedures for waiving sovereign immunity." *Rush Creek*, 107 P.3d at 406. Consequently, the Nebraska Supreme Court's assertion of similarity is inexplicable. It may have chosen arbitrarily to adopt the legal conclusion in *Rush Creek*, but it certainly could not have adopted the "reasoning." 795 N.W. 2d at 279. Additionally, because the Nebraska Supreme Court relied exclusively on *Rush Creek*, it could not have had the benefit of the Eleventh Circuit's decisions in *Sanderlin* and *Contour Spa* or the other federal appellate decisions that have more recently reached the contrary conclusion. *E.g.*, *Memphis Bio-Fuels*, *supra*; *Amerind Risk Mgm't Corp.*, *supra*; *Native American Distributing*, *supra*.

At most, *Storevisions* represents an outlier position on the question of how sovereign immunity may be effectively waived. And since tribal sovereign immunity is a matter of *federal* law, not state law, STOFI respectfully suggests that

this Court should be governed by federal appellate precedents on the subject, rather than a Nebraska decision looking to apply Nebraska agency common law.[38]

IV. THIS COURT'S DECISION IN *MANCHER* DOES NOT COMPEL REVERSAL OF THE TRIAL COURT'S DISMISSAL OF THE AMENDED COMPLAINT.

Mobile Mike has vested itself in this Court's decision in *Mancher* as justification for why dismissal was improper and the case should have been permitted to proceed. The posture of the parties in *Mancher*, however, makes it apparent that it does not control the outcome in this appeal.

In *Mancher*, the plaintiff had sued STOFI (and only STOFI) claiming that it "negligently hired [bingo hall] supervisors who harassed him, slandered him, falsely imprisoned him, maliciously prosecuted him, and violated his civil rights." 708 So. 2d at 328. STOFI moved to dismiss, submitting affidavits that the real defendant in interest – the entity that owned and operated the bingo hall – was the Tribe, which had not been named. *Id.* STOFI further asserted that the Tribe, like STOFI, was entitled to sovereign immunity from suit. *Id.* The *Mancher* decision does not indicate that an evidentiary hearing was held or that extensive

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[38] Nothing may be inferred from the Supreme Court's denial of certiorari in *Storevisions*. *See Excel Communications, Inc. v. AT&T Corp.*, 528 U.S. 946 (1999) (Stevens, J. respecting denial of certiorari) ("[I]t [is] appropriate to reiterate … that the denial of the petition does not constitute a ruling on the merits"); *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917-919 (1950) (Frankfurter, J., respecting denial of certiorari) (recognizing the "sole significance" of a denial of a petition is "that fewer than four members of the Court deemed it desirable to review a decision of the lower court as a matter of sound judicial discretion").

jurisdictional discovery had been permitted and conducted. *Id.* In fact, plaintiff failed to counter STOFI's affidavits entirely, and the trial court dismissed. *Id.*

This Court reversed the dismissal because "the questions presented in this case were inherently factual, not legal." *Id.* In concluding that dismissal was inappropriate at the motion to dismiss stage, the Court noted that the motion to dismiss "contends that the improper party was sued." *Id.* It went on thereafter to conclude that such an issue "relies on matters outside the scope of the pleadings." *Id.* at 329. This is hardly a surprising conclusion. When a plaintiff alleged that a defendant is liable for certain conduct, and the named defendant asserts that another unnamed party is actually responsible, that defense cannot be resolved on a motion to dismiss. As the Court observed: "[W]hether Plaintiff sued the wrong defendant … cannot be considered in a motion to dismiss because such a motion must generally be premised only upon the four corners of Plaintiff's complaint. Here, the defendants cannot prove their argument without going beyond the four corners of the complaint." *Id.* (citing *Holland v. Anheuser Busch, Inc.*, 643 So. 2d 621 (Fla. 2d DCA 1994)).

As for the Court's observation that "whether sovereign immunity bars a complaint should likewise be addressed 'by answer and affirmative defenses,'" *id.* at 329, it cannot be read as a categorical rule precluding consideration of sovereign immunity on a motion to dismiss where, as here, jurisdictional discovery has been permitted and conducted and an evidentiary hearing has been held. This much is evident from the Court's citation to *Lewis v. Edwards*, 661 So. 2d 1237 (Fla. 4th DCA 1995). In *Lewis*, this Court held:

> Questions of sovereign immunity and whether, and to what extent, sovereign immunity, as alleged, has been waived, …as well as questions regarding the legal status of the department and the legal relationship between the department, the tribal corporate entity, and the Seminole Tribe should be addressed by answer and affirmative defenses and *resolved by facts established on this record, rather than by incorporating facts or statements in other cases involving these or similar entities*.

Id. at 1237 (emphasis added). The Court's concern in *Lewis*, therefore, was about deciding complex questions of sovereign immunity in a case involving not only the Tribe, but its police department and two insurance companies, based solely on facts or statements developed in ***other*** proceedings. *Id.*

The *Mancher* court's citation to *Houghtaling* – 708 So. 2d at 329 – also supports the conclusion that a factually developed record allows for dismissal of a complaint based on sovereign immunity. As the Court recognized, the Florida Supreme Court approved the *dismissal* of a suit against a tribal entity on sovereign immunity grounds, but remanded "to allow the plaintiff to establish whether the tribe had expressly consented to suit in its organizational charter or corporate charter." *Id.* Mobile Mike was afforded the opportunity to establish, through a multi-day evidentiary hearing, whether STOFI had properly waived its sovereign immunity.[39]

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[39] The reversal of the dismissal in *Mancher* without prejudice to allowing STOFI to raise sovereign immunity by motion for summary judgment shows that *Mancher* does not control. After all, what would have occurred upon remand in *Mancher* is that the parties would have conducted jurisdictional discovery, held a hearing based on the evidence adduced, and argued the questions of immunity and waiver – precisely what has already occurred here. Allowing STOFI to be (continued . . .)

The *Mancher* court did not address its earlier affirmance of a dismissal based on tribal sovereign immunity in *Casadella*, a case where the Seminole Police Department and a sergeant were sued for wrongful arrest. 478 So. 2d at 471. The plaintiff contended that sovereign immunity had been waived by accepting certain statutory benefits. *Id.* After the trial court denied the defendants' motion to dismiss on sovereign immunity grounds, this Court granted certiorari review and, after noting that "sovereign immunity cannot be implied but must be unequivocally expressed," quashed the ruling and remanded with direction to dismiss the complaint.[40] *Id.*

And, of course, the Court in *Mancher* would not yet have had the benefit of then-Judge Canady's analysis in *McCor*:

> The question of whether a court lacks subject matter jurisdiction over a claim because that claim is barred by tribal sovereign immunity is a

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(. . . continued)
subjected to any additional proceedings would effectively vitiate its sovereign immunity from suit. *McCor*, 903 So. 2d at 357-58 ("Tribal sovereign immunity, like the qualified immunity enjoyed in civil rights cases by public officials, "involves 'immunity from suit rather than a mere defense to liability,'" which is an "entitlement" that " 'is effectively lost if a case is erroneously permitted to go to trial.'" *Tucker v. Resha*, 648 So. 2d 1187, 1189 (Fla. 1994) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806 (1985)).")

[40] The *Mancher* opinion, while citing to *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499 (Fla. 1989), and its holding that jurisdictional questions may be decided on a motion to dismiss based on a limited evidentiary hearing, fails to reconcile its requirement of a motion for summary judgment with the Florida Supreme Court's holding. One may assume, as STOFI has already suggested, that the parties' posture and absence of the Tribe as a named defendant distinguished the situation in *Mancher* from that in *Venetian Salami* (and the one here).

> threshold question that is *properly presented by way of a motion to dismiss, rather than by a motion for summary judgment*. A motion to dismiss for lack of subject matter jurisdiction is analogous to a motion to dismiss for lack of personal jurisdiction. *See Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla. 1989) (setting forth process for determining factual issues raised by motion to dismiss for lack of personal jurisdiction). In considering a motion to dismiss challenging subject matter jurisdiction, a trial court may properly go beyond the four corners of the complaint and consider affidavits. [citations omitted]. Challenges to subject matter jurisdiction raised by Indian tribes asserting tribal immunity have regularly been made by way of motions to dismiss. *See Seminole Tribe v. Houghtaling*, 589 So. 2d 1030, 1031 (Fla. 2d DCA 1991); *Seminole Police Dep't v. Casadella*, 478 So. 2d 470, 471 (Fla. 4th DCA 1985). We therefore conclude that it was proper for the trial court to consider the Tribe's motion to dismiss with the accompanying affidavits and not appropriate to consider the motion for summary judgment.

Id. at 357.

Little would be gained from endorsing Mobile Mike's categorical insistence that a motion to dismiss may never resolve issues of sovereign immunity. Sovereign immunity is not different from other jurisdictional issues that are routinely resolved on a motion to dismiss after jurisdictional discovery has been permitted and a limited evidentiary hearing conducted.

CONCLUSION

Florida and federal law is clear that every doubt regarding the availability of sovereign immunity should be resolved in favor of preserving tribal sovereign immunity. Here, Mobile Mike failed to carry its burden of either refuting that STOFI was entitled to sovereign immunity or establishing that STOFI had lawfully waived its immunity. As such, the trial court's dismissal should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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