UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

DEFENDANT'S, THE SEMINOLE TRIBE OF FLORIDA TRIAL COURT, RESPONSE IN OPPOSITION TO PLAINTIFFS' RENEWED MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Defendant, the SEMINOLE TRIBE OF FLORIDA TRIAL COURT ("Tribal Court"), by and through its undersigned counsel, respectfully submits this Response In Opposition To Plaintiffs' Renewed Motion For Temporary Restraining Order And Preliminary Injunction ("Preliminary Injunction Motion") [ECF No. 11], and states as follows:

INTRODUCTION

This case is an inappropriate attempt by Plaintiffs to turn a routine discovery dispute over a third-party subpoena for financial records into a federal challenge to the jurisdiction of the Tribal Court. As Defendant Tribal Court explains in its Motion to Dismiss filed

contemporaneously herewith, this case is barred by both the sovereign immunity of the Tribal Court and by the tribal court exhaustion doctrine, which requires parties contesting the jurisdiction of a tribal court to present that issue to the Tribal Court in the first instance.

Plaintiffs also have no grounds for demanding a preliminary injunction when they have failed to make even the most cursory effort to contest the subpoena by more routine methods, such as filing a motion to quash or modify the subpoena or objecting to the subpoena and waiting for a motion to compel. Plaintiffs are, therefore, in no danger of American Express being forced to produce their financial records immediately without first having the opportunity to present their objections – jurisdictional and non-jurisdictional – in court.

FACTUAL BACKGROUND

Defendant Tribal Court incorporates herein by reference the Factual Background from its contemporaneously filed Motion to Dismiss and Memorandum of Law in Support ("Motion to Dismiss").

The critical fact here is that Plaintiffs filed this suit and Preliminary Injunction Motion to challenge the third-party Subpoena Duces Tecum dated February 16, 2017 ("Subpoena"), issued in *Seminole Tribe of Florida, Inc.v. Evans Energy Partners*, 15-cv-0013 (Seminole Tr. Ct.) (the "*STOFI v. Evans Energy* Litigation"), but have not entered an appearance with the Tribal Court or made any effort to challenge the Subpoena in that jurisdiction, on jurisdictional grounds or any other grounds. Declaration from Mr. George S. Wolfe, Jr., Tribal Court Administrator, attached to the Motion to Dismiss as **Exhibit 1**, along with an official copy of the court docket *STOFI v. Evans Energy Partners,* 15-cv-0013 attached to Exhibit 1 as **Exhibit 1-A**. No

discovery motions are currently pending, and the Tribal Court has scheduled a status conference for April 26, 2017. *Id.*[1]

ARGUMENT

"A party seeking a preliminary injunction bears the burden of establishing its entitlement to relief." *Scott v. Roberts*, 612 F.3d 1279, 1290 (11th Cir. 2010). "In considering the propriety of preliminary relief, we consider four factors: (1) whether there is a substantial likelihood that the party applying for preliminary relief will succeed later on the merits; (2) whether the applicant will suffer an irreparable injury absent preliminary relief; (3) whether the harm that the applicant will likely suffer outweighs any harm that its opponent will suffer as a result of an injunction; and (4) whether preliminary relief would disserve the public interest." *Id*.

Plaintiffs have not met their burden here.

A. PLAINTIFFS HAVE NO REASONABLE LIKELIHOOD OF SUCCESS ON THE MERITS.

For the reasons stated in the Tribal Court's Motion to Dismiss, Plaintiffs have no reasonable likelihood of success on the merits. The Tribal Court, as part of the Seminole Tribe of Florida ("Tribe"), has sovereign immunity and may not be sued without its consent. *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Florida*, 692 F.3d 1200, 1204 (11th Cir. 2012). Plaintiffs are also required to present their challenges to the Tribal Court's jurisdiction to 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). The Plaintiffs' remaining claims either fail to state a claim for relief or have no federal subject matter jurisdiction.

[1] The defense of this action is being handled by the Administrative Office of the Seminole Court and outside counsel. Judge Osceola has not reviewed the filings in this matter and his role in this matter has been minimized, along with the role of other employees of the Tribal Court directly involved in the *STOFI v. Evans Energy* Litigation, to avoid any potential for or appearance of prejudice.

At this time the Tribal Court will not comment on the validity of the Subpoena or whether a challenge to it would be successful if that challenge were brought in the appropriate forum.

B. PLAINTIFFS WILL NOT SUFFER ANY IRREPARABLE INJURY.

Plaintiffs will not suffer irreparable injury if an injunction is not granted because the mere issuance of a third-party subpoena does not immediately give rise to any privacy injuries. Plaintiffs are free to contest the Subpoena in Tribal Court, and injury will not result until those proceedings are completed and the Tribal Court issues an order compelling production (which may need to be presented to Florida state court for enforcement). Until these proceedings have been initiated and completed, there is no pressing need for injunctive relief. Even then, there is always the possibility of appeal through the Tribal Court system.

Plaintiffs argue that the "Tribe should be enjoined from enforcing the Subpoena because it seeks private, financial records that are protected by federal law and the Florida constitution." [ECF No. 11 at p. 10]. But there is no motion to compel currently before the Tribal Court, and Plaintiffs have shown no reason why their concerns – including their jurisdictional concerns – would not be properly considered by that court if such a motion were filed. They have not even alleged that the Tribal Court would not handle these discovery issues fairly. [*See* ECF No. 1].

Plaintiffs' concern about the potential disclosure of their financial information is also undermined by their failure to avail themselves of any of the normal mechanisms for challenging a third-party subpoena. [*See* Motion to Dismiss, Exhibit 1-A]. Plaintiffs do not allege, in their Complaint or Preliminary Injunction Motion, that they even contacted the issuers of the Subpoena, let alone attempted to negotiate a narrower scope for the Subpoena or to request an

extension of time so that they could pursue this case without the need for an injunction. [*See generally* ECF No. 1; ECF No. 11].

"[S]elf-inflicted wounds are not irreparable injury." *Second City Music, Inc. v. City of Chicago, Ill.*, 333 F.3d 846, 850 (7th Cir. 2003); *see also* 11A Charles Alan Wright, Mary Kay Kane, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure 2948.1 (2d ed. 2011) ("Not surprisingly, a party may not satisfy the irreparable harm requirement if the harm complained of is self-inflicted."); *GEO Grp., Inc. v. United States*, 100 Fed. Cl. 223, 229 (2011) ("And the court is ill-inclined, at this late hour, to pull GEO's chestnuts out of a fire sparked by its own ill-fated tactical decisions."). Before seeking a preliminary injunction, Plaintiffs have an obligation to take normal steps such as conferring with the issuers of the Subpoena and attempting to narrow it or preparing written objections or even seeking an extension of time. If Plaintiffs are as completely unrelated to the parties and issues in the underlying case as their filings here imply, this should not be difficult.

Requiring Plaintiffs to exhaust their remedies in Tribal Court will not cause them any immediate or irreparable injury.

C. A PRELIMINARY INJUNCTION IS NOT IN THE PUBLIC INTEREST AND THE BALANCE OF HARMS DOES NOT SUPPORT IT.

The Supreme Court has clearly stated that it is the policy of the United States to "support[] tribal self-government and self-determination," and that "[t]hat policy favors 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*, 471 U.S. at 856. "Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review." *Id.* at 857.

Encouraging federal courts to jump in whenever there is a routine discovery dispute involving a tribal court violates that public policy and will only serve to create constant aggravation and delay in both the Tribal and federal court systems. If and when a tribal court demonstrates that it is mishandling a jurisdictional issue, and its appellate courts have had an opportunity to correct the mistake, then it might be the appropriate time for the federal courts to intervene. *Id*. But no such circumstances are present here.

Plaintiffs state that the harm that they will suffer if an injunction is not issued is the "disclosure of personal, financial records," [ECF No. 11, p. 13], but that is not the case. The only harm they will suffer is to present their arguments to the Tribal Court in the first instance. If, ultimately, American Express is compelled to disclose this information, it will be after due consideration and upon a more developed record.

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' Renewed Motion For Temporary Restraining Order And Preliminary Injunction [ECF No. 11].

Respectfully submitted this 3rd day of April 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of April 2017, a true and accurate copy of the foregoing 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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