IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

CASE NO.: 4D15-0235
LOWER TRIBUNAL CASE NO.: 14-00419 (14)

MMMG, LLC and MOBILE MIKE PROMOTIONS, INC.,

APPELLANTS,

v.

SEMINOLE TRIBE OF FLORIDA, INC. d/b/a TRIBE, INC.,

APPELLEE.

APPELLANTS' INITIAL BRIEF

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MISCELLANEOUS

PREFACE

- MMMG, LLC shall be referred to as "***MMMG***".
- Mobile Mike Promotions, Inc. shall be referred to as "***MMP***"
- MMMG, LLC and Mobile Mike Promotions, Inc. shall collectively be referred to as "***Appellants***".
- The Seminole Tribe of Florida, Inc. shall be referred to as "***STOFI***" or "***Appellee***".
- Tony Sanchez, Jr. shall be referred to as "***Sanchez***".
- Larry Howard shall be referred to as "***Howard***".
- Mike Ulizio shall be referred to as "***Ulizio***".
- Steven Osceola shall be referred to as "***S. Osceola***".
- Chris Osceola shall be referred to as "***C. Osceola***".
- Tony Sanchez, Jr., Larry Howard, Mike Ulizio, Steven Osceola and Chris Osceola shall be collectively referred to as the "***Individual Defendants***".
- The Seminole Tribe of Florida shall be referred to as the "***Seminole Tribe***".

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STATEMENT OF THE FACTS AND COURSE OF PROCEEDINGS

A. Introduction

Michael Wax is a popular South Florida radio personality known as "Mobile Mike." For decades, he has worked with radio stations and provided media services to South Florida businesses through on-site promotions, radio remotes, giveaways and other forms of advertising. As discussed more thoroughly below, Mobile Mike was approached by certain STOFI shareholders about a joint venture with STOFI (a corporation organized under the laws of the United States - as distinguished from the sovereign Seminole Tribe) to create an advertising agency for all Seminole businesses. Together, they established a corporation called MMMG, with STOFI receiving 51% of the profit and Mobile Mike's company, MMP, receiving 49% of the profit, but with Mobile Mike being the sole managing member. An MMMG Operating Agreement was entered into between STOFI and MMP, generally outlining the terms of the joint venture between the parties to provide the advertising services.

The parties operated MMMG for approximately 18 months before problems arose. During the initial 18 months Mobile Mike engineered and fine-tuned the advertising operations just as he had done for companies throughout South Florida his entire career. Once everything was running on all cylinders a STOFI shareholder and tribal member created problems for the STOFI elected Board of

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Directors, and STOFI wrongfully terminated its relationship with MMP, breached the contract between the parties, and STOFI awarded the advertising to a company owned by Sallie Tommie ("Tommie"), a STOFI shareholder whose brother, Larry Howard, sat on STOFI's Board of Directors. Essentially, STOFI stopped honoring its agreement, and diverted all of the business Mobile Mike created to Tommie's company.

The instant lawsuit was filed against STOFI, among others, and after a 5-day evidentiary hearing the Trial Court dismissed STOFI with prejudice from the suit, finding that the court had no jurisdiction over STOFI due to Tribal Sovereign Immunity. Appellants now challenge the dismissal.

B. Statement of the Facts

1. About STOFI

Appellants did not sue the Seminole Tribe,[1] but rather STOFI, a separate and distinct entity from the Seminole Tribe. STOFI is a federally chartered corporation pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. § 477. STOFI was chartered "as a body politic and corporate of the United States of America under the corporate name 'The Seminole Tribe of Florida, Inc.'" STOFI does not operate pursuant to the Seminole Tribe's constitution, but rather in accordance with

[1] The Seminole Tribe is a federally recognized Indian tribe, and has been placed on the United States Department of Interior's "list of recognized tribes" pursuant to 25 U.S.C. §479a–1.

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STOFI's own Corporate Charter and By-Laws. R.807, pp. 335-36. STOFI's shares are owned by tribal members and not by the Seminole Tribe itself. R.228, §1; *see also* R.806, pp. 330-31. STOFI is governed by a Board of Directors ("Board") that is different from the members of the Seminole Tribal Council. *See* R.228, Art. V; *see also* R.807, pp. 335-36. The Seminole Tribe does not govern STOFI. STOFI exists to create business opportunities for itself with non-Seminoles. R.806, pp. 331-32; R.962, p. 840.

Lavonne Kippenberger, the Tribal Clerk for both STOFI and the Seminole Tribe, oversees the tribal record management systems and the Tribal Clerk's office. S*ee* R.801, p. 309. She confirmed in her testimony that STOFI (i) is a completely different and separate entity from the Seminole Tribe; (ii) operates in accordance with a different budget not funded by the Seminole Tribe; (iii) complies with a corporate charter rather than a constitution; and (iv) STOFI's Board oversees management rather than those elected members of the Tribal Council who govern the Seminole Tribe. R.807, pp. 335-336. Ms. Kippenberger also testified that no provision in STOFI's Corporate Charter states that STOFI is a subordinate entity of the Seminole Tribe. R.806, p. 329. STOFI's Corporate Charter further states that STOFI is to engage in any business that will further the economic well-being of the shareholders of the corporation. R.806, p. 331. Moreover, STOFI's income and funds do not go to the Seminole Tribe. R.806, p. 332.

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2. STOFI's Corporate Charter and By-laws

STOFI's Corporate Charter provides authority to waive sovereign immunity as follows:

> 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.

R.228, Art. VI, § 9 (emphasis added).

Under STOFI's Bylaws, STOFI's Board:

> [M]ay authorize any officer, agent or agents to enter into any contract or execute and deliver any instrument on behalf of the corporation, not inconsistent with the Corporate Powers and all such authority shall be specifically defined in the Board's resolution.

R.228, Art. II, § 7.

STOFI's Bylaws describe the manner in which its Board may act as follows:

> 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,** excepting these authorities and responsibilities specifically outlined in Article IV hereof.

R.228, Art. II, § 5 (emphasis added).

Resolutions passed by STOFI's Board are not readily available to the public.

Ms. Kippenberger testified that a party entering into a contract with STOFI could

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not search STOFI's resolutions since they are kept in a "locked vault" and only tribal members may inspect the records absent approval from STOFI's Board. R,801, pp. 310-12; R.805, p. 326.

STOFI's By-laws describe the powers of STOFI's president, including the following duties:

> (b) He shall have general and active management of the business of the corporation.
>
> (c) He shall see that all orders and resolutions of the Board are carried into effect.
>
> (d) **He shall execute** bonds, mortgages and other **contracts when authorized by the Board**.
>
> ***
>
> (h) He shall operate and conduct the business and affairs of the corporation in accordance with the orders and resolutions of the Board of Directors and in matters which have not been specifically ordered by the Board shall call their 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.

R.228, Art. IV, § 3 (emphasis added).

3. *The Letter of Intent with MMP and Ratification by STOFI's Board*

Since approximately 2001, Mobile Mike, MMP's principal, has provided media services to the Seminole Tribe and STOFI, originally working with radio stations and ultimately providing other forms of promotions. *See* R.86, ¶ 21. In or about June 2011, Mobile Mike was approached by certain STOFI shareholders about entering into a joint venture with STOFI to create an advertising agency

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which would become "in-house" for all Seminole business and events and all of STOFI's advertising. R.86. ¶¶ 22-23.

After numerous discussions between the parties, including a presentation by Mobile Mike to STOFI's Board, on or about December 6, 2011, STOFI and MMP entered into a Non-binding Letter of Intent Agreement ("LOI"). The LOI was drafted by Alan Lerner, STOFI's former General Counsel. R.769, pp. 241-42. The LOI outlined the terms of the joint venture between the parties, and provided:

> The parties plan to form a legal entity or venture with the presently conceived name of MMMG. MMMG and its members recognize and acknowledge the limited purpose of the venture to provide promotional, advertising and marketing services on local, national and global levels. The members agree to establish this joint venture relationship with two consensual parties for the mutual benefit of the parties.

R.106, p. 1.

Under the terms of the LOI, the parties agreed that "[the LOI] shall be reduced to a Definitive Agreement when approval is obtained from [STOFI]." R.106, p. 2. Importantly, the parties further agreed that: "[The LOI] shall be **governed by the laws of the State and venue shall be in Broward County, Florida.**" *Id.* (emphasis added). Sanchez, STOFI's President who negotiated and ultimately signed the LOI on behalf of STOFI, admitted that when he signed the LOI he intended to have disputes resolved in Broward County, Florida, in the courts of the State of Florida, and under the laws of Florida. R.926, p. 696.

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4. The Two MMMG Operating Agreements

In Resolution No. BD-07-12 (the "LOI Resolution") STOFI's Board ratified the LOI on December 21, 2011 (2 weeks after STOFI's President signed it) and provided that "upon ratification of the LOI by the Board, it will be reduced to a binding Definitive Agreement." *See* LOI Resolution, R.252. In particular, STOFI's Board unanimously granted Sanchez the authority "to take all actions and steps and to execute the Definitive Agreement containing the essential terms set forth in this Resolution, any and all other instruments, documents, and certificates necessary to effectuate the above." *Id.*; R.928, p. 704. The LOI Resolution did not specifically limit Sanchez from waiving sovereign immunity on behalf of STOFI. *See* R.252. Thereafter, Sanchez finalized the terms of the MMMG Operating Agreement, and signed the agreement as President on behalf of STOFI. *See* R.838-39, pp. 460-61.

There were two versions of a signed MMMG Operating Agreement entered into evidence during the hearing on STOFI's Motion to Dismiss. Appellants allege that Sanchez signed the MMMG Operating Agreement attached as Exhibit "B" to the Amended Complaint, which provides the following clear and unequivocal waiver of sovereign immunity:

> Section 1. Governing Law. This Agreement and the rights and obligations of the parties under it are governed by and interpreted in accordance with the laws of the State of Florida. (without regard to

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> principles of conflicts of law). **The parties waive any rights pursuant to any available sovereign or governmental immunity.**

MMMG Operating Agreement (Exhibit "B" to the Amended Complaint), R.109, Art. VIII, §1 (emphasis added).

STOFI and the Individual Defendants, on the other hand, dispute the legitimacy of that MMMG Operating Agreement and claim that the agreement, as originally signed on January 5, 2012, did not contain the waiver provision.

The evidence taken at the evidentiary hearing demonstrates that the MMMG Operating Agreement attached to the Amended Complaint contains the signatures of the parties and three witnesses. Sanchez testified he signed the operating agreement but he did not read it and did not know about the waiver provision in the contract until after he signed it. R.926, pp. 695-96; R.927, pp. 700-01. Mobile Mike testified that the waiver provision existed at the time of execution of the contract. R.839, pp. 463-64. Of the three witnesses to the signing of the agreement, only Robert Saunooke, a tribal attorney who represents Sanchez on unrelated matters, testified. He claimed that he reviewed the MMMG Operating Agreement when it was signed by Sanchez and that the agreement contained both the Florida law provision and a waiver of sovereign immunity provision. R.946-47, pp. 777-80.

In addition, Cleveland Baker, a tribal member and shareholder in STOFI, testified that he reviewed the MMMG Operating Agreement on the tribal lands

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where the execution occurred, within minutes of its signing and that he read the waiver provision in the agreement. R.962, pp. 839-841. Mr. Baker further testified that he contacted Sanchez soon thereafter to discuss the waiver provision and Sanchez said he would "take care of it." R.963, p. 842; R.965, p. 853.

5. The Performance Under the Operating Agreement

The parties operated under the MMMG Operating Agreement for approximately 18 months, during which time neither Sanchez nor STOFI ever disavowed the contract or the waiver provision. R.735, pp. 139-40. According to Tena Granit, STOFI's Financial Controller and a CPA who oversees the handling of all financial records for STOFI, STOFI even made payments for over a year to Mobile Mike for his performance under the MMMG Operating Agreement. *Id.*

Ms. Granit also testified that she reviews all agreements and places a particular emphasis on reviewing governing law provisions. R.736, pp.142-44. According to Ms. Granit, contracts entered into by STOFI that contained a provision applying Florida law, such as the MMMG Operating Agreement, usually include a waiver of sovereign immunity. R.736, p. 143.

Kevin Hagen, MMP's counsel, testified that he drafted the sovereign immunity waiver provision in the MMMG Operating Agreement before the signing. R.809, p. 341; R.812, pp. 355-56. Mr. Lerner, STOFI's General Counsel at the time the resolution was passed and the MMMG Operating Agreement was

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signed, testified that he did not see the agreement until after its execution. R.765 pp. 223, 244; R.771, pp. 250-51. Mr. Lerner testified that the validity, interpretation and performance of the MMMG Operating Agreement would apply the laws of the United States and the laws of the State of Florida. R.781, p. 290.

Ethel Huggins, Sanchez's Executive Assistant, could not find the original signed MMMG Operating Agreement, or a copy of same on her computer, when asked by Marc Solomon, STOFI's current General Counsel and the corporate representative at the hearing. R.866, p. 484; R.891, p. 586; R.892, p. 588; R.896, p. 604. Mr. Solomon ultimately obtained a copy of the MMMG Operating Agreement from Mobile Mike, and prepared a first amendment to the agreement removing the Florida law provision and the waiver provision, which he demanded that Mobile Mike sign. R.892, p. 589; R.896, pp. 605-609. He also sent the agreement with the waiver provision to STOFI, who never claimed that the agreement did not contain a waiver provision. R.895, pp. 602-03.

6. *The Individual Defendants*

In addition to STOFI, Appellants sued the Individual Defendants in their individual capacities. *See* R.86, Caption & p.1. Appellants alleged in their Amended Complaint that the Individual Defendants engaged in a scheme to divest MMP of its interest in MMMG to benefit Tommie's corporation, Redline Media Group ("Redline Media"). Tommie's brother, Howard, serves on STOFI's Board.

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The Amended Complaint alleges, R.86, ¶¶ 12-14, 64, 74-75, 78-79, 94-95; and Mobile Mike testified that, the Individual Defendants acted outside the scope of their authority in committing the actions set forth in the Amended Complaint. Mobile Mike testified that the Individual Defendants terminated the MMMG Operating Agreement and ultimately refused to honor its terms in order to curry favor with Tommie. R.956-57, pp. 818-820. Mobile Mike stated that he had separate discussions with the Individual Defendants, and that each of them admitted that they had to "kill" the MMMG deal because Tommie was very powerful in the community, she wanted the media business that MMMG was generating, and that they needed her political support to maintain or to seek their positions on STOFI's Board and/or the Tribal Council, jobs which provided each of them with a substantial income. *Id.*

Mobile Mike further testified that Howard approached him in early 2013 and told him that his sister (Tommie) was putting a lot of pressure on him to kill Mobile Mike's deal with STOFI, or she would not support him in the upcoming election. R.956, p. 818. Mobile Mike testified that C. Osceola told him essentially the exact same thing. *Id.* S. Osceola approached Mobile Mike and told him that Tommie had also approached him to tell him to get rid of Mobile Mike's deal or she would not support him in the upcoming election. *Id.* at pp. 818-19. Ulizio, the CFO for STOFI, told Mobile Mike that if he didn't support Tommie and divert the

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business from Mobile Mike to Redline Media, he would not have a job. *Id.* at p. 819. Mobile Mike advised Sanchez of Tommie's interference, and Sanchez told Mobile Mike that for six months C. Osceola and Howard had been putting a lot of pressure on him to kill Mobile Mike's deal. *Id.* at p. 820. Sanchez told Mobile Mike that if he (Sanchez) wanted to be re-elected to the Board and continue making the money he was earning, it was not going to work out for Mobile Mike. *Id*.

Other testimony and evidence also support the allegations that Sanchez was being pressured by Tommie to end the MMMG venture. Ms. Huggins, Sanchez's Executive Assistant, testified that Tommie was putting a lot of pressure on Sanchez. R.882, pp. 547-48. In email correspondence to Sanchez, Ms. Huggins stated that Tommie was "out to disband the Board's [joint venture] with [Mobile Mike]" and that she "uses [Howard] to get to the Board." R.882, pp. 548-49. Sanchez also admitted that Howard and C. Osceola were making his life very difficult because of Mobile Mike's assertion that there was a waiver of sovereign immunity in the MMMG Operating Agreement. R.927, p. 701.

Sanchez is paid $650,000.00 annually as the President of STOFI and Vice Chairman of the Tribal Council. Other STOFI Board members make at least $120,000.00, and Tribal Council Members make $350,000.00 per year. R.921, pp. 675-76. At the time the parties entered into the MMMG Operating Agreement,

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Sanchez was new to his position. He had been elected President of STOFI approximately 6 months before the LOI was executed. R.867, pp. 489. Sanchez had previously attempted to run for the presidency, but it took him 16 years to finally get elected. R.904-05, pp. 638-39; R.921, p. 676; R.931, p. 716. He stated that he would like to continue to serve as President of STOFI. R.931, p. 716. Ultimately Sanchez and the STOFI Board Members stopped honoring the MMMG Operating Agreement and gave all of the business to Tommie's company.

C. Course of Proceedings and Disposition Below

On or about January 10, 2014, MMMG and MMP filed a 10-count Amended Complaint against STOFI, as well as against Sanchez, Howard, Ulizio, S. Osceola and C. Osceola in their individual capacities (not as agents for STOFI or the Seminole Tribe). *See* R.86.

On February 21, 2014, STOFI and the Individual Defendants jointly filed a Motion to Dismiss asking the Trial Court to dismiss the Amended Complaint for lack of subject matter jurisdiction pursuant to Florida Rule of Civil Procedure 1.140(b)(1) because they are allegedly immune from suit by virtue of the doctrine of sovereign immunity. *See* R.178. Appellants filed their Response in Opposition to Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction ("Response to Motion to Dismiss") on or about October 17, 2014 (R.595) & Response in Opposition to Defendants' Motion in Limine (R.570).

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A five day evidentiary hearing was held beginning October 20, 2014, and on December 15, 2014 the Trial Court entered an Order Granting in Part and Denying in Part Defendants' Motions to Dismiss Based On Sovereign Immunity ("Order on Motion to Dismiss"). *See* R.1029. In particular, the Trial Court found that STOFI is entitled to sovereign immunity "absent a waiver in their charter, valid waiver in the contract or through an Act of Congress waiving immunity." *Id.* at ¶ 23; *see also id.* at ¶ 35("In accordance with binding precedent, STOFI is entitled to sovereign immunity unless and until it waives such immunity."). With respect to the issue of a contractual waiver, the Trial Court ruled there was a factual issue as to which version of the MMMG Operating Agreement was valid, and that it should not decide this issue on a motion to dismiss. *Id.* at ¶ 40. For purposes of the Motion to Dismiss, therefore, the Trial Court assumed that the contract attached to the Amended Complaint as Exhibit "B" applied. *Id.* Nonetheless, the Trial Court found that the waiver in the MMMG Operating Agreement was not enforceable because it ruled that Sanchez lacked authority to execute an agreement that waived STOFI's sovereign immunity. *See id.* at ¶¶ 41-43. The Trial Court also found that Sanchez could not waive sovereign immunity for STOFI through his apparent authority. *See id.* at ¶¶ 44-49.

Appellants appeal the Order on Motion to Dismiss as it related to STOFI.

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SUMMARY OF ARGUMENT

STOFI expressly waived its right to sovereign immunity in the MMMG Operating Agreement which provided a clear and unequivocal waiver, the only requirement by the United States Supreme Court for a valid waiver of tribal sovereign immunity. At a minimum, there is an issue of fact regarding whether there was waiver of sovereign immunity by STOFI which precludes dismissal of this case for lack of subject matter jurisdiction. Indeed, under the facts and circumstances as alleged in this case, whether or not STOFI waived its purported sovereign immunity is not an issue for the Trial Court to determine on a motion to dismiss. Issues of fact still remain concerning whether STOFI signed the Operating Agreement containing the waiver of sovereign immunity provision and whether Sanchez had apparent authority to waive sovereign immunity in this instance. Thus, the issue of whether tribal sovereign immunity has been waived in this case – either by actual or apparent authority – is for the trier of fact, and should not have been determined on a motion to dismiss. Accordingly, the Trial Court's decision to grant STOFI's Motion to Dismiss should be reversed.

STANDARD OF REVIEW

The standard of review of a trial court's denial of a motion to dismiss is *de novo*. *See Landmark American Ins. Co. v. Studio Imports, Ltd., Inc.*, 76 So. 3d 963, 964 (Fla. 4th DCA 2011)(citation omitted).

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Ordinarily, on a motion to dismiss, the Trial Court is confined to consideration of the allegations contained within the four corners of the complaint. *See Swope Rodante, P.A. v. Harmon*, 85 So. 3d 508, 509 (Fla. 2d DCA 2012). All such allegations must be taken as true and any reasonable inferences drawn from the complaint must be construed in favor of the non-moving party. *Barbado v. Green & Murphy, P.A.*, 758 So. 2d 1173, 1174 (Fla. 4th DCA 2000). However, as instructed by the Fourth District Court of Appeal, "[a] motion to dismiss based on lack of subject matter jurisdiction may properly go beyond the four corners of the complaint when it raises solely a question of law." *Mancher v. Seminole Tribe of Florida, Inc.*, 708 So. 2d 328 (Fla. 4th DCA 1998) (emphasis added).

ARGUMENT

I. The Trial Court Erred in Granting STOFI's Motion To Dismiss on Sovereign Immunity Grounds Because STOFI is a Federally Chartered Entity, Legally Separate and Distinct From the Tribe, and the Court Should Not Apply the Tribe's Constitution and Ordinances to STOFI's Contracts.

It is undisputed that the Seminole Tribe is a federally recognized tribe, constitutes a separate government and has sovereign immunity. STOFI, on the other hand, does not act in a governmental capacity but acts as a corporation organized under the laws of the United States pursuant to 25 U.S.C. § 477, legally separate and distinct from the Seminole Tribe, and as such, the Seminole Tribe's ordinances regarding tribal sovereign immunity do not apply to STOFI. STOFI

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operates in accordance with its own Corporate Charter and By-Laws and has shareholders. STOFI's Board is different from the Tribal Council, and STOFI's commercial activities are separate from the Tribe's. *See* Affidavit of Former Tribal Clerk Priscilla Sayen, R.570; Exhibit "B" ("Seminole Tribe of Florida, Inc. is a completely different entity from the Seminole Tribe of Florida. It operates in accordance with a different budget and a corporate charter rather than a constitution. It is governed by a Board of Directors that is different from those elected members of the Tribal Council who govern the Seminole Tribe of Florida. The business enterprises operated by the Seminole Tribe of Florida, Inc. constitute agriculture, citrus, tobacco and cattle."). *See also* R.807, pp. 335-336. Indeed, Congress added § 477 to promote business between Native Americans and others.

It is well established that tribal entities "have no inherent immunity of their own." *Trudgeon v. Fantasy Springs Casino,* 71 Cal.App.4th 632, 639 (1999). "Instead, they enjoy immunity only to the extent the immunity of the tribe, which does have inherent immunity, is extended to them." *Id.* In *Mancher*, the Fourth DCA did not find that STOFI enjoyed automatic sovereign immunity, and reversed the trial court's order granting STOFI's motion to dismiss for lack of subject matter jurisdiction based upon STOFI's claim of tribal sovereign immunity. *See* 708 So. 2d at 328-29 (finding challenge to jurisdiction based on tribal sovereign immunity is "not amenable to resolution by motion to dismiss because there are

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disputed factual questions"). Here, although disputed factual questions exist, the Trial Court ignored STOFI's corporate status and ruled sovereign immunity exists regardless of whether STOFI waived its sovereign immunity in the Contract.

Although the Trial Court followed *Mancher* when ruling on the Individual Defendants' Motion to Dismiss on sovereign immunity grounds, the Trial Court erred by not applying the same standard to STOFI. Instead the Trial Court found that "STOFI's sovereign immunity from suit is derivative of and flows from the [Seminole] Tribe's sovereign immunity." R.1029.

Notably, a Section 477 corporation does not share in the Seminole Tribe's governmental sovereign immunity, but can extend tribal immunity in its charter and regulations. In particular, Section 477 provides as follows:

> The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe: *Provided*, that such charter shall not become operative **until ratified by the governing body of such tribe**. **Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law; but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted lands included in the limits of the reservation.** Any charter so issued shall not be revoked or surrendered except by Act of Congress.

25 U.S.C. § 477 (emphasis added).

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In enacting the Indian Reorganization Act, it is clear that Congress intended to create two separate and distinct legal entities— the tribal governmental entity (like the Seminole Tribe) under 25 U.S.C. § 476, and the federal corporate entity (like STOFI) under 25 U.S.C. § 477. Section 476 contains specific language granting a federally recognized Indian tribe sovereign immunity. *See* 25 U.S.C. § 476 (f)-(h). In contrast, Congress excluded any language extending tribal sovereign immunity to the federal corporate entity created under Section 477. *See e.g., GNS, Inc. v. Winnebago Tribe of Nebraska*, 866 F.Supp. 1185, 1188-89 (N.D.Iowa 1994) (citations omitted) ("Pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. § 461 et seq., an Indian Tribe may organize simultaneously in two ways: first, it may organize as a tribal governmental entity governed by a constitution and bylaws pursuant to 25 U.S.C. § 476 (a so-called Section 16 organization); second, it may incorporate as a federal corporation governed by the terms of its charter pursuant to 25 U.S.C. § 477 (a so-called Section 17 corporation). The Section 16 governmental entity and Section 17 federal corporation are separate legal entities. This court has held that a Section 17 corporation waives sovereign immunity." *Veeder v. Omaha Tribe of Neb.*, 864 F.Supp. 889, 900 (N.D. Iowa 1994) (recognizing that Indian tribes organized as Section 477 federal corporations waive sovereign immunity); *Investment Finance Management Co., Inc. v. Schmit Industries, Inc.*, 1991 WL 635929, *5 (N.D. Iowa

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July 3, 1991) (holding that the Winnebago Tribe "entered into the contract as a section 17 corporation and not as a section 16 corporation, thus waiving its sovereign immunity. Section 17 corporations waive sovereign immunity."); *see also Wippert v. Blackfeet Tribe*, 859 P.2d 420, 427 (Mont. 1993), *overruled on other grounds, Green v. Gerber*, 303 P.3d 729, 734 n. 4 (Mont. 2013) ("The Indian Reorganization Act of 1934 authorizes two distinct legal entities, one governed by a constitution and the other, by a corporate charter. Sovereign immunity applies to the constitutional entity but not to the corporate entity . . .").

The trial judge erred when it concluded that STOFI, a Section 477 corporation, is presumptively entitled to tribal sovereign immunity by applying the Seminole Tribe's constitution and ordinances. The Trial Court should have analyzed the waiver of sovereign immunity issue under STOFI's charter and regulations applying Florida law. Accordingly, the Trial Court's ruling that STOFI is immune from suit by virtue of tribal sovereign immunity should be reversed.

II. The Trial Court Erred in Dismissing STOFI Because There are Numerous Issues of Disputed Fact as to Whether STOFI Waived Sovereign Immunity.

While not presumptively covered by tribal sovereign immunity, even if it were, STOFI waived its right to sovereign immunity.

"[A]n 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 (1998). A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). "[A] tribal corporation may . . . expressly waive immunity by agreement." *Inglish Interests, LLC v. Seminole Tribe of Fla. Inc.*, 2011 WL 208289, *6 (M.D. Fla. Jan. 21, 2011) (*citing Tamiami Partners Ltd. v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1048 (11th Cir. 1995)); *see also Furry v. Miccosukee Tribe of Indians of Florida*, 685 F.3d 1224, 1236 (11th Cir. 2012) ("Waiver . . . occurs when the tribe itself consents to the jurisdiction of the state or federal courts, through, for example, a provision in a commercial contract."). "While a contractual waiver of sovereign immunity must be unequivocal, it need not contain 'magic words' stating that the tribe hereby waives its sovereign immunity." *Mastro v. Seminole Tribe of Florida*, 2013 WL 3350567, *6 (M.D.Fla. Jul. 2, 2013) (citation omitted and emphasis added).

It is undisputed that STOFI agreed to be governed by Florida law, not tribal law, in connection with the MMMG venture. The LOI, which was approved by STOFI's Board, and both versions of the MMMG Operating Agreement, provide that the laws of Florida would govern the agreement. *See* R.106, p. 2. Thus, because the contract itself specifies that it is to be governed by Florida law, the Trial Court was required to apply Florida law to determine whether the contractual waiver of tribal sovereign immunity is effective.

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Under Florida law, "a '[w]aiver is the intentional or voluntary relinquishment of a known right, or conduct which warrants an inference of the relinquishment of a known right.'" *Hill v. Ray Carter Auto Sales, Inc.*, 745 So. 2d 1136, 1138 (Fla. 1st DCA 1999). "Whether a waiver has occurred in any given situation is generally a question of fact." *Id.*; *see also Gulfstream Park Racing Ass'n, Inc. ex rel. TIG Specialty Ins. Solutions v. Kessinger*, 874 So. 2d 645, 647 (Fla. 4th DCA 2004) ("Waiver is a factual issue to be determined by the finder of fact, in this case, the jury. Yet, the issue was not submitted to the jury. Instead, the trial court assumed the role of seventh juror and made the factual finding. We hold that it erred in doing so and in granting the motion for directed verdict.").

a. Issue 1 – Did the Waiver Provision Exist?

In this instance, STOFI disputes the legitimacy of the MMMG Operating Agreement (Exhibit "B" to the Amended Complaint), and claims that the agreement, as originally signed on January 5, 2012, did not contain the waiver provision. *See* R.203, p. 28. In particular, STOFI claims that the inclusion of the final sentence in Article VIII, Section 1 of the agreement was the result of fraud by MMP and its principal, Mobile Mike. *Id.* Thus, from the onset, whether the MMMG Operating Agreement included the waiver language as alleged by Appellants, or whether the language occurred by fraud as alleged by STOFI, sets forth a classic factual dispute, which is not appropriate for determination on a

motion to dismiss. *See Mancher*, 708 So. 2d at 328. The Trial Court recognized and acknowledged the dispute when it said "Certainly, if there is a factual issue as to which contract is the valid contract, with or without an express waiver of sovereign immunity, the Court should not decide this factual issue at a hearing on the STOFI and STOFI defendants' motion to dismiss based on sovereign immunity. Therefore, the Court defers on this factual issue and for purposes of the motions to dismiss on sovereign immunity, will assume that contract B with the express waiver, attached to and pled in Plaintiffs complaint, is applicable, without prejudice to STOFI and the STOFI defendants, if needed, to raise the issue by further motion or affirmative defense." R.1029, ¶ 40.

b. Issue 2 – Sanchez's Actual Authority to Waive Immunity

Alternatively, STOFI claims that Sanchez did not have actual authority to waive sovereign immunity, and the waiver is ineffective because it was not approved by the Tribal Council or STOFI's Board as required by the Tribe's Ordinance C-01-95. R.181 (*quoting* Ordinance C-01-95). Appellee mistakenly referred to STOFI and the Seminole Tribe interchangeably; applying Seminole Tribe Ordinances and Constitution to STOFI, when no such provision existed in STOFI's charter, by-laws or regulations. Even if Sanchez had authorized the waiver, STOFI further erroneously argues that the waiver provision in the

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agreement did not comply with the requirements of STOFI's Corporate Charter, and therefore is not valid.

The Trial Court found that a "proper and enforceable waiver of sovereign immunity is dependent on compliance with the sovereign entity's 'rules' for waiving immunity"; R.1029, ¶ 43, and that STOFI'S Charter and By-laws make clear that Sanchez, as the President of STOFI, may only act pursuant to the direction of STOFI's Board as reflected in a duly enacted resolution. *See id.* at ¶¶ 41-42. The Trial Court's position, however, lacks factual support since the Charter contains no such requirement for a Board Resolution to waive sovereign immunity. The Charter merely states that waiver occurs through express provision in a contract, which occurred here. The Trial Court again confused the Tribal Constitution, with STOFI's Corporate Charter. In this case, the Trial Court found that Sanchez was not given explicit authority (*i.e.*, actual authority) by STOFI's Board in the LOI Resolution to execute an agreement that waived STOFI's sovereign immunity. *Id.* at ¶ 42.

STOFI's Charter and By-laws, however, do NOT provide for or require a resolution to waive sovereign immunity. Moreover, the Board did not place any limitations whatsoever on Sanchez's right to waive sovereign immunity, as required by STOFI's By-laws if such a limitation is desired. *See* R.228, Art. II, § 5 (emphasis added) ("Acts of the Board may be by motion duly carried, except that

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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 . . .”). With actual authority, Sanchez finalized the terms of the MMMG Operating Agreement which unequivocally waived sovereign immunity. These facts taken together, therefore, support a viable claim for actual authority.

Unlike the Seminole Tribe, STOFI does not constitute a Sovereign Nation. The Tribe’s Ordinances govern only the Seminole Tribe’s governing body. STOFI exists as a corporation just like Apple, Amazon or General Motors. The Trial Court, however, relied upon and commingled the Tribe’s Ordinances with the Corporate Charter, in determining STOFI, an independent corporation, to be protected by the sovereign immunity doctrine.

In the Order on Motion to Dismiss, the Trial Court incorrectly applied the Tribe’s and STOFI’s “rules” to determine whether there was a contractual waiver of sovereign immunity. The MMMG Operating Agreement specifies that it is to be governed by Florida law, not tribal rules. Neither the Seminole Tribe nor STOFI’s rules apply under Florida law to determine whether a waiver occurred. *See Bates Associates, LLC v. 132 Associates, LLC*, 290 Mich.App. 52, 59 (Mich.App.2010) (citations omitted and emphasis added) (“The Tribe argues that the purported waivers of sovereign immunity and tribal-court jurisdiction in the

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settlement agreement are invalid because they were not supported by a resolution of the Tribe's board of directors as required under § 44.105 and § 44.109 of the Tribe's code. We note that the United States Supreme Court has not addressed this issue and has not required anything other than clear, unequivocal language for a valid waiver.") (emphasis added).

Under Florida law actual authority exists when a principal gives an agent the authority to act on its behalf. *See Hobbs Const. & Development, Inc. v. Colonial Concrete Co.*, 461 So. 2d 255, 259 (Fla. 1st DCA 1984) ("The power of an agent to bind his principal may rest on real or actual authority conferred in fact by the principal or may be founded on apparent or ostensible authority arising when the principal allows or causes others to believe the agent possesses such authority, as where the principal knowingly permits the agent to assume such authority to where the principal by his actions or words holds the agent out as possessing it."). Here, STOFI's Board unanimously granted Sanchez the actual authority "to take **all actions and steps** and to execute the Definitive Agreement containing the essential terms set forth in this Resolution, any and all other instruments, documents, and certificates necessary to effectuate the above." R.252 (emphasis added).

c. Issue 3 – Sanchez' Apparent Authority to Waive Immunity

Additionally, issues of fact remain concerning whether Sanchez had apparent authority to waive sovereign immunity. Here again, the Trial Court

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refused to apply Florida law as the parties had agreed, and instead improperly applied "rules" governing the Seminole Tribe and STOFI. *See* R.1029, p. 44, ¶ ("The Court must respect the laws and rules governing the [Seminole Tribe] and STOFI. Clearly STOFI has a specific procedure in place for a waiver of sovereign immunity that was not followed and which every [Seminole Tribe] and STOFI member or attorney for STOFI or [the Seminole Tribe] testified they knew: a Board Resolution was needed that expressly defined the authority to waive sovereign immunity."). Again the court completely ignores Florida corporate law and applied Tribal law when the Tribe has not been named as a party in this action. Most courts, when considering STOFI-like issues, erroneously apply Tribal law to issues which do not involve the Tribe. STOFI successfully convinces courts to ignore STOFI as a corporation and instead treat it as the Tribe. This court can finally put a stop to such improper conduct.

Under Florida law, apparent agency arises when there has been (1) a representation by the principal that the actor is his or her agent, (2) reliance on that representation by a third party, and (3) a change in position by the third party in reliance on that representation. *Blunt v. Tripp Scott, P.A.*, 962 So. 2d 987, 989 (Fla. 4th DCA 2007) (citation omitted). Furthermore, the reliance of a third party on the apparent authority of a principal's agent must be reasonable and rest in the

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actions of or appearances created by the principal. *Id.*; *Stone v. Palms West Hosp.*, 941 So. 2d 514, 520 (Fla. 4th DCA 2006).

Importantly, Florida courts recognize that a president of a corporation is vested with apparent authority to conduct corporate business, and that a party doing business with a corporation is permitted to rely on the president's apparent authority to bind the corporation. *See Cambridge Credit Counseling Corp. v. 7100 Fairway, LLC*, 993 So. 2d 86, 90 (Fla. 4th DCA 2008) (corporation's president had apparent authority to enter into guarantee of commercial lease as part of assignment to tenant); *Protection House, Inc. v. Daverman and Associates*, 167 So. 2d 65, 67 (Fla. 3d DCA 1964) (president of two corporations had apparent authority, either express or implied, to bind the corporations to a contract with architect to prepare plans and supervise construction of building for one corporation and an oral assignment of a contract to the other corporation); *see also Pan-American Const. Co. v. Searcy*, 84 So. 2d 540, 544 (Fla. 1956) (citations omitted) ("We have held that in a proper case the signature of the president of a corporation may bind the corporation, under the doctrine of inherent powers. These powers are 'in reality one form of apparent powers, *i.e.*, powers apparent from the very nature of the office.'").

Although there is no case law directly on point in Florida, other jurisdictions have applied agency principles to determine whether an agent with authority to

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contract on behalf of a tribe had apparent authority to waive sovereign immunity. *See Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402, 408 (Colo.Ct.App. 2004) (applying Colorado agency principles to hold that the chief financial officer of the Ute Tribe had apparent authority to waive the tribe's sovereign immunity without approval from the tribal council). The *Rush Creek* court held:

> The words, actions, and other described conduct of the Tribe, reasonably interpreted, would and did cause Rush Creek to believe that the Tribe consented to have the contract and waiver signed on its behalf by the CFO. The CFO held himself out as the Tribe's agent and acted at least with apparent authority in assenting to the contract and the waiver therein. Rush Creek relied to its detriment upon the apparent authority of the CFO. Hence, we conclude as a matter of law that the CFO had apparent authority to sign the contract and waive the Tribe's sovereign immunity.

Id. at 408;[2] *see also 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, 181 L.Ed.2d 736 (2012) (adopting the reasoning of *Rush Creek,* the Nebraska Supreme Court applied Nebraska agency law principles to conclude that the Omaha Tribe of Nebraska's

[2] The *Rush Creek* court found that just because Supreme Court precedent requires that waivers of sovereign immunity must be express, it does not follow that "the authority to sign waivers cannot be established by apparent authority." *Id.* at 407; *see also id.* at 406 ("The statement in the Tribal Chairman's affidavit that the CFO did not have authority from the Tribal Council to waive sovereign immunity goes only to disprove express authority; it is not relevant in determining the existence of apparent authority, nor does it negate or prohibit the existence of apparent authority.").

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chairman and vice-chairman had apparent authority to waive the tribe's sovereign immunity without a resolution from the tribal council).

Here, the trial judge did not acknowledge the *StoreVisions* case, and disregarded the holding in *Rush Creek* because the tribe's constitution in *Rush Creek* was silent as to the requisite procedures for waiving sovereign immunity. According to the Trial Court, this lack of procedures was "an important distinction for the decision here" because "the STOFI Charter required a Board of Directors specific resolution authorizing a waiver" of sovereign immunity and the LOI which was approved by resolution did not authorize it. *See* R.1029, ¶ 44. The STOFI Corporate Charter does not require any resolution for STOFI to waive sovereign immunity. To the contrary, the Amended Corporate Charter of STOFI provides:

> Article VI – Corporate Powers
>
> Section 9. To waive sovereign immunity from suit but only if expressly stated by contract . . .

R.228. The Contract expressly and clearly waives sovereign immunity.

Also, the Trial Court's rationale is flawed since a party relying on apparent authority is not required to check the corporate documents to determine the limitations of the apparent authority or the corporate guidelines. This would vitiate the entire concept of apparent authority.

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Instead, the Trial Court relied on *Contour Spa at the Hard Rock. Inc. v. Seminole Tribe of Florida*, 692 F.3d 1200 (11th Cir. 2012), a case involving whether the Seminole Tribe waived its sovereign immunity when it entered into a lease agreement with the owner of a spa. There, the plaintiff appealed dismissal due to the Seminole Tribe's sovereign immunity. *See* 692 F.3d at 1201. In that lease, the Seminole Tribe expressly waived sovereign immunity for default or breach of the lease agreement. *Id.* at 1202. The lease's validity was conditioned upon approval by the Secretary of the Interior and it incorporated by reference the regulations prescribed pursuant to 25 C.F.R. Part 162. *Id.* Although the Seminole Tribal Council submitted the lease to the Secretary of the Interior for approval, it was never approved. *Id.* The plaintiff alleged, however, that the Seminole Tribe knowingly made false oral and written assertions that the lease was valid, and that it then spent more than $1.5 million to design, build and open the spa. *Id.*

On appeal, the plaintiff argued that "equitable principles should hold the [Seminole] Tribe to its express waiver of sovereign immunity, even though the lease containing that waiver is plainly invalid as a matter of law since the Secretary of the Interior never approved it." 692 F.3d 1204. The Eleventh Circuit disagreed, and found that estoppel cannot compel enforcement of a contract's provisions when the contract is rendered legally invalid by operation of federal law. In particular, the appellate court explained:

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> Contour has provided us with no support for its claim that the Seminole Tribe is somehow estopped from asserting the invalidity of the lease agreement in its entirety. Indeed, Contour's own brief concedes that because "the Secretary of Interior did not approve the long term lease contract . . . the waiver of sovereign immunity contained in that lease is not binding." We are, therefore, unpersuaded by Contour's equitable estoppel argument, and join our sister circuits that have addressed similar arguments in holding that estoppel cannot compel enforcement of any of a contract's provisions when the contract is rendered legally invalid by operation of federal law.

Id. at 1210. Based upon the holding in *Contour Spa*, the Trial Court found that the waiver of sovereign immunity in the MMMG Operating Agreement (Exhibit "B" to the Amended Complaint) was "void and ineffective as against STOFI and the STOFI defendants acting within the scope of their duties on the council." R.1029, ¶ 44.

The Trial Court's reliance on *Contour Spa* was erroneous for a number of reasons. First, *Contour Spa* is not analogous to the instant action. Contour Spa concerned waiver by the Seminole Tribe, not STOFI which is a federally chartered entity, separate and distinct from the Seminole Tribe. Moreover, the lease at issue in *Contour Spa* and the applicable federal regulations and statutes required the approval of the lease by the Secretary of the Interior, which was never actually obtained and thus the lease was legally invalid. The only requirement for a valid waiver in this instance is that the waiver must be clearly and unequivocally expressed, which it was. More importantly, *Contour Spa* did not consider which

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law applies to determine what acts constitute a waiver of tribal sovereign immunity, since the court never addressed the issue because the lease never had approval from the Secretary of the Interior, whereas in this instance, under the MMMG Operating Agreement, STOFI agreed to be governed by Florida law, which recognizes that a president of a corporation is vested with apparent authority.

The Trial Court also mistakenly relied on *Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282 (11th Cir. 2001) as the "prevailing case law on the subject [of apparent authority]." In *Sanderlin*, a former employee of the Tribe brought a disability discrimination action against the Tribe under the Rehabilitation Act (the "Act"). *Id.* at 1284. The plaintiff argued, *inter alia*, that by accepting federal funds via the Act, the Tribe voluntarily waived its right to immunity from lawsuits brought under the Act. *Id* at 1286. However, the Eleventh Circuit disagreed, stating that "Tribal Ordinance C-01-95 deals specifically with the Tribe's sovereign immunity and how a waiver may be affected by tribal leaders." *Id* at 1287. Because the Tribe had enacted specific procedures to follow in order to validly waive its sovereign immunity, the appellate court held that sovereign immunity had not been waived due to a lack of any resolution by the Tribal Council, among other things. *Id.* Like the *Contour Spa* case, *Sanderlin* is not comparable to the facts and circumstances involved in this case. Sanderlin

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concerned waiver by the Seminole Tribe, not STOFI. *Sanderlin* did not involve a contract containing an express waiver of sovereign immunity; rather, in *Sanderlin*, the tribal chief had, on behalf of the Tribe, signed applications for federal funds and agreed to the condition that the tribe comply with section 504 of the Rehabilitation Act of 1973. The appellate court concluded that the applications conveyed nothing more than a promise not to discriminate, but could not be construed as express consent to be sued in federal or state court. *Id.* at pp. 1288–1289. Furthermore, *Sanderlin* did not involve a contract containing a choice of law provision.

In this case, the Amended Complaint alleges, and the record provides that Sanchez held himself out as President, STOFI's agent, and acted at least with apparent authority in assenting to the MMMG Operating Agreement and the waiver of sovereign immunity contained therein. Sanchez signed the MMMG Operating Agreement as STOFI's President after Board approval of the LOI giving Sanchez the authority to proceed with the MMMG business venture. The parties operated under the agreement for approximately 18 months, and STOFI even made numerous performance payments. Sanchez and STOFI did not make any attempt to immediately disavow the agreement, even though Sanchez was notified by a member of the Seminole Tribe that the agreement contained a waiver of sovereign immunity. Arguably, the words, actions and other conduct of Sanchez and STOFI,

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reasonably interpreted, could have caused MMP to believe that STOFI consented to have the agreement and waiver signed on its behalf by Sanchez. However, like the issue of waiver, this issue of apparent authority concerns issues of fact that are not appropriate on a motion to dismiss, and must be left to the jury. *See Taco Bell of Cal. v. Zappone*, 324 So. 2d 121, 123 (Fla. 2d DCA 1975) (citation omitted) ("This issue of apparent authority often presents a mixed question of law and fact, and is one which should be submitted to the jury under appropriate instructions.").

Thus, the issue of whether tribal sovereign immunity has been waived in this case – either by actual or apparent authority – is for the trier of fact, and should not have been determined by the Trial Court on a motion to dismiss. Indeed, because disputed factual issues like this are not appropriate for resolution on a motion to dismiss, in *Mancher,* the Fourth District Court of Appeal reversed the trial court's order granting STOFI's motion to dismiss for lack of subject matter jurisdiction (similarly based upon a claim of tribal sovereign immunity). *See* 708 So. 2d at 328 (a motion to dismiss based on lack of subject matter jurisdiction may go beyond the four corners of the complaint only when it raises a question of law).

In *Mancher*, the plaintiff filed a complaint against STOFI and its agent, Seminole Management Associates, Ltd., alleging that STOFI employed him at a bingo hall operated by them. *See* 708 So. 2d at 328. The plaintiff claimed that as his employer, STOFI negligently hired supervisors. *Id.* Plaintiff also alleged that

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STOFI was subject to the jurisdiction of Florida courts as a federal corporation conducting business in the county of Broward which had waived its sovereign immunity for corporate activities. *Id.* STOFI moved to dismiss the complaint for lack of subject matter jurisdiction. *Id.* In support of its motion to dismiss, STOFI filed sworn affidavits from key members of the Tribe, asserting that the Tribe owned and operated the bingo hall and that STOFI had no connection to it. *Id.* STOFI also argued that both entities were protected from suit by sovereign immunity. *Id.* After a hearing, the trial court in *Mancher* determined that it did not have subject matter jurisdiction over STOFI. *Id*.

The Fourth DCA disagreed and reversed the dismissal order finding "[a] motion to dismiss based on lack of subject matter jurisdiction may properly go beyond the four corners of the complaint when it raises solely a question of law. The questions presented in this case were inherently factual, not legal." *Id.* at 328 (emphasis added). In particular, the Fourth DCA found:

> We recognize that a court may consider affidavits when determining a motion to dismiss under very limited circumstances. These include a challenge of personal jurisdiction, *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla.1989); venue, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. National Bank of Melbourne & Trust Co.*, 238 So. 2d 665 (Fla. 4th DCA 1970); the sufficiency of service of process, *Viking Superior Corp. v. W.T. Grant Co.*, 212 So. 2d 331 (Fla. 1st DCA 1968); forum non conveniens, *Ciba-Geigy Ltd. v. Fish Peddler, Inc.*, 691 So. 2d 1111, 1121 (Fla. 4th DCA), *rev. denied*, 699 So. 2d 1372 (Fla. 1997); **and, finally, subject matter jurisdiction**, *Barnes v. Ostrander*, 450 So. 2d 1253 (Fla. 2d DCA 1984) (involving § 61.1318(2), Fla. Stat. (1983), designed to discourage forum shopping

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> where there is a child custody decree of another state). Here, the motion to dismiss contends that the improper party was sued and that Seminole Tribe, Inc. enjoys sovereign immunity. These issues are not amenable to resolution by motion to dismiss because there are disputed factual questions. The motion itself relies on matters outside the scope of the pleadings.

Id. at 328-29 (emphasis added).

Like *Mancher*, in this case there are numerous factual issues concerning whether STOFI waived its purported right to sovereign immunity. Whether the MMMG Operating Agreement included the waiver language as alleged by Appellants, whether the language occurred by fraud as alleged by STOFI, and whether Sanchez had actual or apparent authority to waive sovereign immunity all involve disputed issues of fact that must be determined by the jury. The *Mancher* decision was binding authority on trial court. *See State v. Hayes*, 333 So. 2d 51, 53 (Fla. 4th DCA 1976) (citations omitted) ("[I]f the district court of the district in which the trial court is located has decided the issue, the trial court is bound to follow it."). Accordingly, the Trial Court's failure to apply the standards set forth in the *Mancher* decision was erroneous and requires that the Trial Court's Order on Motion to Dismiss be reversed.

CONCLUSION

For the foregoing reasons, Appellants/Plaintiffs MMMG, LLC and Mobile Mike Promotions, Inc. respectfully request that this Court reverse the Trial Court's December 15th Order granting Appellee/Defendant The Seminole Tribe of Florida,

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Inc.'s Motion to Dismiss the Amended Complaint, and remand this case to the Trial Court for further proceedings thereon.

DATED: June 22, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the typeface used in this brief is no smaller than 14 point Times New Roman in compliance with Rule 9.210 of the Florida Rules of Appellate Procedure.

By: /s/ Gary S. Phillips
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CERTIFICATE OF SERVICE

We hereby certify that a true and correct copy of the foregoing was served via email this 22nd day of June, 2015, to:

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