UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-CV-61048-Dimitrouleas-Rosenbaum

HOLLYWOOD MOBILE ESTATES LIMITED,
a Michigan Limited Partnership,

Plaintiff,

v.

SEMINOLE TRIBE OF FLORIDA and UNITED STATES DEPARTMENT OF THE INTERIOR, DIRK KEMPTHORNE, in his official capacity as SECRETARY OF THE INTERIOR,

Defendants.
_____/

DEFENDANT, SEMINOLE TRIBE OF FLORIDA'S MEMORANDUM OF POINTS OF AUTHORITIES IN OPPOSITION TO PLAINTIFF'S EMERGENCY MOTION FOR PRELIMINARY INJUNCTION AND EMERGENCY ADDENDUM THERETO

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Defendant, Seminole Tribe of Florida, a federally recognized Indian tribe (Tribe), by and through its undersigned attorneys, appearing specially and reserving its right to challenge subject matter jurisdiction on the grounds of tribal sovereign immunity pursuant to Rule 12(b)(1), Fed. R. Civ. P., hereby files this Memorandum in Opposition to Plaintiff's Emergency Motion for Preliminary Injunction pursuant to this Court's order of July 15, 2008, and states as follows:

Supporting Materials: In support of this motion, the Tribe has or will file, in addition to attached exhibits, the Affidavits of Max B. Osceola, Jr., a member of the Tribal Council; Fred Hopkins, Director of Real Estate Services of the Seminole Tribe of Florida and William R. Latchford, Chief of the Seminole Police Department.

Nature of the Claim Asserted: Plaintiff, the Lessee, by assignment, of a 105 acre parcel of tribal trust land which it operated as a mobile home park until July 15, 2008, under Business Lease No. 48 (Lease), seeks an injunction prohibiting the Tribe from re-entering and re-taking the leased land and terminating the Lease for uncured defaults set forth in a notice of default letter dated June 17, 2008, from the Chairman of the Tribal Council of the Seminole Tribe of Florida to plaintiff so that the parties can be ordered to arbitration under an inapplicable provision under the Lease. On July 15, 2008, the Seminole Tribe of Florida re-entered and re-took the premises and terminated the Lease. The Tribe is now operating the premises as a mobile home park. Plaintiff's request for an injunction is now moot.

For the reasons set forth below, the arbitration clause contained in Article 5.G of the Lease, which pertains to agreements required to be reached by the parties under the Lease, specifically does not apply to the remedies under Article 18 of the Lease which pertains to defaults, and is conditioned only upon notice and an opportunity to cure.

Parties: (a.) The Seminole Tribe is a federally recognized Indian tribe. It presently consists of approximately 3300 members and occupies tribal trust and reservation lands in Broward, Hendry, Glades, Collier, Hillsborough and St. Lucie Counties in the State of Florida. These tribal trust lands are legally titled in the name of the United States of America in perpetual trust for the benefit of the Seminole Tribe of Florida. The tribal trust land in issue is a parcel of 105 acres, more or less, located on the Hollywood Reservation of the Seminole Tribe which is utilized as a mobile home park.

(b.) Hollywood Mobile Estates Limited (Lessee) is a Michigan limited partnership, which is the successor-in-interest, by assignment, to the rights, duties and obligations of the Lessee under Business Lease No. 48 (Lease), dated March 11, 1969, between the Tribe and Joseph L. Antonucci, as Lessee, with a scheduled expiration of March 10, 2024. Plaintiff acquired the Lease by assignment dated March 20, 1986 and, until the Tribe re-entered and re-took the leased premises and terminated the Lease for uncured defaults on July 15, 2008, Lessee operated the premises as a mobile home park with the exception of approximately ten (10) acres of valuable undeveloped frontage land located on the west side of State Road 7, South of Stirling Road on the Tribe's Hollywood Reservation.

(c.) The United States of America is legal title holder to all tribal trust land, including the Tribe's Hollywood Reservation, which it owns for the perpetual benefit of the Tribe. Pursuant to a Self Determination Contract between the Secretary of the Interior (Secretary) and the Tribe under Public Law 93-638, the Secretary has delegated the rights, duties and obligations of the United States to the Seminole Tribe with regard to Real Estate management and services, including those pertaining to the leased premises.

The Lease: Under the Lease that is the subject of this civil action, the premises were to be developed, used and operated pursuant to a general plan of development prepared by the Lessee and approved by the Tribe and the Secretary. The general plan of development was to provide for a mobile home park together with commercial facilities, community services and amenities for residents of the park.

Under Article 5 of the Lease, as later modified, the rent to be paid by the Lessee to the Seminole Tribe was 15% of the gross rental income resulting from the operation of a mobile home park or $150,000.00, whichever is greater. The Lessee was also obligated to pay to the Tribe a sum equal to fifteen percent (15%) of the gross profit on the sale of leasehold improvements.

Where the Lessee develops a portion of the leased premises and operates a business or businesses thereon, other than as a mobile home park, Lessee is required to pay a percentage of gross receipts, which is required to be established by mutual agreement. (Article 5.B). Where the parties cannot mutually agree to the rental, the percentage rent is to then "... be established by arbitration between the parties as hereinafter provided." [*See, Articles 5.B and 5.G*] Where the Lessee receives income derived from subleasing or from another authorized use of the leased premises, other than as a mobile home park, the percentage rental rate is to be calculated from a percentage of gross receipts to be established by mutual agreement. Once again, in the event that the Lessor and Lessee cannot mutually agree upon the percentage rental rate, "... then the parties shall utilize those arbitration procedures as outlined in Article 5(G)." [*See, Article 5.C*].

Article 5.G of the Lease contains an arbitration provision applicable solely to those circumstances where the parties are unable to reach an agreement which is affirmatively required to be reached under the Lease, such as those referenced in Article 5.B and 5.C. In circumstances

where the parties cannot reach a required mutual agreement, Article 5.G provides for the following:

> Whenever during the term of this lease the Lessee, the Lessor, and the Secretary are unable to reach an agreement as required by this lease, and it becomes necessary to submit a matter to arbitration for settlement, an Arbitration Board shall be established. Said Arbitration Board shall consist of three (3) persons, one member to be selected by the Lessee, one member to be selected by the Lessor, and the third to be selected by the other two members. If the two members selected by the Lessee and Lessor are unable to agree upon a third member within twenty (20) days after the Lessee and Lessor selections have been made, the senior judge of the Federal District Court for the District wherein the leased premises are located shall select the third member. The cost of such arbitration shall be shared equally by the Lessee and the Lessor. It is further understood and agreed that the Secretary may be expected to accept any reasonable decisions reached by said Arbitration Board but [the Secretary] cannot be legally bound by any such decision which might be contrary to, or in conflict with, the best interest of the Indians or the United States Government. (emphasis added)

By its clear language, the arbitration provision in Article 5.G is not intended to apply to defaults under the Lease. This is clear in Article 18 which addresses defaults under the Lease. Article 18 provides the Lessor and Secretary with an immediate right to resort to self-help or litigation, conditioned only upon notice and an opportunity to cure, whereas the arbitration provision in Article 5.G applies only to situations where the parties are unable to reach an agreement as required by the Lease; it does not apply to defaults. Moreover, the arbitration provision, by its terms, cannot be applied so as to bind the Secretary to any decision which is not in the best interest of the Seminole Tribe and the United States.

The purpose of Article 5.G is clear when read in the context of additional examples of agreements that the parties are required to reach under the Lease that trigger Article 5.G. Two such agreements are discussed above. A non-exclusive list of additional examples are described in the Lease as follows:

(a.) Under Article 14.C, the Lessor and Secretary are not permitted to unreasonably withhold approval of any sublease, assignment or transfer or any other matter requiring approval and agreement pursuant to the provisions of Article 14. Arbitration would be applicable under Article 5.G if the parties cannot reach an agreement.

(b.) Under Article 15, the leased property may not be encumbered without the written approval and agreement of the Lessor and Secretary, which approval shall not be unreasonably withheld. If a dispute arises as to whether the Lessor and Secretary are unreasonably withholding their agreement to an encumbrance, the provisions of Article 5.G would apply.

(c.) Article 16.E, relates to the distribution of insurance proceeds. Article 16.E. expressly states that "[a]ny disagreements arising hereunder shall be resolved by those arbitration procedures hereinbefore described." (emphasis added).

(d.) Article 17 pertains to eminent domain. Where the parties cannot agree upon the apportionment of an eminent domain award, Article 17 provides that any disagreement shall be resolved "... by those arbitration procedures hereinbefore described." (emphasis added).

(e.) Article 20 pertains to future assessments, taxes and fees. Where the parties cannot agree on a levy, such "... levies as may be contested by the Lessee or Sub-Lessee shall be subject to arbitration as otherwise provided in this lease agreement." (emphasis added).

Not unexpectedly, the provisions of Article 18, which pertain to defaults under the Lease, do not require the parties to reach an affirmative mutual agreement like those contemplated in Articles 5.B, 5.C, 14.C, 15, 16.E, 17, and 20. In fact, Article 18 makes no reference at all to arbitration and does not contemplate arbitration. Article 18 provides the Lessor and the Secretary with the direct right, in the event of an uncured default, after notice and an opportunity to cure, to re-enter and re-take the premises, and to terminate the Lease. The provisions of

Article 18 of the Lease, as written, do not contemplate arbitration. It reads, in pertinent part, as follows:

> 18. DEFAULT
>
> ... Should Lessee default in any payment of monies or fail to post bond, as required by the terms of this lease, and if such default shall continue uncured for the period of thirty (30) days after written notice thereof by the Secretary to encumbrancer and Lessee, during which thirty (30) day period encumbrancer and Lessee shall have the privilege of curing such default, or should Lessee breach any other covenant of the lease, and if such breach shall continue uncured for a period of sixty (60) days after written notice thereof by the Secretary to encumbrancer and Lessee, during which sixty (60) day period encumbrancer and Lessee shall have the privilege of curing such breach, then Lessor and the Secretary may either:
> A. Collect, by suit or otherwise, all monies as they become due hereunder, or enforce, ..., Lessee's compliance with any other provision of the lease, or
> B. Re-enter the premises and remove all persons and property there from, excluding the property belonging to authorized sub-lessees, and either:
> (1) Re-let the premises without terminating this lease, as the agent and for the account of Lessee, but without prejudice to the right to terminate the lease thereafter, and without invalidating any right of Lessor and the Secretary or any obligation of Lessee hereunder. ...
> (2) Terminate this lease at any time and even though Lessor and the Secretary have exercised rights as outlined in (1) above. Exercise of this remedy shall exclude recourse to any other remedy.
>
> * * *
>
> No waiver of a breach of any of the covenants of this lease shall be construed to be a waiver of any succeeding breach of the same or any other covenant.

Events of Default. In the Notice of Default letter to plaintiff, the Chairman of the Tribal Council of the Seminole Tribe of Florida gave notice of defaults to plaintiff together with an opportunity to cure. The events of default are described below.

On March 24, 1986, Hollywood Mobile Estates, as Lessee by assignment, entered into a Leasehold Mortgage (**Exhibit "A"**), in which it granted to Michigan National Bank-Oakland (Bank) a note securing payment of the sum of $8,121,600.00. In connection with the mortgage, Lessee executed several additional documents which were later modified and renewed with new

documents unknown to the Tribe. These documents operated to convey to the Bank all of Lessee's right, title and interest in and to the Lease and the leasehold estate arising thereunder, together with all of its right, title and interest in and to all buildings, improvements and appurtances, then standing or thereafter constructed or placed upon any part of the leased premises, including all plumbing, electric light fixtures, as well as fixtures and fittings of any kind in any building and also includes all streets, as well as all present or future leases and rents derived from the demised premises.

The Mortgage executed and delivered by the Lessee to the Bank and the related security documentation, together with subsequent modifications and renewals, purport to collaterally assign all rents generated by the mobile home park, including that portion of the rent consisting of the Seminole Tribe's percentage interest therein, which is expressly not subject to any lien or encumbrance under Article 15 of the Lease. In addition, the Mortgage at page 7 provides, as additional security, a collateral assignment of all rents and income as well as profits from whatever source derived or flowing from the mortgaged property, including all real property and any buildings or structures, then existing or thereafter constructed on the leased real estate, together with any business then or thereafter conducted. The *habendum clause* contained on page 8 of the Mortgage indicates that the leased premises were being conveyed to the Bank "**in fee simple and forever**."

The Mortgage additionally grants to the Bank an unfettered right to enter upon, hold, occupy and enjoy the leased premises, free and clear of all liens and encumbrances. These rights are not made subject to the specific approval of the Tribal Council or the Secretary. Under the terms and conditions of the mortgage, the rights reserved to the Bank in the Mortgage appear to overlook the fact that the beneficial owner of the leased premises is a federally recognized Indian

tribe governed by specific federal laws which pertain to tribal trust land that is in reservation status.

Under the provisions of Section 6(c) on page 15 of the mortgage, the purchaser, in the event of foreclosure, succeeds to all right, title and interest of the Lessee. No mechanism for approval of the purchaser by either the Tribe or the Secretary is referenced in the mortgage, nor is there any evidence that the subject mortgage has been specifically approved by the Tribe or the Secretary pursuant to the provisions of 25 U.S.C. § 81 and 25 U.S.C. § 84 as those statutes were then in effect at the time. This provision also violates the Non Intercourse Act, 25 U.S.C. § 177. Sections 81 and 84 require the Secretary's endorsement, which is conspicuously missing.

Sections 12 and 16 of the mortgage grant to the Bank the right to re-enter the premises in the event of default. Under paragraph 21 of the Mortgage, Lessee granted the Bank, or any one of its employees, agents or attorneys permission to enter onto the leased premises in the event of a continuing default, to the exclusion of the Lessee, in order to permit the Bank to lease, operate, manage or control the leased premises and conduct any business thereon without specific approval of the Tribe or the Secretary. (*See*, Mortgage at Section 21 at pages 30-31).

Paragraph 22, on pages 31 and 32 of the Mortgage provides for receivership in the event of default. Thus, Lessee granted the Bank the right to the appointment of a receiver by any court of competent jurisdiction to take complete charge of, manage and operate the leased property and to collect the rents thereof (to the exclusion of all other parties.) Article 15 of the Lease specifically forbids any encumbrance upon or interference with that portion of the rent that is payable to the Tribe. It also forbids encumbering any part of the underlying trust land. The receivership is authorized to continue until the full payment of all sums owing to the Bank, until title of the property has passed "... by **sale**" under the Mortgage. (Mortgage at page 32). No

provision is made for the Tribe to approve any such sale or the purchaser – no matter how objectionable the purchaser may be -- and no consent is given for the Tribe to allow any conditional or other encumbrance or lien being placed on its percentage of rents or the underlying land. Along similar lines, paragraph 23 of the Mortgage allows the Bank, without the specific consent of the Tribe or the Secretary, to sell the underlying leased property. This provision reads as follows:

> That in the case of any sale by MORTGAGEE under this Leasehold Mortgage, by virtue of judicial proceedings or otherwise, the Property may be sold in one parcel and as an entirety or in such parcels, and in such manner or order as the MORTGAGEE in its sole discretion, may elect.

Although the Lease at page 10 specifically provides that all improvements on the leased property shall become the property of the Seminole Tribe, the Lessee pledged such improvements to the Bank as additional collateral under the Mortgage and granted to the Bank the right to sell the fixtures attached to tribal land in the event of default by deeming them not to be fixtures. (Mortgage at 36). Federal Indian law does not indulge these legal fictions.

In Article 11 of the Lease, the failure and refusal of Lessee to completely develop and productively use the valuable 10 acre frontage on SR 7 deprives the Seminole Tribe of its portion of significant commercial rents which would have been generated if Lessee had honored its obligation to completely develop and use the 10 acres of frontage property. This failure violates Article 11 of the Lease. After Hollywood Mobile Estates consciously decided not to develop and make use of the approximate 10-acres of vacant tribal frontage on State Road 7, the Tribe requested that Hollywood Estates simply return it. After initially agreeing to do so, Lessee then attempted, in writing, to negotiate additional favorable concessions for itself in exchange for its required performance under the Lease. (**Exhibit "B"**).

Lessee also granted as security to the Bank not merely its share of rents derived from the leased property, but all rents from its use of the leased premises. (Mortgage at p. 7). Similarly, the Mortgage provides to the Bank, as security, the following:

> ... all and singular the rents, income, issues, profits and revenue ... from whatever source derived, arising or flowing from the said Mortgaged Property, including ... the real and personal property, or any building or structure now or hereafter placed on said Real Estate, and any business now or hereafter placed on said Real Estate, and any business now or hereafter conducted thereon or herewith, ...(emphasis added)

(Mortgage at 7 – 8). These collateral assignments of rent include the Tribe's percentage rent and violate the provisions of Article 15 of the Lease. Article 15 expressly addresses encumbrances for purposes of capitalization and prohibits any encumbrance on the Tribe's interest in the underlying land and in its portion of the rental payments, including any provision which delays or interrupts the Tribe's receipt of its portion of rental payments:

> An encumbrance under this part may be made by [Hollywood Mobile Estates] for the purpose of borrowing capital for the development and improvement of the leased premises, providing the encumbrance is confined to the leasehold interest of [Hollywood Mobile Estates] and does not in any way jeopardize the [Tribe's] interest in the land and no encumbrance shall be approved which shall provide for the interruption or cessation of rental payments to the [Tribe] in the event of default, forfeiture, foreclosure or other action against [Hollywood Mobile Estates] as provided in the approved encumbrance.

(Lease at Article 15; emphasis added).

Additionally, Lessee purportedly granted to the Bank the right, on default under the Mortgage, to collect and retain all rents up to the full amount of the indebtedness due and owing, prior to honoring any obligation to make any payment of the rent to Seminole Tribe. The pertinent portions of the Mortgage at 31 read as follows:

> ... and the [lender] shall be entitled to collect and receive all earnings, revenues, rents, issues, profits and income of the Mortgaged Property ... the [lender] shall apply the monies ... first to the payment of the principal under the Note and interest thereon, when as the same shall become payable, and

second, to the payment of any other sums required to be paid by [Hollywood Mobile Estates] under this Leasehold Mortgage. (emphasis added).

On or about March 24, 1986, Lessee entered into a collateral assignment of leases, rents and profits with Michigan National Bank which was recorded in Official Records Book 13284, Page 666 of the Public Records of Broward County, Florida (**Exhibit "C"**), wherein it granted to the Bank, as assignee, all of its right, title and interest, in all present or future leases of the property that are the subject of the Lease, together with all security deposits and other collateral securing performance, as well as all rents, issues, profits, revenues, royalties, rights and benefits derived or to be derived from the Lease. Lessee also granted to the Bank, as assignee, an irrevocable power of attorney to demand, receive and enforce payment and to give receipts, releases, satisfactions for and to sue for all sums of monies payable to Lessee under any leases regarding tribal trust property and further granted to the Bank, the right to take over and assume management operation and control of the leased premises.

On October 1, 1993, Lessee and the Bank entered into a modification of mortgage agreement that was recorded in Official Records Book 21346 at Page 0705 and at Page 714 of the Public Records of Broward County, Florida. (**Exhibit "D"**) Under the terms and conditions of this modification, the loan evidenced by the mortgage was renewed with an outstanding principal balance of $6,784,902.27. In paragraph 9(b) on page 4 of the mortgage modification, Lessee granted to the Bank a first mortgage lien upon the Property and collateral therein described. The property referenced in the modification is the underlying tribal trust real property on the Hollywood Reservation of the Seminole Tribe underlying the mobile home park as described in Exhibit "A" that is attached to and made a part of the modification. The Lessee never sought or obtained specific tribal or other consent to encumber the underlying tribal trust property and it is a violation of both Article 15 of the Lease and federal law to do so.

On August 31, 1998, Lessee entered into a second modification of mortgage **(Exhibit "E")** acknowledging that the mortgage encumbers the real property on which the mobile home park is located as well as all leases, rents, assignments and profits relating thereto which are the subject of a collateral assignment to the Bank. This second modification is recorded in Official Records Book 2886 at Page 1214 and Page 1221 of the Public Records of Broward County, Florida. Under the second modification, Section 34 of the mortgage is deleted as to the individual guarantees of the partners and the partnership referred to therein which are rendered void and of no further effect. In paragraph 8 of the second modification, Lessee, once again, granted to the Bank a first lien upon the real property which constitutes tribal trust land upon which the mobile home park is located, including the unused vacant frontage property. This is found in paragraph 8 on page 3 of the second modification of mortgage. The second modification also limits the Bank's collection rights to the real property and other collateral described in the security documents of the Bank's loan since the second modification voids all guarantees by the individual partners and the partnership.

Legal Analysis

The law in the Eleventh Circuit is clear with respect to the showing that must be made for a party to obtain a preliminary injunction:

> A district court may grant injunctive relief only if the moving party shows that: (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause to the opposing party; and (4) if issued, the injunction would not be adverse to the public interest.

Siegel v. LaPore, 234 F.3d 1163, 1176 (11th Cir. 2000) *citing* McDonald's Corp. v. Robertson, 147 F.3d 1301, 1306 (11th Cir. 1998). It is also well settled in this Circuit that:

> [a] preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the "burden of persuasion as to each of the four prerequisites.

Siegel, 234 F.3d at 1176. The grant of a preliminary injunction is the exception and not the rule, and movant must clearly carry the burden of persuasion as to each prerequisite necessary for the court to grant preliminary injunctive relief. Id. *quoting from* Texas v. Seatrain International, S.A., 218 F.2d 175, 179 (5th Cir. 1975).

In this case, plaintiff largely bases its motion for a preliminary injunction upon the limited arbitration provision contained in Article 5.G of the Lease and seeks to preserve the now altered *status quo* so that the Court can order arbitration, even though the arbitration clause is plainly inapplicable to this matter and the Tribe has already re-entered and re-taken the property and has terminated the Lease. The mobile home park is now being operated under new management. While the arbitration provision contained in Article 5.G of the Lease is clearly intended to apply only to those agreements affirmatively required to be reached by the parties in the Lease, as noted above, the clear language of Article 18 regarding defaults under the Lease make it clear that a material default under the Lease is not subject to arbitration. Article 18 expressly permits the Lessor and the Secretary the direct and unimpeded right to re-enter and re-take the leased premises and to terminate the Lease, conditioned not upon arbitration but upon notice and an opportunity to cure. When the Tribe served its Notice of Default and provided an opportunity to cure, Lessee denied that it had breached or defaulted under the Lease. There is no ambiguity on this point, but if there were, the laws of construction require that all ambiguities must be liberally construed and resolved in favor of the Tribe. U.S. v. Nice, 241 U.S. 591, 599 (1916) ("doubtful expressions are to be resolved in favor of the [Indians]"); County of Oneida v. Oneida Indian Nation of New York, 470 U.S. 226, 247 (1985).

In view of the fact that plaintiff cannot meet its burden as to each prerequisite for the granting of a preliminary injunction, plaintiff's motion for preliminary injunction must respectfully be denied.

A. **Substantial Likelihood of Success on the Merits.** Plaintiff cannot show a substantial likelihood that it will prevail on the merits for several reasons. First, plaintiff has clearly failed to use the entire parcel of property as required by Article 11.B of the Lease by neglecting to completely develop and productively use the ten (10) acre frontage for more than twenty (20) years, thereby depriving the Seminole Tribe of fifteen (15%) percent of gross rents that would have been generated through Lessee's productive use thereof. [Affidavit of Fred Hopkins.]

Secondly, the mortgage which Lessee granted to the Bank together with related mortgage documents and subsequent modifications and renewals thereof (Exhibits A and C through E), make clear the fact that Lessee has granted rights to the Bank which clearly violate the Lease and, in some instances, federal law. These include, without limitation, the following:

(a.) The Lessee has granted to the Bank a collateral assignment of all gross rental income including, without limitation, that portion of the percentage rent that belongs to the Tribe in violation of Article 15 of the Lease. In the collateral assignment of all rents, the Bank, Receiver, or an agent of either, is entitled to collect all rents, including that portion belonging to the Tribe, and apply the rent to pay the indebtedness before any payment is made to the Tribe.

(b.) The Bank has security in all buildings, structures, roads, easements and improvements, all of which are an integral part of the underlying tribal trust land and are not subject to a lien or encumbrance under Article 15 of the Lease. This provision also violates the Lease as well as the Non-Intercourse Act in 25 U.S.C. § 177 as well as 25 U.S.C. § 81 and 84, both prior to and after the amendments of March 14, 2000.

(c.) Paragraph 6(c) of the mortgage allows a purchaser at foreclosure to succeed to the rights of Lessee without the specific consent and approval by the Tribe or the Secretary, no matter how objectionable, odious and unworthy the purchaser may be. Additionally, the Bank has the right to have a receiver appointed by a court without the consent or approval of the Tribe and Secretary and the receiver is permitted to take possession of the property, collect all rents and to operate all businesses thereon until title to the mobile home park has passed, by sale, to a purchaser at foreclosure without granting any right to the Tribe to disapprove of either the receiver or the purchaser, no matter how unacceptable the receiver or purchaser may be to the Tribe. These provisions also violate Article 15 of the Lease.

(d.) The individual partners as well as the partnership have been released by the Bank from their guarantees of the mortgage loan, thereby creating a strong disincentive for the partnership to continue to have a personal risk in the operation of the business and to operate it profitably. This was done without the knowledge, consent or approval of the Tribe or the Secretary.

In addition to the foregoing, the Tribe intends to challenge the subject matter jurisdiction of this Court based upon the Tribe's immunity from suit under the doctrine of tribal sovereign immunity. Plaintiff contends that sovereign immunity is unavailable to the Tribe under the authority of C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411 (2001) as standing for the proposition that an arbitration clause (whether applicable or not) constitutes a complete waiver of tribal sovereign immunity. This is simply not the case, particularly since the arbitration provision contained in Article 5.G, allows for arbitration only in those instances where the parties cannot affirmatively reach an agreement required to be reached under the Lease, such as those agreements referenced in Articles 5.B, 5.C, 14.C, 15, 16, 17 and

20. It does not pertain, in any respect, to the language contained in Article 18 regarding remedies for breach and default which entitle the Tribe to immediately re-enter and re-take the premises and terminate the Lease, conditioned not upon arbitration, but upon notice and an opportunity to cure.

In C&L Enterprises, the Tribe proposed and entered into a standard form construction contract for the installation of a roof on a tribally owned commercial building located outside of Indian Country. Unlike the Lease in this case, the contract in C&L Enterprises contains a clause requiring that "[a]ll...disputes...arising out of...the Contract...shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association.... The award rendered by the arbitrator...shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof." Id. at 415. Under the provisions set forth above, Justice Ginsburg, writing for a unanimous Court, held that the arbitration clause pertaining to the resolution of all disputes in the standard form construction contract or an off reservation project constituted a clear and unmistakable waiver of tribal sovereign immunity since: (a) the arbitration clause was applicable to and intended to govern all disputes under the contract, and (b) the Tribe consented to having final judgment entered under Oklahoma law on the arbitral award. The Court held that this clearly meets the standard of a clear, express and unmistakable tribal waiver.

In the Lease that is subject of this civil action, the arbitration provision is extremely limited since the Secretary may not be legally bound by any arbitral award which may be contrary to or in conflict with the best interests of the Indians or the United States government. A further distinction exists with respect to the location of the property. The demised premises in

this case is located on tribal trust land in reservation status whereas the land in C&L Enterprises was not on tribal trust land.

In C&L Enterprises, the court observed that the arbitration clause, unlike the one in this case, required the resolution of all contract related disputes between the parties to be resolved by binding arbitration with the ensuing arbitral award reduced to final judgment in accordance with applicable law, under a choice of law provision. In the Lease now before the Court, there is no provision for governing arbitration rules or for the arbitral award to be reduced to a final judgment in accordance with any choice of law, nor is there any requirement that disputes pertaining to defaults under the Lease be submitted to arbitration for any purpose.

The plain language of the Lease now before the Court does not contain any clear, express and unmistakable agreement on the part of the Tribe to waive immunity so that disputes arising under the Lease, pursuant to Article 18, became subject to arbitration. The language of Article 18 does not lend itself to such an interpretation. Moreover, any alleged waiver of tribal sovereign immunity does not comply with the procedures for waiving sovereign immunity under the Tribal Sovereign Immunity Ordinance, C-01-95. [Affidavit of Max. B. Osceola at Exhibit "B".]

Thus, the substantial difference between this case and C&L Enterprises is that the Tribe did not consent to arbitrate any breach or default under the Lease nor is there any language that purports to say that it did. It is also clear that the Tribe did not consent to the enforcement of any arbitral award in any court or other forum nor did the Tribe unmistakably waive its immunity from suit with regard to any default or breach under the Lease. The position taken by plaintiff asks this Court to disregard the facts, the language of the Lease and to construe C&L Enterprises as authority for the misguided proposition that any reference to arbitration (whether applicable or

not and regardless of context) waives tribal sovereign immunity from suit. C&L Enterprises is distinguishable in every material respect from this case, and plaintiff's position on this issue is unfounded.

Clearly, plaintiff also cannot demonstrate a substantial likelihood of success on the merits. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, 523 U.S. 751 (1998); Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe of Oklahoma, 498 U.S. 505, 509 (1991).

B. **Irreparable Injury.** A showing of irreparable injury is "the *sina qua non* of injunctive relief." Siegel, 234 F.3d at 1176 citing Northeastern Fla. Chapter of the Association of General Contractors v. City of Jacksonville, 896 F.2d 1283, 1285 (11th Cir. 1990). The traditional standard necessary for a moving party is a clear showing that in the absence of the issuance of a preliminary injunction, there is a substantial likelihood that the moving party will suffer an irreparable injury. Siegel, 234 F.3d at 1176 citing McDonald's Corp. v. Robertson, 147 F.3d at 1306. Even where a plaintiff is able to demonstrate a substantial likelihood of success on the merits, the absence of a showing that there is a substantial likelihood that the moving party will suffer irreparable harm would make the grant of a preliminary injunction improper. Snook v. Trust Company of Georgia of Savannah, N.A., 909, F.2d 480, 486 (11th Cir. 1990) (affirming denial of preliminary injunction even though plaintiff established substantial likelihood on the merits where irreparable injury not shown.) A showing of irreparable injury must neither be remote nor speculative but actual and imminent. City of Jacksonville, 896 F.2d at 1177.

C. **Threatened Injury to Movant.** In view of the fact that the movant has an arguable claim for alleged ascertainable damages, it cannot be said that any threatened injury to the movant outweighs the damage that the proposed injunction would cause to the Tribe. As the

Tribe will show, the plaintiff is not only in default under the Lease for the reasons that are set forth herein but the Park is also being run in an unsafe and dangerous manner. As the evidence will show, the failure of management to exercise vigilance in performing background checks for age and criminal history has led to street crime which has been openly taking place in the park, including burglaries, robberies as well as drug dealing and prostitution, both male and female. This causes a significant risk of harm not only to the residents of the Park but also to the surrounding residents who are members of the Tribe residing on the Hollywood Reservation. [Affidavit of William R. Latchford]

Based upon the foregoing, it is respectfully submitted that the plaintiff cannot make the showing necessary to justify this Court in entering a preliminary prohibitory injunction. Accordingly, it is respectfully requested that the motion for preliminary injunction be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-CV-61048-Dimitrouleas-Rosenbaum

HOLLYWOOD MOBILE ESTATES LIMITED,
a Michigan Limited Partnership,

Plaintiff,

v.

SEMINOLE TRIBE OF FLORIDA and UNITED STATES DEPARTMENT OF THE INTERIOR, DIRK KEMPTHORNE, in his official capacity as SECRETARY OF THE INTERIOR,

Defendants.
_____/

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2008, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic filing.

/s/ Donald A. Orlovsky

DONALD A. ORLOVSKY

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Case No. 08-CV-61048 – Dimitrouleas – Rosenbaum
United States District Court, Southern District of Florida

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