IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

NICOLAS A. MANZINI,

Plaintiff,

v.

TALBERT CYPRESS, and
LUCAS K. OSCEOLA,

Defendants.
_____/

CIVIL DIVISION

CASE NO. 24-CV-24670-RAR

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

Defendants Talbert Cypress and Lucas K. Osceola (together, "Defendants"), reply in support of their Motion to Dismiss (D.E. 21) (the "Motion") and state as follows:

1. **Plaintiff Cannot Circumvent Tribal Sovereign Immunity.**

Plaintiff's Response to the Motion to Dismiss (D.E. 27) summarily asserts that Tribal sovereign immunity "does not bar this action" and nothing more. Plaintiff completely fails to explain why the *Ex parte Young* doctrine applies in this case or point to allegations regarding the Defendants' conduct necessary to invoke this narrow and stringent exception to sovereign immunity. Instead, Plaintiff cites to a handful of inapposite authorities that have no bearing on the issues raised in Defendants' Motion.

First is Plaintiff's reliance on *Michigan v. Bay Mills Indian Cmty*., 572 U.S. 782 (2014). *Bay Mills* is not an *Ex parte Young* decision. Rather, Plaintiff's selective quote from the *Bay Mills* opinion is dicta that provides an example – not a holding – the Court used to explain how the *Ex parte Young* doctrine would authorize the State of Michigan to seek injunctive relief against tribal officers operating an unlicensed gaming facility on non-Tribal lands (*i.e.*, on land subject to Michigan law). *Id*. at 796.

As to *Tamiami II*, Plaintiff again cites pages that are not part of the opinion. (*See* D.E. 27 (citing *Tamiami II* at pages 55 and 56). Even still, *Tamiami II* does not provide carte blanche to sue Defendants in their official capacities as Tribal officers as Plaintiff contends. In *Tamiami III*, the Eleventh Circuit admonished the plaintiffs for suing individual tribal members in their official capacity as "a thinly-disguised attempt by Tamiami to obtain specific performance of the Tribe's obligations" to obtain relief ultimately desired against the tribe: "The doctrine of *Ex parte Young* may not be used in this fashion. It is well established that *Ex parte Young* does not permit individual officers of a sovereign to be sued when the relief requested would, in effect, require the sovereign's specific performance of a contract." 177 F.3d 1212, 1225-26 (11th Cir. 1999). *See also Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1296–97 (10th Cir. 2008) ("Where a suit is brought against the agent or official of a sovereign, to determine whether sovereign immunity bars the suit, we ask whether the sovereign 'is the real, substantial party in interest.'" . . . This 'turns on the relief sought by the plaintiffs.'")(quoting *Frazier v. Simmons,* 254 F.3d 1247, 1253 (10th Cir.2001)); *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1160 (9th Cir. 2002) ("[W]e have permitted suits against officials when it is alleged that those officials acted beyond their authority in contravention of constitutional or federal statutory law. Nevertheless . . . a suit may be barred, even if the officer being sued has acted unconstitutionally or beyond his statutory powers, when the requested relief will require affirmative actions by the sovereign or disposition of unquestionably sovereign property.")

In summary, Plaintiff wholly fails to explain why the narrow *Ex parte Young* doctrine applies here nor has he attempted to address the Court's concerns with respect to same raised in its Order to Show Cause. (D.E. 9.) Instead, Plaintiff attempts to make the exception to sovereign immunity the rule by suing Defendants in their official capacities rather than the Tribe itself.

Regardless, Defendants' sovereign immunity plainly bars Plaintiff's purported claims for compensatory damages or other monetary relief. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 119-20 (1984) (holding that the Eleventh Amendment, the source of Tribal sovereign immunity, bars claims for monetary damages). Accordingly, Defendants' sovereign immunity shields them suit and provides a proper basis for dismissal of this action with prejudice.

2. The Court Lacks Federal Question.

Fundamentally, Plaintiff's Amended Complaint asserts various state-law claims that do not require the Court to interpret the IGRA or NIGC resolutions and, therefore, federal question jurisdiction is lacking.

Rather, Plaintiff's Response makes clear that his purported claims arose from Defendants' alleged "fail[ure] to implement and enforce the Tribe's gaming ordinance attached to Defendants motion [to dismiss] as exhibit '1'; *i.e.* they flatly refused [plaintiff's] **demand for restitution of sums converted**." (*See* D.E. 27 at 7, n.5.) (emphasis added). Conversion is a state law claim. Plaintiff's Response further claims that Exhibits 1 through 3 of his Amended Complaint evidence Defendants' wrongful conduct the resolution of which requires this Court to interpret the IGRA. (*See* D.E. 27 at 8.) Yet, none of those exhibits make any reference to the IGRA, let alone require its interpretation. Thus, Plaintiff "is not bringing a cause of action created by federal law" nor has he "establish[ed] that [his] right to relief necessarily depends on resolution of federal law." *Jefferson State Bank v. White Mountain Apache Tribe*, 2011 WL 5833831, at *2 (D. Ariz. Nov. 21, 2011) (quoting *Peabody Coal Co. v. Navajo Nation,* 373 F.3d 945, 949 (9th Cir. 2004)).

Further, Plaintiff fails to meaningfully distinguish *Harris v. Sycuan Band of Diegueno Mission Indians*, 2009 WL 5184077, at *7 (S.D. Cal. Dec. 18, 2009), which held alleged violations of the IGRA do not confer federal question jurisdiction because "the IGRA provides no general

private right of action." (quoting *Hein v. Capitan Grande Band of Diegueno Mission Indians*, 201 F.3d 1256, 1260 (9th Cir. 2000)). The fact that *Harris* was not an *Ex parte Young* action (*i.e.*, there were no tribal officer defendants) has no bearing on whether Plaintiff has stated a federal question by making conclusory allegations of IGRA violations, while having no private right of action.

Further, *Tamiami II* and *Bay Mills* say nothing about the existence of federal questions and do not support the application of *Ex parte Young* under the allegations in the Amended Complaint. *Bay Mills* does not even address the issue of federal question jurisdiction while *Tamiami II* held that a federal question existed because *inter alia* the plaintiff's contract with the Tribe incorporated and was governed by the IGRA such that the alleged breach of the agreement required the court's interpretation of same. *See Tamiami III*, 177 F.3d 1212, 1223 (11th Cir. 1999) (citing *Tamiami II*, 63 F.3d at 1047) ("The *Tamiami II* panel concluded that these claims arose under federal law because the Agreement incorporated—by operation of law if not by reference—the provisions of IGRA and its associated regulations regarding licensing procedures.")

Finally, nothing in the Amended Complaint "requires that th[is] Court interpret discrete provisions of the IGRA and the NIGC regulation [*sic*] insofar as the individual Defendants' unlawful conduct is concerned." (D.E. 27, p. 8-9.) At bottom, Plaintiff alleges that he was shortchanged an indeterminable amount from a kiosk that depicts a sign advising patrons that the machine does not dispense coins and provides patrons with a voucher to retrieve their change from a cashier. (*See* D.E. 12, Exs. 1-3.)

The NIGC Regulation at 25 C.F.R. § 518.5(b)(4) only requires the Tribe to have established dispute resolution procedures in order to obtain NIGC approval for Class II gaming, all of which are set forth in the Tribe's gaming ordinance. (*See* D.E. 21-1, at 15-16) (section titled "Description of Procedure for Resolving Disputes Between the Gaming Public and the Tribe . . . .") That

regulation does not provide Plaintiff with a private right of action simply because he opposes the Tribe's established dispute resolution.

3. The Court Lacks Diversity Jurisdiction.

Plaintiff's argument that this Court has diversity jurisdiction is meritless. In his Response, Plaintiff claims that his Amended Complaint satisfies the amount-in-controversy requirement because it "does not contain any limiting language from which the Court can conclude that his prayer for monetary damages falls below the jurisdictional amount." (D.E. 27, at 9.) From this, Plaintiff argues that Defendants cannot meet the "legal certainty test" for diversity jurisdiction. This is a misstatement of the law. " [W]here jurisdiction is based on a claim for indeterminate damages, the [ ] 'legal certainty' test gives way, and the party seeking to invoke federal jurisdiction bears the burden of proving by a preponderance of the evidence that the claim on which it is basing jurisdiction meets the jurisdictional minimum." *Dibble v. Avrich*, No. 14-CIV-61264, 2014 WL 5305468, at *5 (S.D. Fla. Oct. 15, 2014) (quoting *Federated Mut. Ins. Co. v. McKinnon Motors, LLC*, 329 F.3d 805, 807 (11th Cir.2003)). Here, Plaintiff is alleging that he was shortchanged amounts less than one, so it is inconceivable that he suffered a loss in excess of $75,000.00.

As to citizenship, Defendants refer the Court to the authorities cited in their Motion that clearly establish that Tribal members are citizens of the state in which they reside – here, Florida. Further, Plaintiff's claim that no "court within the Eleventh Circuit" has reached the same conclusion is false. *See Henry-Bey v. Champery Real Estate 2015, LLC*, Case No. 18-80953-CV, 2018 WL 7824482, at *2 (S.D. Fla. Dec. 18, 2018) (quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 n.10 (1987)) ("Moreover, the Supreme Court has stated that Native Americans 'are citizens of the States in which they reside.'").

4. Plaintiff Cannot State a Claim.[1]

Plaintiff cites to *Tamiami II* for the proposition that the IGRA and NIGC regulations create a private right of action for his purported claims arising from Defendants alleged violations of same. Again, Plaintiff misapprehends the holding in *Tamiami II*. As discussed above, *Tamiami II* held that the tribal officers may be amenable to suit based on allegations that they exceeded the limits of Tribal authority limited by the IGRA and NIGC regulations governing the relationship between the Tribe and the plaintiff pursuant to a written contract incorporating those statutory authorities. The Eleventh Circuit in *Tamiami II* expressly ***did not address*** whether the IGRA or NIGC regulations create a private right of action against tribal officers: "We do not reach the question whether, despite the individual defendants' amenability to suit, Tamiami can state a claim for relief against them." *Tamiami II*, 63 F.3d at 1051, n. 72.

Plaintiff's attempt to justify his purported FDUTPA claim underscores the propriety of dismissal. Plaintiff's conclusory allegation that he suffered "actual and compensatory damages" is insufficient to state a claim under FDUTPA. *See Marrache v. Bacardi U.S.A., Inc.*, 17 F.4th 1084, 1099 (11th Cir. 2021) (affirming dismissal of FDUTPA claim because plaintiff failed to allege "specific facts" regarding purported damages sufficient to satisfy notice pleading standard). Additionally, Plaintiff engages in a hair-splitting exercise in a fruitless attempt to avoid FDUTPA's safe harbor provision. Fla. Stat. § 551.121(6) expressly authorizes the payout vouchers that Plaintiff takes issue with and, thus, his FDUTPA claim is barred by the safe harbor provision therein. Finally, Plaintiff has failed to support his purported claims for conversion or unjust

[1] Plaintiff does not address Defendants' argument that he failed to state a claim for declaratory relief in Count II. Accordingly, this argument is not address herein and Count II should be dismissed.

enrichment because he cannot point to a single allegation wherein he claims that he demanded any monies from Defendants and that Defendants refused to return any monies owed to him.

5. The Tribe is a Necessary Party.

Plaintiff's claims that the Tribe cannot be a necessary and indispensable party primarily because it is protected by sovereign immunity that its presence would allow for "summary disposition of all claims alleged in this action." (D.E. 27, at 15.) Ironically, Plaintiff's position underscores the need for dismissal here because, as discussed above, Plaintiff has not alleged any facts sufficient to invoke the narrow *Ex parte Young* doctrine. Further, Plaintiff does not address or even dispute Defendants' argument that the Tribe is necessary and indispensable party because he is seeking relief from the Tribe; nor does he attempt to distinguish the extensive authorities cited in the Motion for the proposition that the Tribes generally are required parties where Tribal officers are named defendants. (*See generally* D.E. 21, § IV.) Plaintiff's improper attempt to seek relief from the Tribe by bringing an action against its Chairman and Vice Chairman only supports dismissal under Rule 19.

6. The Amended Complaint is a Shotgun Pleading.

Count I of the Amended Complaint purports to bring claims for alleged violations of the IGRA, unidentified NIGC regulations, and FDUTPA, as well as Florida common law claims for conversion and unjust enrichment. Plaintiff has not and cannot defend such pleading deficiencies that plainly run afoul of *Weiland v. Palm Beach Cnty. Sheriff's Office*, 792 F.3d 1313, 1323 (11th Cir. 2015). (identifying impermissible shotgun pleadings to include, *inter alia*, those that are "replete with conclusory, vague, and immaterial facts not obviously connected to any particular cause of action" or which "fail[] to "separate into a different count each cause of action or claim for relief").

CONCLUSION

For the reasons stated above, Defendants respectfully request that this Court enter and order dismissing the Plaintiff's Complaint with prejudice or, in the alternative, ordering Plaintiff to fully exhaust its tribal remedies.

Dated: February 26, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 26, 2025 true and correct copy of the foregoing was filed on the Court's CM/ECF filing system and thereby served by email on counsel of record in the service list below.

By: /s/ *Todd Friedman*

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