CASE NO. 10-10304-I

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

HOLLYWOOD MOBILE ESTATES, LTD.,

Appellant,

vs.

MITCHELL CYPRESS, CHAIRMAN, SEMINOLE TRIBE OF FLORIDA, RICHARD BOWERS, VICE-CHAIRMAN, SEMINOLE TRIBE OF FLORIDA, MAX B. OSCEOLA, JR., ROGER SMITH, AND DAVID CYPRESS, COUNCIL MEMBERS, SEMINOLE TRIBE OF FLORIDA, WILLIAM R. LATCHFORD, CHIEF OF POLICE, SEMINOLE TRIBE OF FLORIDA AND FRED HOPKINS, DIRECTOR, REAL ESTATE SERVICES DEPARTMENT, SEMINOLE TRIBE OF FLORIDA, in their official capacities,

Appellees.

On Appeal of a Final Judgment of the United States
District Court for the Southern District of Florida

APPELLEES' BRIEF

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Hollywood Mobile Estates, Ltd.,

vs.

Mitchell Cypress, Chairman
Seminole Tribe of Florida, et al.
_____/

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, the undersigned counsel for Appellees hereby certifies that the following is a list of persons and entities who may have an interest in the outcome of this case:

INTERESTED PERSONS

1. Bruce S. Rogow, Esq.
2. Bruce S. Rogow, P.A.
3. Cynthia E. Gunther, Esq.
4. Michael P. Hamaway, Esq.
5. Mombach Boyle & Hardin
6. John M. Mullin, Esq.
7. Tripp Scott, P.A.
8. Hollywood Mobile Estates, Ltd., a Michigan Limited Partnership
9. Joseph M .Goldstein, Esq.
10. Shutts & Bowen
11. LaSalle Bank Midwest National Association
12. Marilynn Koonce Lindsey, Esq.
13. United States Attorney's Office
14. United States Department of the Interior
15. Dirk Kempthorne (Secretary of the Interior)
16. Judge William P. Dimitrouleas
17. Magistrate Judge Lurana S. Snow
18. Wilda Wahpepah, Esq.
19. Christine L. Swanick, Esq.
20. Dorsey & Whitney, LLP
21. Spencer M. Partrich (General Partner, Hollywood Mobile Estates)

22. Seminole Tribe of Florida
23. Donald A. Orlovsky, Esq.
24. Kamen & Orlovsky, P.A.
25. John H. Harrington, Esq. (Office of the Solicitor General, S.E. Region)
26. Mitchell Cypress, Chairman, Seminole Tribe of Florida (Defendant)
27. Richard Bowers, Vice-Chairman, Seminole Tribe of Florida (Defendant)
28. Max B. Osceola, Jr., Council Member, Seminole Tribe of Florida (Defendant)
29. Roger Smith, Council Member, Seminole Tribe of Florida (Defendant)
30. David Cypress, Council Member, Seminole Tribe of Florida (Defendant)
31. William R. Latchford, Chief of Police, Seminole Tribe of Florida (Defendant)
32. Fred Hopkins, Director, Real Estate Services Department, Seminole Tribe of Florida (Defendant)

CORPORATE DISCLOSURE

In this regard to "corporate disclosure," there are no publicly traded companies with an interest in the outcome of this matter.

STATEMENT REGARDING ORAL ARGUMENT

This Court has decided a wealth of cases involving the jurisdictional bar of tribal sovereign immunity to unconsented suits against federally recognized Indian tribes and their employees, officials and agents. The Court has also addressed issues arising under Ex parte Young, 209 U.S. 123 (1908). Accordingly, there does not appear to be a compelling reason which requires oral argument regarding the legal issues presented in this appeal. Nevertheless, this case arises from a unique set of facts involving the conflicting rights of a sovereign tribal government and a mobile home park operator under a lease agreement which expressly provides a self-help repossession remedy that forms the apparent basis of an alleged ongoing violation of federal law that has not been specifically identified. In view of the foregoing, oral argument may assist the Court in determining whether subject matter jurisdiction should be evaluated and considered under Ex parte Young, 209 U.S. 123 (1908).

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STATEMENT OF JURISDICTION

Appellees, referred to as the Tribal Council Defendants would respectfully assert that the District Court was without subject matter jurisdiction over the claims asserted by Hollywood Mobile Estates Limited (Lessee) and correctly dismissed the claims on that basis because the claims asserted did not meet the Ex Parte Young exception to the jurisdictional bar of tribal sovereign immunity.

STATEMENT OF THE ISSUES

I. Does the Ex parte Young doctrine apply and overcome the jurisdictional bar of tribal sovereign immunity from suit where a complaint for prospective injunctive relief against tribal officials also seeks, as a part of the claim, to compel payment of rental income previously collected by the Tribe.

II. Did the District Court err in dismissing Lessee's claim against the Tribal Official Defendants on tribal sovereign immunity grounds through an incorrect application of the analytical framework of Ex parte Young and its progeny?

STATEMENT OF THE CASE AND THE FACTS

Order Appealed: Lessee appeals from an Order and Final Judgment (Dkt. 15, 17) of the trial court granting the motion of the Tribal Official Defendants to dismiss the Complaint for lack of subject matter jurisdiction pursuant to Rule 12 (b)(1) Fed. R. Civ. P. on the grounds of tribal sovereign immunity.

The Tribal Parties: The Seminole Tribe of Florida (Tribe) is a federally

recognized Indian tribe that consisted of approximately 3,300 enrolled members at the time the action was filed against the Tribal Official Defendants. It occupies tribal trust and reservation lands in Broward, Hendry, Glades, Collier, Hillsborough and St. Lucie Counties in the State of Florida. The named Appellees referred to herein as the Tribal Official Defendants consist of the elected Chairman and Vice Chairman of the Seminole Tribal Council, together with the elected Tribal Council representatives from the Brighton, Big Cypress and Hollywood Reservation communities, each of who have been named in their official capacity. The other named Tribal Official Defendants are the Chief of Police and the Director of Real Estate Services. (Dkt. At 1, 5)

The Tribal Action: This case originates from a lease dispute between the Tribe and Lessee, arising under Business Lease No. 48 (Lease) regarding a parcel of tribal trust land, in reservation status, consisting of approximately 105 acres which is located on the Tribe's Hollywood Reservation (Tribal Action). (Dkt. 5 at 2 and Exhibit D) Approximately 95 acres of this tribal land was, until July 15, 2008, utilized by Lessee as a mobile home park. The remaining 10 acres, which remains vacant and unused, consists of frontage property on a major Broward County commercial corridor. (Dkt 5 at 8-9 and Exhibits D and E).

In its analysis, the trial court in the Tribal Action noted that the arbitration

references in Article 5.G of the Lease do not pertain to defaults under the Lease but rather pertain only to agreements affirmatively required to be reached by the parties under the Lease. Article 18 of the Lease, regarding defaults, expressly allows the Tribe, in the event of default, to exercise self-help remedies, including the remedy of re-entering and taking back the premises and removing all persons (with the exception of sublessees), conditioned *not* upon arbitration, but upon notice and an opportunity to cure, which were given. By virtue of a Self Determination Contract between the United States and the Tribe that originated in the late 1980s pursuant to Public Law 93-638, the Secretary of the Interior (Secretary) delegated to the Tribe all federal functions involving real estate services, with the possible exception of termination of the Lease for the United States. (Dkt. 5 at 2 and Exhibit K)

In paragraph 23 of the complaint in the Tribal Action, Lessee alleges that the Tribe may not enforce a Lease other than through the mechanism provided by 25 CFR § 162.110, without regard to the fact that the Tribe acts pursuant to a government-to-government Self-Determination Contract through which the Tribe fulfills functions previously provided by the Secretary with respect to real estate services and which defines the nature and extent of the Tribe's ability to deal with the enforcement provisions under a Lease. Additionally, 25 CFR § 162.110

provides that the provisions of regulations that authorize the Secretary to take certain action will extend to any Tribe or tribal organization which, like the Tribe, is administering specific programs or providing specific services under a contract entered into under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450. (Dkt. 5 at 3).

Following the Tribe's election to repossess the leased premises, administrative proceedings were commenced. These administrative proceedings are on administrative appeal by the Tribe before the Interior Board of Indian Appeals (IBIA), based upon the December 4, 2008 decision of the Regional Director to decline the Tribe's request to terminate the Lease based upon an administrative finding that no material breach exists under the Lease. The agency decision of the Regional Director does not order Lessee restored to possession, nor does it order the Tribe to pay any sums over to Lessee. (Dkt. 5, Exhibit A of Exhibit A). Lessee has not appealed from the Regional Director's non-final agency decision. As a result, Lessee has failed to exhaust administrative remedies, if any, that were available to it regarding these issues, and has accepted, as final, the terms of the agency decision with respect to the effect of the agency decision on Lessee. The Tribe has filed a timely administrative appeal and is seeking an appellate determination as to whether the Regional Director correctly declined to

terminate the Lease and whether his conclusion -- that Lessee did not materially breach the Lease -- is supportable by the administrative record in which a contrary written finding was made by the Regional Director on September 26, 2008, regarding the issue of breach for which an order to show cause was issued. (Dkt. 5, 3-4 and 7 and Exhibits A and B to Exhibit A).

In view of the fact the agreement to arbitrate in the Lease does not apply to the default provisions of the Lease, the trial court in the Tribal Action held that the Tribe did not waive its sovereign immunity and that Lessee had no likelihood of success on the merits of its claims against the Tribe. (Dkt. 5 at 5 and Exhibit K) Shortly, thereafter, Lessee filed a notice of voluntary dismissal as to the Tribe. (Dkt. 5 at 5 and Exhibit D)

The Tribal Official Defendants and Ex Parte Young: In its Complaint, (Dkt. 1), the Lessee has sued each of the Tribal Official Defendants in an effort to compel them to reinstate Lessee, by way of a mandatory injunction, back into the leased premises in reliance upon a non-final agency decision issued by the Regional Director of the Bureau of Indian Affairs (BIA) declining the Tribe's request to terminate the Lease because of a finding that no material breach exists thereunder. (Dkt. 5 at 5-6) The BIA letter does not, by its own terms, constitute final agency action as to the Tribe, and is presently the subject of an administrative

appeal filed by the Tribe which is presently pending before the IBIA, an administrative appellate review body within the Office of Hearings and Appeals in the United States Department of the Interior. (Dkt. 5 at 6 and Exhibit A) A passing reference is made to the appeal in paragraph 19 of the Lessee's complaint. (Dkt. 1 at 6). Irrespective of the agency decision contained in the Regional Director's letter, the decision is not final as to the Tribe *by its terms*, and remains so pending the conclusion of the administrative appeal and any further appeals to the District Court and the Circuit Court of Appeal under the Administrative Procedures Act, 5 U.S.C. § 701 et seq.

In the complaint, the Lessee seeks not only prospective injunctive relief but also seeks retroactive and compensatory relief, referred to as "restitutionary relief" in the form of a repayment of rents allegedly collected by the Tribe from sublessees during the period from July 15, 2008, to the date of final judgment. (Dkt.1 at ¶ 16, 17, 20, 22 and WHEREFORE clause seeking "restitutionary relief.")

The Tribal Official Defendants filed a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12 (b)(1) Fed. R. Civ. P. based upon the doctrine of tribal sovereign immunity in which the Tribal Official Defendants maintain that since no subject matter jurisdiction exists against the Tribe, which is

the actual the real and substantial party–in-interest, no subject matter jurisdiction exists for the claim against the Tribal Official Defendants. (Dkt. 5 at 5-18). The Tribal Official Defendants also pointed out in their motion that the Tribe had appealed from the agency decision of the Regional Director, since no timely appeal has been filed by Lessee as to any aspect of the form and content of the agency decision. On this basis, the Tribe asserted that Lessee cannot seek to be restored to possession of the leased premises and to be paid the back rents collected by the Tribe if Lessee did not exhaust administrative remedies for this relief in the administrative action in which it participated. The Tribal Official Defendants contend that while the agency decision of the Regional Director consists of a written refusal to grant the Tribe's request to terminate the Lease, the agency decision does not purport in any way to compel or request the Tribe to restore Lessee to possession of the leased premises. It merely declines the Tribe's request to terminate the Lease based upon a finding that no material breach of the Lease exists. (Dkt. 5 at 5-7).

The Tribal Official Defendants maintain that by not filing a timely notice of appeal from the Regional Director's agency decision in the letter of December 4, 2008, the agency decision *became final agency action as to the type of relief sought by Lessee*, thereby precluding Lessee from seeking the same relief in the

trial court based upon the alleged failure of Lessee to exhaust administrative remedies on the same relief before the trial court. (Dkt. 5 at 5-8 and Exhibit A). (Dkt. 5 at 6-7).

In their jurisdictional motion, the Tribal Official Defendants contend that even if subject matter jurisdiction existed with respect to an action against the Tribal Official Defendants, Lessee's claim against the individual Tribal Council members would be insufficient since no action has been brought against the individual Tribal Council members, collectively, as and constituting the Seminole Tribal Council. The Tribal Official Defendants assert that even in their official capacities, they do not individually steer the tribal government unless they are acting collectively in a quorum as the Tribal Council, properly convened in legal session, in accordance with the constitutional mandates of the Amended Tribal Constitution and By-laws. (Dkt. 5 at 6-7 and Exhibit B). They also assert that absent a directive from the Tribal Council, embodied in a resolution duly enacted in legal session, the Chief of Police and the Director of Real Estate Services are powerless to take any discretionary action to restore plaintiff to possession of the subject premises. (Dkt. 5 at 6 and Exhibit B at Article V, Section 9(a) and Article IV, Sections 1-2 and By-laws at page 11).

The Underlying Dispute: As a result of what the Tribe maintains are uncured defaults about which Lessee was notified and given an opportunity to cure in a letter dated June 17, 2008, from Chairman Mitchell Cypress, the tribal government elected to avail itself of self-help remedies provided under Article 18 of the Lease by re-entering and taking back the leased premises upon Lessee's written refusal to cure or even address the defaults set forth therein. Lessee then filed suit against the Tribe in the Tribal Action seeking an emergency injunction to prevent the Tribe from re-entering and taking the premises in order to force the Tribe into arbitration under Article 5.G of the Lease. This issue was extensively briefed and argued before the trial court in the Tribal Action in connection with the Lessee's emergency motion for preliminary injunction which the trial court denied, based upon its finding of a clear inability of Lessee to demonstrate a substantial likelihood of success on the merits of its case. (Dkt. 5 at 8-9 and Exhibits K and E through J).

The specific events of lease default asserted by the Tribe are in the record and are not itemized here; however, the Tribe maintains that it acted in accordance with self-help repossession rights contained in the Lease and has filed an administrative appeal challenging the finding of the Regional Director of the BIA

that Lessee did not materially default under the Lease. (Dkt. 5 at 8-10 and Exhibits A, D-F).

In the Complaint, Lessee has sued each of the individual elected members of the Tribal Council Member Defendants, the Tribal Police Chief, and the Tribe's Real Estate Service Director "…seeking to enjoin them from illegally taking certain leased premises" and compelling them to return the leased premises based upon a non-final administrative decision of the Eastern Regional Director of the BIA which is presently the subject of an administrative appeal in which Lessee is an active participant. (Dkt. 1 at 1-2). Lessee contends that this Court has jurisdiction under 28 U.S.C. § 1331 because Lessee contends that the complaint presents "substantial federal questions in dispute between the parties, and arises under the Constitution, laws and treaties of the United States." (Dkt. 1 at 7 ¶2) However, nowhere within the Complaint is there any reference to an ongoing or other violation of any specific or identified body of federal law. (Dkt. 1) With respect to the Tribal Official Defendants, Lessee contends that the Tribal Official Defendants each make or carry out policy for the Seminole Tribe, the named Lessor under the Lease. (Dkt.1 at ¶ 4) Lessee asserts that the Tribe's decision was authorized by the individual elected Tribal Official Defendants, a fact which appears contradicted by Article V of the Amended Constitution and Bylaws of the

Seminole Tribe of Florida (Dkt. at 5 and Exhibit B) defining the powers of the Tribal Council in the context of a collective body that may only act, as such, as constitutionally prescribed pursuant to resolutions duly enacted in legal session by a majority vote of a quorum of elected members, and subject to revocation by tribal member referendum. (Dkt. 1, 5).

While the Tribe's action in retaking and removing Lessee from tribal trust land that is subject to a long term lease could arguably constitute a claim for breach of lease and/or wrongful repossession for which a claim for ascertainable money damages and legal remedies may lie, Lessee's allegations do not reference or identify any specific body of federal law which serves to transform an alleged breach of lease into an ongoing violation of federal law. The only passing reference to federal law is contained in paragraph 23 of the Complaint wherein Lessee references 25 U.S.C. § 450 f(a)(2)(E) for the proposition that a Tribe may not grant a lease without Secretarial approval or exercise the approval or termination function of the Secretary. The provisions of 25 CFR. § 162.110 are referenced as the mechanism for enforcing the terms of a lease; however, no real reference is made to the fact that the Tribe has entered into a Self Determination Contract to provide those federal services which were previously provided directly by the BIA. Nevertheless, Lessee has made no reference to an underlying violation

of federal law that transforms the retaking of tribal trust land that is subject to a commercial lease between a Tribe and a non-tribal party from an arguable action for breach of lease (for which the Tribe contends there is an adequate legal remedy in damages) into an ongoing violation of federal law./[1]

In the action before the trial court, the parties briefed the issues relating to the doctrine of Ex Parte Young as an exception to the jurisdictional bar of tribal sovereign immunity. In the final analysis, the trial court determined that Lessee's claims remain barred on jurisdictional grounds and that Lessee's claim does not meet the test for the Ex Parte Young exception to apply. (Dkt. 15 and 17).

SUMMARY OF THE ARGUMENT

The trial correct dismissed the Lessee's claim against the Tribal Official Defendants for lack of subject matter jurisdiction under Rule 12 (b)(1), Fed. R. Civ. P. based upon the sovereign immunity of the Tribe and the Tribal Official Defendants from suit. Properly viewed, Lessee's suit against the Tribal Official Defendants is, in actuality, a claim against the tribal sovereign, which is the real,

[1]/ The party seeking to invoke federal jurisdiction bears the burden of establishing that subject matter jurisdiction exists. Scott v. Breeland, 792 F.2d 925, 927 (9th Cir. 1986). It has long been settled that an action will be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction if the claim does not arise under the Constitution or the laws of the United States, there is no case or controversy or the case is not one prescribed by any jurisdictional statute. Baker v Carr, 369 U.S. 186 (1962).

substantial party in interest.

In this case, Lessee is attempting to do directly that which it could not do directly in the Tribal Action. Where, as here, an action is brought, in effect, against a sovereign tribal government, any action against tribal officials must be dismissed on tribal sovereign immunity grounds for lack of subject matter jurisdiction unless it can be shown that the Tribe has clearly, expressly and unmistakably waived its immunity from suit through the deliberative act of its Tribal Council, or that tribal sovereign immunity has been clearly, expressly and unmistakably abrogated by an Act of Congress. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998); Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe of Oklahoma, 498 U.S. 505, 509 (1991); Sanderlin v. Seminole Tribe of Florida, 243 F. 3d 1282 (11th Cir. 2001).

Tribal sovereign immunity will likewise operate as a jurisdictional bar to civil actions asserted against tribal officials whose acts are within that degree of authority which the Tribe is lawfully capable of bestowing upon the tribal official. *See*, Tamiami Partners, Ltd. et al v. Miccosukee Tribe of Indians of Florida, 177 F.3d 1212, 1225 (11th Cir. 1999); *see also*, Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 479-480 (9th Cir. 1985).

The limited application of the Ex parte Young doctrine, as an exception to

the bar of tribal sovereign immunity, involves a four part analytical framework. That four part framework as applied to tribal officials is as follows: (a) whether the action is truly against the tribal officials or is in actuality against the tribal government itself; (b) whether the alleged conduct of the tribal officials, sued individually, constitutes a violation of federal law; (c) whether the relief sought is permissible prospective injunctive relief or such relief as more analogous to a retroactive award of damages impacting the tribal treasury; and (d) whether the suit rises to the level of implicating "special sovereignty interests". Chafin v. Kansas State Fair Board, 348 F.3d 850, 866 (10th Cir. 2003) *citing* Robinson v. Kansas, 295 F.3d 1183, 1191 (10th Cir. 2002). Applying this framework to the case now before the Court, Lessee's claim is jurisdictionally infirm and the trial court's dismissal should be affirmed.

Using the criteria from the Ex parte Young analysis, the jurisdictional infirmities of Lessee's claim become apparent. The Supreme Court has applied Ex parte Young to allow suits for prospective equitable relief against a state officer to enjoin **future** violations of federal law, **but has consistently prohibited any retroactive or compensatory relief**. Edelman v. Jordan, 415 U.S. 651 (1974) (relief that includes retroactive payments, even if brought against a tribal official, is actually a suit against the tribe and is barred by tribal sovereign immunity).

Thus, Lessee's claim for "restitutionary relief" in connection with rents previously collected immediately serves to take this case outside of the framework. In addition, although the purpose of the doctrine is to create an exception to the bar of tribal sovereign immunity to enjoin future violations of federal law, Lessee has yet to reveal the precise federal law that is in jeopardy of future violation. Lessee's claim is also focused upon the tribal treasury and tribal assets rather than upon the Tribal Official Defendants.

Based upon the foregoing, the Seminole Tribe would respectfully submit that the trial court's dismissal on jurisdictional grounds should be affirmed.

ARGUMENT

The Bar of Tribal Sovereign Immunity: In both civil actions, the trial court found that Lessee would not be entitled to an injunction against the Tribe or the Tribal Official Defendants because the trial court lacks subject matter jurisdiction based upon the doctrine of tribal sovereign immunity. As a sovereign tribal government, the Tribe, as well as its tribal officials are immune from unconsented suit in all state and federal courts, absent a clear, express and unmistakable waiver of immunity by the Tribe through the deliberative act of its constitutionally constituted governing body, or the clear, express and unmistakable abrogation of immunity by Congress. Kiowa Tribe of Oklahoma v. Manufacturing Technologies,

Inc. 523 U.S. 751 (1998); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978); Sanderlin v. Seminole Tribe of Florida, 243 F.3d 1282, 1285 (11th Cir. 2001). *See also*, Seminole Tribal Sovereign Immunity Ordinance, C-01-95, (Dkt. 5, 14-17 and Exhibit C), *see also*, (Dkt. 5 at Exhibit K). This includes Lessee's present attempt to sue individual Tribal Council members and other tribal officials in their official capacity for relief that Lessee knows that it cannot seek directly from the Tribe itself.

Where a tribal official, employee or other tribal agent acts on behalf of an Indian tribe in the course of his or her official duties when the conduct in question occurred, that tribal official, employee or agent is likewise immune from suit by a third party by virtue of the Tribe's sovereign immunity. *See*, Tamiami Partners, Ltd. et al v. Miccosukee Tribe of Indians of Florida, 177 F.3d 1212, 1225 (11th Cir. 1999); *see also*, Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 479-480 (9th Cir. 1985); United States v. Oregon, 657 F.2d 1009, 1012, n.8 (9th Cir. 1981); White Mountain Apache Tribe v. Industrial Commission of Arizona, 696 P.2d 223 (Ariz. App. 1985); and Seminole Police Department v. Casadella, 478 So.2d 470 (Fla. 4th DCA 1985) (directing dismissal of a wrongful arrest claim against the Seminole Police Department and an individual police officer).

This case is, in substance, a case against the Tribe which cannot be sued

indirectly, in which Lessee has nominally sued the Tribal Official Defendants. It is a thinly veiled effort by Lessee to attempt to do indirectly what it cannot do directly. Where an action is brought by a third party, such as Lessee, against a tribal official, the action will be dismissed on tribal sovereign immunity grounds where, as here, the suit is, in substance, an action against the tribal sovereign or where, as here, the action seeks to compel the tribal sovereign to act or to fund compensation from tribal assets. State of Oklahoma ex rel. Oklahoma Tax Commission v. Graham, 822 F.2d 951, 957 (10th Cir. 1987) *vacated on other grounds* 484 U.S. 973; Bottomly v. Passamaquoddy Tribe, 599 F.2d 1061, 1067 (1st Cir. 1979); United Nuclear Corporation v. Clark, 584 F. Supp. 107-109 (D.D.C. 1984) (". . . an Indian tribe may not be sued indirectly by making the Tribal Representatives the nominal defendants.")

In this case, Lessee seeks mandatory injunctive relief to restore itself to possession of tribal trust property from which it was removed as a result of the official *deliberative* act of a majority vote of a quorum of Tribal Council Members, acting collectively while in legal session, wherein the Tribal Council authorized the sovereign government of the Tribe to undertake a self-help remedy expressly authorized under Article 18 of the Lease based upon a written notice of default and a written response denying that there was any default requiring cure. By

reconfiguring its prior claim against the Tribe as a claim against each elected individual Tribal Council member (named separately in their official capacities and not collectively), as well as by naming the Tribal Chief of Police and the Tribal Director of Real Estate Services who have no independent authority to act, in any event, without Tribal Council direction or authorization, Lessee's complaint misperceives and inaccurately portrays the acts of the Tribal Council Members pursuant to their charge under the Tribal Constitution.

What Lessee appears to overlook is the fact that under to the Tribe's Amended Constitution and By-laws, none of the named officials has any authority to act individually, without constitutional direction. The elected Tribal Council Members must act collectively, but only when a quorum is assembled and then, only while in legal session and pursuant to a majority vote. (Article V of the Amended By-laws, Dkt. 5, Exhibit B at 11). They have virtually no individual official power. An example is found in Article I, Section 1 of the Tribal By-laws which defines the power of the Tribal Council Chairman as the power to preside over Tribal Council meetings and the power to perform any act specifically delegated to him by the Tribal Council pursuant to a resolution duly enacted by the Tribal Council as a whole in legal session (Dkt. 5 at Exhibit B at 9). The Tribal Police Chief and the Tribal Real Estate Director have no independent discretionary

authority to act. Their charge must come from the Tribal Council and be embodied in a resolution or ordinance duly enacted by the Tribal Council while in legal session. (Article 5, Section 9(a) of the Amended Constitution, Dkt. 5, Exhibit B at 6). The action which Lessee seeks to compel, through a mandatory injunction, are the acts of a tribal government that can only occur if the Tribal Council Defendants, acting collectively in their official capacity, affirmatively vote to make them happen and then delegate authority to the Police Chief and Real Estate Director to carry out the Council's instructions. For this reason, Lessee's request for mandatory injunctive relief and the payment of rents previously collected by the Tribe is clearly, in substance, a suit against the tribal sovereign over which the trial court continues to lack subject matter jurisdiction.

As sovereign governmental entities that predate the formation of the United States, Indian tribes and their officials and agents (through whom tribes must act) are immune from suit by third parties without their consent. Kiowa, *supra;* Cherokee Nation of Oklahoma v. Babbitt, 117 F.3d 1489, 1498-1499 (D.C. Cir. 1997). This immunity does not derive from an act of Congress or an executive order, but rather is one of the inherent powers of limited sovereignty which has never been extinguished. Id. at 1498, *citing*, United States v. Wheeler, 435 U.S. 313, 322 (1978). Following a line of cases that began during the tenure of Chief

Justice Marshall during the early days of Removal Policy, the Supreme Court clarified the doctrine in 1940 to hold that tribes are immune from all types of claims for relief, including those embodied in complaints, as well as compulsory and permissive counterclaims and crossclaims. United States v. U.S. Fidelity Guaranty Company, 309 U.S. 506, 512 (1940), Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 509 (1991). (tribal sovereign immunity operates to bar a counterclaim). "The immunity of tribes from suit is an "established part of our law." Id. at 512-513.

The Constitution vests Congress with exclusive authority and plenary power over relations with Indian tribes. U.S. Const. art. I, Section 8, clause 3; Oneida Indian Nation v. County of Oneida, 414, U.S. 661, 670 (1974). Nevertheless, Indian tribes are regarded as "domestic dependent nations" which, as sovereign governments, possess all aspects and attributes of sovereignty except in those limited circumstances where they have been taken away by Congressional action. Potawatomi, *supra*, 498 U.S. at 509. Despite Congress' plenary power over Indian tribes, and the fact that Congress has "always been at liberty to dispense with… or limit it," Congress has utilized great restraint in the exercise of its power such that its authorization of suits against tribes has been both "occasional" and "limited." Potawatomi, *supra* 498 U.S. at 510. Even the modest group of statutes affecting

tribes is subject to canons of construction which require that all ambiguities and doubtful expressions be liberally construed in favor of tribes since these canons are rooted in the unique trust relationship between the United States and Indian tribes. Oneida, *supra* at 247. It is against this protective backdrop that suggested exceptions to the doctrine of tribal sovereign immunity must be carefully weighed and measured.

Indian tribes are regarded by the United States as dependent political sovereign governments which possess all aspects and attributes of sovereignty except in those limited circumstances where they have been taken away by congressional action. Id. As an aspect of their sovereignty, Indian tribes and their tribal officials are immune from suit in state or federal courts for actions -- on or off the reservation, whether governmental or commercial -- without the clear and unmistakable waiver of the Tribal Council, in legal session, or a clear, express and unmistakable Act of Congress, neither of which exists in this case. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, 523 U.S. 751 (1998); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-59 (1978); Sanderlin v. Seminole Tribe of Florida, 243 F. 3d 1282 (1th Cir. 2001).

Indian tribes and their agents are considered to have an immunity from suit similar to that enjoyed by the federal government. Namekagon Development

Company v. Bois Forte Reservation Housing Authority, 517 F. 2d 508, 510 (8th Cir. 1975). Moreover, since an Indian tribe's sovereign immunity is coextensive with that of the United States, a third party, such as Lessee, may not maintain an equitable, legal or other claim against an Indian tribe or any of its tribal officials or agents absent a firm showing of an effective waiver which is unequivocally and unmistakably expressed. Ramey Construction Company, Inc., v. Apache Tribe of Mescalero Reservation, 673 F. 2d 315, 319-320 (10th Cir. 1982). A waiver of tribal sovereign immunity may never arise by inference or by implication. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-59 (1978). If a waiver of immunity exists -- by act of the Tribal Council or by act of Congress -- the waiver or abrogation of immunity must be clear, express and unmistakable. United States v. Dion, 476 U.S. 734, 738-739 (1986). Nothing less than unmistakable clarity in the language of the statute will suffice. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985).

In order for a tribal waiver to exist, the claimant must show that the Seminole Tribe, acting through the deliberative act of its Tribal Council, in legal session, knowingly agreed to be subject to the court's jurisdiction in a manner consistent with the constitutional mandates of the Amended Constitution and By-laws of the Seminole Tribe as a sovereign tribal government.

A sovereign tribal government -- which is immune from suit -- may only act through its officials, employees and agents, and the defense of sovereign immunity may not be evaded by the "simple device of suing officers in their individual capacity." John v. Hoag, 500 N.Y.S. 2d. 950, 954 (N.Y. Supp. 1986); *see also*, Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 688 (1949). (The sovereign can only act through agents); State of Oklahoma v. Graham, 822 F.2d 951, 957 (10th Cir. 1987), *vacated on other grounds*, 484 U.S. 973; Bottomly v. Passamaquoddy Tribe, 599 F.2d 1061, 1067 (1st Cir. 1979); United Nuclear Corporation v. Clark, 584 F. Supp. 107-109 (D.D.C. 1984); Kenai Oil & Gas, Inc. v. Department of Interior, 522 F. Supp. 521, 531 (D. Utah 1981); ("tribal immunity may not be evaded by suing tribal officers. . . .") *aff'd* 671 F.2d 383 (10th Cir. 1982). Here, Lessee's claim against the Tribal Official Defendants should be dismissed as it is, in reality, a claim against the tribal sovereign, brought in an effort to circumvent the dismissal of the Tribe in the Tribal Action. The fact that the Lessee is now seeking to obtain mandatory injunctive relief to compel the Tribal Official Defendants to take action which Lessee previously sought in the administrative proceedings and which were not in the BIA order that is now on administrative appeal by the Tribe, lends no assistance to Lessee's position in this case since Lessee has not appealed from the agency decision and, accordingly, has

not exhausted administrative remedies on the same issues that are now before this Court.

By failing to file a timely administrative appeal regarding agency action which did not provide the relief sought by Lessee in those proceedings, Lessee cannot now seek the same relief from the court as Lessee has failed to exhaust administrative remedies regarding the relief sought. Accordingly, no jurisdiction exists to consider the issues now raised by Lessee, either as to the Tribe or as to Tribal Officials. *See*, Stock West Corporation v. Lujan, 982 F.2d 1389, 1394-1395 (9th Cir. 1993) ("Stock West was undoubtedly required to take an administrative appeal from the BIA Area Director's decisions…before seeking judicial review….Stock West will not be able to obtain IBIA review of the merits of the BIA decisions because, according to the IBIA, the time in which Stock West could bring administrative appeals has elapsed.") Thus, the failure on the part of Lessee to exhaust administrative remedies in administrative proceedings in which it fully participated as to the relief now being sought furnishes an additional jurisdictional basis for dismissal.

Tribal Sovereign Immunity and the Ex parte Young Doctrine: Lessee contends that under the very limited and narrow doctrine of Ex parte Young, 209 U.S. 123 (1908), Lessee's claims against the Tribal Official Defendants overcomes

the jurisdictional bar of tribal sovereign immunity. In order for that to be so, the court must determine whether the Complaint alleges an ongoing violation of federal law and seeks relief properly described as prospective injunctive relief. Verizon Maryland, Inc. v. Public Service Commission of Maryland, 535 U.S. 635, 645-646 (2002).

The Ex parte Young doctrine involves a four part analytical framework for determining whether the jurisdictional bar of tribal sovereign immunity should be overcome. As applied to tribal officials, the test is as follows: (a) whether the action is truly against the tribal officials or is, in actuality, against the tribal government itself; (b) whether the alleged conduct of the tribal officials, sued individually, constitutes a violation of federal law; (c) whether the relief sought is permissible prospective injunctive relief or whether such relief is more analogous to a retroactive award of damages impacting the tribal treasury; and (d) whether the suit rises to the level of implicating "special sovereignty interests." Chafin v. Kansas State Fair Board, 348 F.3d 850, 866 (10th Cir. 2003) *citing* Robinson v. Kansas, 295 F.3d 1183, 1191 (10th Cir. 2002). Applying this framework to the case now before the Court, Lessee's claim is jurisdictionally infirm the trial court's order of dismissal should be affirmed. The Tribe's analysis under this standard is as follows:

(a) Whether the action is truly against the tribal officials or is in actuality against the tribal government itself.

Where a suit is brought against an official or agent of a sovereign to determine whether sovereign immunity bars the suit, the court must ask whether the sovereign is the real, substantial party-in-interest. The answer to this question turns on the nature of the relief sought. Native American Distributing v. Seneca-Cayuga Tobacco Company, 546 F. 3d 1288, 1296 (10th Cir. 2008) *quoting* Frazier v. Simmons, 254 F.3d 1247, 1253 (10th Cir; 2001). The general rule is that relief sought nominally against an officer in his individual capacity is, in fact, against the sovereign if the decree would operate against the sovereign. Id. *quoting* Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 101 (1984). Where the suit seeks monetary damages from the officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, sovereign immunity does not bar the suit, **so long as the relief is sought not from the sovereign's treasury**. Native American Distributing, *supra, quoting* Alden v. Maine, 527 U.S. 706, 757 (1999). Here, the money sought by Lessee would come directly from the same Tribal Treasury where it was placed, and the mandatory injunction sought by Lessee attempts to force the Tribe, not the individuals, to restore Lessee to possession of tribal property under a Lease in which the Tribe is

the named Lessor. Thus, the requested relief operates directly and substantially against the Tribe.

(b) Whether the alleged conduct of the tribal officials, sued individually, constitutes a violation of federal law.

Under Ex parte Young, the suit must be brought against the tribal official who has the requisite connection to the challenged action. *See*, BSNF Railway v. Vaughan, 509 F.3d 1085 (9th Cir. 2007). In that case, the court explained that under the doctrine of Ex parte Young, immunity does not extend to officials acting pursuant to an allegedly unconstitutional statute and indicated that the doctrine would be extended to tribal officials who are sued in their individual capacity since "tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law." BNSFRC v. Blackfeet Tribe, 924 F.2d 899, 901 (9th Cir. 1991) *overruled on other grounds* by Big Horn County Electric Cooperative, Inc. v. Adams, 219 F.3d 944, 953 (9th Cir. 2000). The Ex parte Young doctrine is not intended to operate to transform a routine breach of a commercial lease agreement into a continuing and ongoing violation of federal law, the specifics of which Lessee has yet to identify in its pleadings or otherwise.

The Supreme Court has applied Ex parte Young to allow suits for prospective equitable relief against a state officer to enjoin **future violations** of

federal law, **but has consistently prohibited any retroactive or compensatory relief**. Edelman v. Jordan, 415 U.S. 651 (1974) (relief that includes retroactive **payments**, even if brought against a tribal official, is actually a suit against the tribe and is barred by tribal sovereign immunity). Lessee's claim for reimbursement of rental income collected since July 2008 – which Lessee calls "restitutional relief" – places Lessee's claim squarely outside of the Ex parte Young doctrine. Lessee has not met this burden and has not taken any meaningful steps to inform the court or the Tribe as to the nature of the unidentified and unidentifiable ongoing future violation of federal law upon which Lessee's claim is based. Instead, Lessee seems to suggest that the Court and the Tribal Official Defendants take Lessee's word for the fact that an independent basis for federal jurisdiction exists that does something more than transform what appears to be, at best, an action for breach of a long term commercial lease agreement that expressly permits a self-help remedy of repossession -- into a claim for an ongoing violation of federal law, simply because the Lessor is a federally recognized Indian tribe and its land in reservation status. This does not rise to the level of meeting that part of the Ex Parte Young analytical framework that requires that the facts demonstrate that the elected and non-elected tribal officials have some nexus to the official actions which Lessee contends are on-going violations of federal law. If Lessee's

claim is permitted to stand, breach of contract claims will soon strategically rise to have a constitutional dimension never intended by Congress or the courts.

(c) Whether the relief sought is permissible prospective injunctive relief or analogous to a retroactive award of damages impacting the tribal treasury:

In determining whether Ex parte Young is applicable to a tribal official's claim of immunity, the relevant inquiry is whether the complaint truly seeks prospective injunctive relief. Verizon Maryland, Inc. v. Public Service Commission of Maryland, 535 U.S. 635, 645-646 (2002). The doctrine is only applicable to prevent ongoing and future violations of federal law. Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 101 and 106 (1984).

The Ex parte Young doctrine allows official-capacity claims against individuals to go forward only when prospective non-monetary equitable relief is requested, as an exception to Eleventh Amendment and tribal sovereign immunity. The analysis in Native American Distributing, *supra* and in Fletcher, *supra*, indicate that even when prospective non-monetary relief is involved, the determinative question is whether the relief would, in actuality, run against the Tribe. In this case, the relief sought involves monetary compensation from the Tribal treasury that extends back to July 15, 2008. Moreover, the relief sought is not relief against the tribal officials to prevent future violations of federal law.

Instead, Lessee's claim is a thinly veiled effort to assert a claim that clearly implicates the Tribe by making tribal officials the nominal defendants.

Lessee's claim for "restitutionary relief" appears suspiciously like a claim for money damages. Not surprisingly, such monetary compensation, if paid, would come from the same depository into which it was placed -- the Tribal Treasury. Moreover, the fact that Lessee's claim can be reduced to a monetary amount leads one to the conclusion that Lessee's claim has an adequate remedy at law which makes Lessee's injunction claim appear suspect.

(d) Whether the suit rises to the level of implicating "special sovereignty interests".

In Idaho v. Couer D'Alene Tribe of Idaho, 521 U.S. 261 (1997) (the court held that even when a lawsuit is commenced against state officials and the plaintiff has alleged an ongoing violation of its property rights in contravention of federal law, that, in and of itself, will not be sufficient to invoke the Ex parte Young doctrine if the suit over property interests implicates special sovereignty interests. In Couer D'Alene, the Court suggested that if the relief requested involves the adjudication of property interests (like a quiet title action) that implicate special sovereignty interests, the Ex parte Young doctrine is inapplicable and will not overcome tribal sovereign immunity. Even if a party meets **all of the traditional**

requirements for the application of the Ex parte Young doctrine that does not automatically allow the suit to proceed in federal court. It is clear that the rule in C'ouer D'Alene Tribe requires a more thorough investigation into the nature of the claim, the state's interest and the potential effect of the requested relief in order to determine what sovereign interests the court's decision might affect and whether federal jurisdiction is appropriate.

Lessee ignores the fact that under the protective provisions contained in the Tribal Constitution, none of the individual elected Tribal Council Member Defendants have individual official power, in their capacity, to take action to restore (or to oust) the Lessee to the subject property in conformity with the subject lease. Likewise, none of the individual elected Tribal Council Member Defendants have the individual official power to access funds from the Tribal Treasury. For almost the identical reason, neither the Tribal Police Chief nor the Tribal Real Estate Services Director have non-delegated or discretionary power to provide any relief sought in the complaint unless they are given delegated authority embodied in a resolution duly enacted by the Tribal Council acting as a collective body while assembled in legal session, after notice to tribal membership. This is because the relief requested implicates the special sovereignty interests that derive from constitutional protections which prohibit elected Tribal Council members from

having unrestrained power to act, other than collectively, in or out of legal session. In addition to the foregoing, even duly enacted resolutions and ordinances evidencing the exercise of governmental power are subject to referendum recall by a vote of the tribal membership. The complaint fails to name the elected Tribal Council Defendants, collectively, as and constituting the Seminole Tribal Council which is essential since the Tribal Official Defendants have no singular power in their official capacity to act otherwise. Here, the whole of the Tribal Council is far greater than the sum of its parts.

The powers of the Tribal Council are defined in Article V of the Tribal Constitution. (Dkt. 5 at Exhibit B). Among the powers of the Tribal Council, while acting collectively, are the power to manage, lease or otherwise deal with tribal lands and communal resources of the Tribe in order to prevent the sale, disposition, lease or encumbrance of tribal lands (Article V, Section 3); to administer tribal funds (Article V, Section 5); to adopt resolutions regulating the conduct of tribal affairs (Article V, Section 8); to enact ordinances establishing and governing tribal law enforcement on the reservation and providing for the exclusion of any nonmembers from tribal trust land whose presence may be injurious to tribal members or to the interests of the Tribe (Article V, Section 11) and to promote and protect the peace, safety and general welfare of the Tribe and

its members (Article V, Section 12). The Tribal Constitution expressly prohibits the delegation of these enumerated powers to tribal officials except by ordinance or resolution duly enacted by the Tribal Council while in legal session (Article V, Section 9(a)). Article IV of the Tribal By-laws provides for only two methods for the implementation of governmental acts. All final decisions of the Tribal Council on matters of permanent interest are embodied in numbered ordinances (Article IV, Section 1) and all final decisions of the Tribal Council on matters of temporary or limited interest are embodied in numbered resolutions (Article IV, Section 2). Nearly all actions of the Tribal Council must be made collectively by a majority of the Tribal Council Member Defendants while assembled in legal session.

All authority given and exercised by the tribal government is based upon the concept of actual authority. The doctrine of apparent authority is not a recognized part of tribal commerce in most instances. By way of example, even the Tribal Council Chairman would be powerless to take any singular discretionary official action with respect to Lessee's claims. In Article I, Section 1 of the Tribal Bylaws, the Chairman of the Tribal Council is constitutionally empowered to do the following: (a) preside over all meetings of the Tribal Council; and (b) to exercise any authority specifically delegated to him in a resolution duly adopted by the Tribal Council while in legal session pursuant to Article V, Section 9 of the

Constitution. Beyond that, neither the Tribal Chairman nor any other elected member of the Tribal Council has any individual official power or authority to address any of the acts alleged or relief sought in the complaint. The relief sought necessarily implicates special sovereignty interests that vest governmental power in the collective group action of elected individuals and not in the individuals themselves.

Lessee now seeks to turn its civil breach of lease claim into an unspecified federal claim with a constitutional or *quasi*-criminal dimension. Nevertheless, the claim, as framed, implicates special sovereignty interests of the Tribe which strike at the heart of the Tribe's constitutional government because in order for the Tribal Council to accomplish what Lessee is seeking will require the court to: (a) order the elected members of the Tribal Council into session and (b) compel them to place matters on an agenda contrary to establish procedures for doing so and (c) abandon their own obligations of office to vote affirmatively on matters directed by the court which would be contrary to the interest of the Tribe. Moreover, Lessee is seeking to expand the judicial power to a point where the court would, to accomplish what Lessee is seeking, exercise near total dominion and control over the constitutionally constituted governing body of the Florida Seminoles, thereby assuming plenary power over the Tribal Council -- a power constitutionally

consigned solely to the Congress. U.S. CONST. art. I §8, cl 3. It is respectfully submitted that the Ex parte Young doctrine was never intended to achieve that type of reach, particularly with respect to what amounts to a civil breach of lease claim with ascertainable damages in the first instance.

STANDARD OF REVIEW

The standard of review for the review of a district court's dismissal of a complaint for lack of subject matter jurisdiction under Rule 12 (b)(1) Fed. R. Civ. P. based upon the doctrine of tribal sovereign immunity is *de novo*. Sanderlin v. Seminole Tribe of Florida, 243 F. 3d1282, 1285 (11th Cir. 2001) *citing* State of Florida v. Seminole Tribe of Florida, 181 F. 3d 1237, 1240-41 (11th Cir. 1999); Florida Paraplegic Association v. Miccosukee Tribe of Indians of Florida, 166 F. 3d 1126, 1128 (11th Cir. 1999).

CONCLUSION

Based upon the foregoing, the Tribal Official Defendants would respectfully submit that the claim asserted by Lessee should be dismissed for lack of subject matter jurisdiction as Lessee's claim under Ex parte Young fails to overcome the bar of tribal sovereign immunity.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains _____ words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and this brief has been prepared in a proportionally spaced typeface using Word 2007 in 14-point Times New Roman font.

Respectfully submitted,

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