

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA  
FORT LAUDERDALE DIVISION**

ASKER B. ASKER,  
BASSAM ASKAR,  
KOUSAY ASKAR,  
SHERA ASSHAQ,  
ALEXANDRA ASKAR,  
AWHAM ASKAR,  
JAMES E. GILLETTE, JR.,  
THOMAS HORVATIS, and  
RICHARD WIGGINS,

Plaintiffs,

vs.

SEMINOLE TRIBE OF FLORIDA, INC.,  
AMERICAN EXPRESS COMPANY, and  
The SEMINOLE TRIBE OF FLORIDA  
TRIAL COURT, Hon. Moses B. Osceola,  
Tribunal Chief Judge,

Defendants.

Case No. 0:17-cv-60468-BB

**RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO  
MODIFY/VACATE THE COURT'S ORDER OF DISMISSAL BY DEFENDANT  
THE SEMINOLE TRIBE OF FLORIDA TRIAL COURT,  
HON. MOSES B. OSCEOLA**

Defendant, the Seminole Tribe of Florida Trial Court ("Tribal Court"), Hon. Chief Judge Moses B. Osceola, respectfully submits this Response In Opposition To Plaintiffs' Motion To Modify/Vacate The Court's Order Of Dismissal ("Motion to Vacate") [ECF No. 40].

**MEMORANDUM OF LAW**

It is the Tribal Court's position that it is an indispensable party under Fed. R. Civ. P. 19 to any litigation against Defendant, American Express Company ("American Express"), adjudicating the propriety and scope of the Tribal Court's jurisdiction, including any effort to quash, limit or enforce Tribal Court subpoenas. That inquiry properly belongs in the Tribal

Court in the first instance. *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 856–57 (1985).

There is no relief that Plaintiffs could pursue against American Express in the Tribal Court's absence. Under Rule 19, a person must be joined if "that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may as a practical matter impair or impede the person's ability to protect the interest." Fed. R. Civ. P. 19(a). Plaintiffs have brought this matter specifically alleging that the Tribal Court has no authority to issue a subpoena, and it is the scope of the Tribal Court's jurisdiction, not any action or omission by American Express, that is the entire subject of this federal court case, so the Tribal Court undeniably claims an interest in the subject of the action.<sup>1</sup> Although the Tribal Court takes no position on whether this particular subpoena may be enforced against

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<sup>1</sup> When that person cannot be joined the Court must determine "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed" considering: "(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided... (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder." Fed. R. Civ. P. 19(b). These determinations "must be based on stated pragmatic considerations." *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1280 (11th Cir. 2003) (citing *In re Torcise*, 116 F.3d 860, 865 (11th Cir. 1997)). The Tribal Court itself cannot be joined for reasons of sovereign immunity, although Plaintiffs could bring claims for strictly injunctive relief against Tribal Court officials following exhaustion of tribal remedies. But since Plaintiffs are asking to dismiss the Tribal Court, this distinction is not necessary here. Instead, it is clear that had Plaintiffs not named the Tribal Court and Chief Judge Osceola in their Complaint, the Tribal Court could have intervened and moved to dismiss the action. *N. Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1278 (10th Cir. 2012). It is well-established that an Indian tribe or tribal entity may file a motion "to intervene . . . for the limited purpose of filing a motion to dismiss for failure to join necessary and indispensable parties pursuant to Rule 19 of the Federal Rules of Civil Procedure." *Lebeau v. United States*, 115 F. Supp. 2d 1172, 1174 (D. S.D. 2000). This procedural mechanism is often used by tribes to bring a Rule 19 challenge where, as here, plaintiffs seek to circumvent tribal sovereign immunity by suing non-Indian entities. *Citizens Against Casino Gambling in Erie Cnty. v. Kempthorne*, 471 F. Supp. 2d 295, 312 (W.D.N.Y. 2007), *amended on other grounds*, 06-CV-0001S, 2007 WL 1200473 (W.D.N.Y. Apr. 20, 2007).

American Express – no party has filed a motion to compel or a motion to quash in Tribal Court – the Tribal Court objects to having the question of its subpoena enforcement jurisdiction determined in this Court before the Tribal Court has had a chance to consider the issue in the first instance. *Nat'l Farmers Union Ins. Cos.*, 471 U.S. at 856–57. The jurisdiction of tribal courts to issue third-party subpoenas to non-Indians is an underdeveloped area of law that has serious and growing importance for tribal courts in the conduct of their routine judicial business. It is impossible “in equity and good conscience,” Fed. R. Civ. P. 19(b), to determine the Tribal Court’s subpoena powers in the Tribal Court’s absence, and is inconsistent with the Congressional policy “of supporting tribal self-government and self-determination” through “a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge,” *Nat'l Farmers Union Ins. Cos.*, 471 U.S. at 856–57. *See also Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1499 (9th Cir. 1991) (“Some courts have noted, however, that when the necessary party is immune from suit, there is very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor”); *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1157 (9th Cir. 2002) (dismissing claims on Rule 19 grounds where claims implicated tribal governmental interests).

The Tribal Court has no objection to this Court’s May 4, 2017 “ORDER OF DISMISSAL WITHOUT PREJUDICE Closing Case,” [ECF No. 39] as contemplated by the plain language of Rule 41(a)(1)(A) of the Federal Rules of Civil Procedure. As the Tribal Court explained in its Motion to Dismiss [ECF No. 25], the above-captioned action is barred by tribal sovereign immunity and by Plaintiffs’ failure to exhaust their Tribal Court remedies. But the Tribal Court respectfully requests that this Court deny the Plaintiffs’ Motion to Vacate.

Additionally, the Tribal Court requests that the Court clarify that—because the case is dismissed without prejudice without reaching the important jurisdictional questions raised in the pending motions to dismiss—no order issued in this case should be construed to limit the rights of the Tribal Court to execute its duties as the judicial branch of the Seminole Tribe of Florida in any manner.

In their Motion to Vacate, Plaintiffs have made it clear that they intend to pursue further action against American Express and may plan to raise the entry of a default judgment against American Express as a judgment on the merits, as to American Express, that a Tribal Court subpoena is not valid. The right to make such a determination regarding the Tribal Court's jurisdiction belongs to the Tribal Court in the first instance. *Nat'l Farmers Union Ins. Cos.* The failure of American Express to appear here should not preclude future actions in the Tribal Court or another court to enforce any subpoenas or other judicial orders issued by the Tribal Court.

The Tribal Court has not asked this Court to vacate the default judgment against American Express because the Tribal Court's only interest in this matter is its right to consider questions of its own jurisdiction in the first instance. The question of whether these particular financial documents may be obtained from this particular custodian is only relevant to the Tribal Court and Chief Judge Osceola to the extent that they are called upon to act in their official judicial capacities.

**CONCLUSION**

WHEREFORE, for the reasons stated above, Defendant, SEMINOLE TRIBE OF FLORIDA TRIAL COURT, HON. CHIEF JUDGE MOSES B. OSCEOLA, respectfully requests that this Court deny Plaintiffs' Motion To Modify/Vacate The Court's Order Of Dismissal [ECF No. 40], and clarify that the Court has not issued any judgment in this matter that would preclude the Tribal Court or any other court from enforcing a Tribal Court subpoena.

Respectfully submitted this 5<sup>th</sup> day of May 2017.

/s/ Caran Rothchild

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 5<sup>th</sup> day of May 2017, a true and accurate copy of the foregoing Response In Opposition To Plaintiffs' Motion To Modify/Vacate The Court's Order Of Dismissal By Defendant The Seminole Tribe Of Florida Trial Court, Hon. Moses B. Osceola was filed with the Clerk of the Court via the CM/ECF filing system and electronically served and/or mailed via U.S. Certified Mail to the following:

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