IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No.: 17-12535-A

ASKER B. ASKER, et al.
Plaintiffs/Appellants,

v.

AMERICAN EXPRESS COMPANY and
SEMINOLE TRIBE OF FLORIDA, INC., et al.
Defendants/Appellees.

Appeal from the United State District Court for the
Southern District of Florida
District Court No.: 0:17-cv-60468-BB

PLAINTIFFS/APPELLANTS' REPLY BRIEF

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SUMMARY OF THE ARGUMENT

The Seminole Tribe of Florida, Inc. ("STOFI") and the Seminole Tribe of Florida Tribal Court, Hon. Moses B. Osceola, Tribunal Chief Judge ("Tribal Court") (collectively the "Tribal Defendants"), have filed Answer Briefs containing a number of arguments that should be rejected by this Court. Most significantly, the arguments advanced in the Answer Briefs fail to adequately address the procedural question on review, which is whether the District Court abused its discretion in dismissing the action outright without allowing the Plaintiffs/Appellants the opportunity to pursue a default judgment against American Express Company ("AMEX").

The Tribal Defendants' arguments attempt to distinguish the case law relied upon by the Initial Brief by claiming the District Court's Order of Dismissal was appropriately premised on a lack of subject matter jurisdiction, including the non-joinder of the Tribal Defendants. This contention should be rejected for several reasons. First, the Order of Dismissal itself contained no rationale regarding subject matter jurisdiction or any other stated reason for dismissal. Instead, the Order on Plaintiffs' Motion to Modify/Vacate the Order of Dismissal contained a few paragraphs describing perceived pleading deficiencies in the complaint, but did not address the Tribal Defendants' non-joinder argument. Second, and more significantly, the District Court did not identify any subject matter jurisdictional

issues that could not be easily remedied by amendment, as pointed out in the Initial Brief. The Appellants are entitled to pursue a default judgment against AMEX in the underlying case, where issues of joinder and jurisdiction should be rightfully determined on proper procedural posture. To rule otherwise will deprive Appellants of their due process rights.

In the alternative, STOFI and the Tribal Court rely on their arguments regarding sovereign immunity, comity, the Exhaustion Principle, and non-joinder. The Answer Briefs contend that Appellants are obligated to exhaust their remedies in Tribal Court, but fail to satisfactorily explain why the exceptions to the Exhaustion Principle do not apply. More importantly, STOFI and the Tribal Court's interpretation of the United States Supreme Court's exceptions to the Exhaustion Principle renders the exceptions meaningless, as it would foreclose the federal court's ability to ever hear and adjudicate disputes over tribal jurisdiction in the absence of affirmative consent by the tribal body. Therefore, this Court should reverse the Order of Dismissal and remand this matter for further proceedings.

ARGUMENT

I. The District Court Is Required to Provide Notice and An Opportunity to Respond Prior to *Sua Sponte* Dismissing an Action, Irrespective of Whether the Decision to Dismiss is Due to Lack of Subject Matter Jurisdiction, and the Tribal Defendants' Papers and Motions Do Not Constitute Notice.

The Rule in this Circuit is unequivocal that before a District Court *sua sponte* dismisses an action, the Court must provide notice to the Plaintiff of its intent to do so. *See Surtain v. Hamlin Terrace Found.*, 789 F.3d 1239, 1248 (11th Cir. 2015) ("Prior to dismissing an action on its own motion, ***a court*** must provide the plaintiff with notice of its intent to dismiss and an opportunity to respond.") (emphasis added). In the face of this clear requirement, the Tribal Defendants make the argument that a perceived lack of subject matter jurisdiction over Appellants' claims against AMEX vitiated the need to provide notice. This argument is without merit for several reasons.

A. The District Court Erroneously Dismissed the Action for Lack of Subject Matter Jurisdiction, and Did Not Give Notice of Its Intent to Do So.

While a District Court may *sua sponte* dismiss an action under Fed. R. Civ. P. 12(h)(3), in this case there was no such rationale given in the Order of Dismissal. *See* Dkt. 39. The District Court's Order gave no indication for the basis of the dismissal, and Appellants believed that the dismissal was simply an oversight. *See* Dkt. 40 (Appellants' Motion to Vacate/Modify requesting reinstatement of case against AMEX, believing dismissal to be an inadvertence). The District Court's initial response was an Order to Show Cause, wherein it requested only "what available relief [Appellants] intend to seek against AMEX." *See* Dkt. 41. The District Court finally elucidated a motivation for dismissal of the action when it ruled

on Appellants' Motion to Vacate/Modify. *See* Dkt. 45. In its Order, the District Court listed a failure to state a claim, and a lack of Article III standing, injury-in-fact, causation, redressability, and the failure to exhaust tribal remedies as the rationale behind dismissal. Contrary to the Tribal Defendants' assertions, these reasons do not justify the Court's *sua sponte* dismissal of the action. In addition to the reasons provided in the Initial Brief, a few additional considerations should be considered by this Court in rejecting the Tribal Defendants' arguments. *See* Initial Brief, at pp. 12 – 14 (Argument demonstrating why District Court's determination of lack of subject matter jurisdiction was erroneous and, at best, cited to possible pleading deficiencies which could be easily remedied by amendment).

First, the District Court's Order of Dismissal failed to assert the alleged lack of subject matter jurisdiction as a basis for *sua sponte* dismissal. As noted previously, the Order of Dismissal gave no indication of perceived pleading deficiencies and the subsequent Order to Show Cause similarly gave no indication that the District Court considered such pleading deficiencies as tantamount to a lack of subject matter jurisdiction. Appellants were not given the opportunity to amend or otherwise brief the issue, and the failure to provide a clear basis of dismissal in the Order of Dismissal deprived the Appellants of their due process rights. See *Carroll v. Fort James Corp.*, 470 F.3d 1171, 1177 (5th Cir. 2006) (*quoting Bazrowx v. Scott*, 136 F.3d 1053, 1054 (5th Cir. 1998)) ("[A] district court can only dismiss

an action on its own motion 'as long as the procedure employed is fair.'"); *see also Tazoe v. Airbus S.A.S.*, 631 F.3d 1321, 1336 (11th Cir. 2011) (Dismissal without following correct procedure is a denial of due process).

Further, the argument advanced by STOFI that the tribal Defendants' Motions and Papers served as adequate notice for procedural purposes is without merit because it is the District Court's responsibility to make its intentions known, not the defendants. *See Surtain*, 789 F.3d at 1248 (11th Cir. 2015) ("Prior to dismissing an action on its own motion, ***a court*** must provide the plaintiff with notice of its intent to dismiss and an opportunity to respond.") (emphasis added). In addition, the Tribal Defendants alleged a variety of grounds for dismissal, including sovereign immunity (which is no longer at issue after voluntary dismissal) and exhaustion of tribal remedies, which was similarly inapplicable to the action.

Finally, STOFI argues that Appellants' failure to move for default judgment prior to dismissal is somehow fatal to this Appeal. This contention is not supported in this Circuit's jurisprudence or in others. *Davoodi v. Austin Indep. Sch. Dist.*, 755 F.3d 307, 311 (5th Cir. 2014) ("Our sister circuits have similarly allowed parties to appeal the improper *sua sponte* dismissal of their claims, even when those parties did not file a Rule 59(e) motion.") (*citing Grant v. Cnty. of Erie*, 542 Fed.Appx. 21, 24 (2d Cir. 2013) (unpublished); *Chase Bank USA, N.A. v. City of Cleveland*, 695

F.3d 548, 557–58 (6th Cir.2012); *Tazoe v. Airbus S.A.S.*, 631 F.3d 1321, 1336 (11th Cir. 2011); *Cepero–Rivera v. Fagundo*, 414 F.3d 124, 130 (1st Cir. 2005)).

Therefore, the District Court erred in dismissing the action *sua sponte* without providing adequate notice or providing a basis for its ruling.

B. A Sua Sponte Dismissal for Lack of Subject Matter Jurisdiction Does Not Deprive Appellants the Opportunity to Contest the District Court's Rulings.

The Tribal Defendants make a related argument that somehow Appellants are precluded from Appealing the dismissal on procedural grounds because of the District Court's later findings that it lacked subject matter jurisdiction over the action. However, the Initial Brief has already contested the District Court's rulings regarding subject matter jurisdiction, and that analysis is properly before the Court in determining whether a *sua sponte* dismissal without notice is justified under the exceptions to the rule. *See* Initial Brief, at pp. 12 – 14. Thus, this Court has properly before it the District Court's findings, which it must review *de novo*. *Nicholson v. Shafe*, 558 F.3d 1266, 1270 (11th Cir. 2009). ("We review *de novo* dismissals for lack of subject matter jurisdiction."). The Appellants have always maintained that subject matter jurisdiction is present in the underlying action and was not a basis for *sua sponte* dismissal and are therefore not precluded from contesting the District Court's findings in conjunction with the general rules regarding lack of notice.

C. Failure to Exhaust Tribal Remedies Is Not a Jurisdictional Bar to Suit.

Finally, the Tribal Defendants appear to contend that the District Court's dismissal for failure to exhaust tribal remedies served as an adequate jurisdictional bar justifying the *sua sponte* dismissal without adequate notice. Aside from the inapplicability of the Exhaustion Principle in this case, discussed *infra*, it is well settled that the Exhaustion Principle does not implicate the District Court's jurisdiction in this matter. *Strate v. A-1 Contractors*, 520 U.S. 438, 451, 117 S.Ct. 1404, 1412 (1997) ("The Court recognized in *Iowa Mutual* that the exhaustion rule stated in *National Farmers* was 'prudential,' not jurisdictional."). Therefore, the rulings on appeal must be reversed to the extent the District Court or the Tribal Defendants' premise the rulings on the alleged failure to exhaust tribal remedies as a jurisdictional bar justifying the sua sponte dismissal without notice.

II. The Tribal Court Is Patently Without Colorable Jurisdiction to Issue or Enforce the Subpoena in Question, and therefore the Tribal Defendants Are Foreclosed from Arguing the Exhaustion Principle and Are Not Indispensable Parties.

The Tribal Defendants' Answer Briefs argue several different, albeit related, arguments in the alternative to the District Court's stated reasons for dismissal in the Order Denying Plaintiffs' Motion to Modify/Vacate, which can be further condensed to the following statement:

> The Tribal Court must decide matters of its own jurisdiction, and because Appellants failed to exhaust their (arguably) available remedies in the Tribal Court, they are foreclosed from bringing an action to protect their rights in federal court. Further, because the Tribal

> Defendants were dismissed from the underlying lawsuit, the District Court was correct when it ruled to dismiss the action for lack of subject matter jurisdiction for failure to join the Tribal Defendants as indispensable parties under Rule 19.

These arguments are belied by the procedural history of this case, and the relevant law on joinder as applicable in jurisdictional questions as presented by the Tribal Courts. While the Appellants contend that these issues are manifestly outside the scope of this Appeal, nonetheless each of the Tribal Defendants' arguments can be quickly and easily defused when scrutinized against the law and facts of this case.

A. The Exceptions to the Exhaustion Principle in *Montana* Are Met Because the Tribal Court Is Without Jurisdiction to Enforce or Issue the Subpoenas, and Therefore the Alleged Lack of Exhaustion of Tribal Remedies Is Not a Valid Basis to Dismiss the Underlying Action.

The Supreme Court has long held that tribal courts are the appropriate courts to determine their own jurisdiction, and that federal courts should not intervene until prospective litigants have exhausted their remedies in the appropriate tribal forums. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856–57, 105 S.Ct. 2447, 2453 – 2454 (1985); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15–16, 107 S. Ct. 971, 976 – 977 (1987). However, this principle is subject to several important exceptions, where:

> (1) an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) the action is patently violative of express jurisdictional prohibitions; (3) exhaustion would be futile because of the lack of adequate opportunity to challenge the court's

> jurisdiction; or (4) it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana's (v. U. S.*, 450 U.S. 544 (1981)) main rule.

Burlington N. R.R. Co. v. Red Wolf, 196 F.3d 1059, 1065 (9th Cir.1999). Here, without foreclosing the other exceptions, the primary dispositive exception is that issuance of the subpoena is plainly outside the jurisdiction of the Tribal Court or STOFI. It is fundamental that "[n]either *Montana* nor its progeny purports to allow Indian tribes to exercise civil jurisdiction over the activities or conduct of non-Indians occurring *outside their reservations.*" *Hornell Brewing Co. v. Rosebud Sioux Tribal Ct.*, 133 F.3d 1087, 1091 (8th Cir. 1998) (Court affirming District Court's grant of preliminary injunction of Tribal Court proceedings).

Here, it is plainly obvious that the Tribal Court lacks jurisdiction to enforce and issue the disputed subpoenas. The Tribal Defendants appear to agree that this precise issue does not appear to have not been ruled upon in any reported cases. *See* Answer Brief of Seminole Tribe of Florida Tribal Court, at pp. 14 – 15. However, that does not mean that this question is a difficult one to resolve.[1] Courts routinely consider these issues as a straightforward legal analysis. *See, e.g., Hornell Brewing Co. v. Rosebud Sioux Tribal Ct.*, 133 F.3d 1087, 1091 (8th Cir. 1998); *Yellowstone*

[1] While not discussed in any detail by the Tribal Defendants' Answer Briefs, it must be emphasized again that the Tribal Court itself has already determined that all but one of the disputed subpoenas were an abuse of process and that it lacked jurisdiction to enforce them. *See* Opinion and Order, July 5, 2017, *Seminole Tribe of Florida, Inc. d/b/a Askar Energy v. Evans Energy Partners, LLC*, 2016-CV-0013.

County v. Pease, 96 F.3d 1169, 1170 (9th Cir. 1996). There is no dispute that Appellants are not members of the Seminole Tribe, do not conduct business with the Seminole Tribe, or are otherwise associated with the underlying Tribal Court action involving Evans Energy Partners, LLC. Significantly, none of the Appellants have submitted to the Tribal Court's jurisdiction and the Tribal Defendants fail to provide any justification whatsoever as to why the Appellants or AMEX should be subject to the Tribal Court's jurisdiction and subpoena power. It is undeniable that the Tribal Court can have no colorable claim of jurisdiction over the non-Indian Appellants because they have no connection to the Tribe, nor is there any nexus between the confidential financial information sought in the subpoenas and the Tribal Court's dubious jurisdiction over the lawsuit against Evans Energy partners, LLC. Under these circumstances it is clear that exhaustion of tribal remedies is not required or necessary and the District Court erred to the extent it premises exhaustion as a basis for dismissal.

B. Dismissal of the Tribal Defendants Did Not Deprive the District Court of Subject Matter Jurisdiction Because the Tribal Defendants Are Not Indispensable Parties.

The Tribal Defendants' final alternative basis for affirmance of the District Court's rulings is that the Appellants' voluntary dismissal of the Tribal Defendants deprived the District Court of jurisdiction because the Tribal Defendants are indispensable parties to the action under Fed. R. Civ. P. 19. While at first blush this

argument appears compelling, the unique circumstances of this case mandate a different result.

Under Rule 19, Courts must undertake a multi-part analysis to determine whether a party is necessary, and whether the action can continue in their absence:

> Rule 19 states a two-part test for determining whether a party is indispensable. First, the court must ascertain under the standards of Rule 19(a) whether the person in question is one who should be joined if feasible. If the person should be joined but cannot be (because, for example, joinder would divest the court of jurisdiction) then the court must inquire whether, applying the factors enumerated in Rule 19(b), the litigation may continue.

Focus on the Family v. Pinellas Suncoast Transit Auth., 344 F.3d 1263, 1279–80 (11th Cir. 2003). The first portion of the test concerns the "necessary" determination of a party before they can be deemed indispensable such that the action must be dismissed. This first determination has been described as requiring a District Court to determine if "complete relief" is possible for the parties already in the suit, and whether the non-party challenging the District Court's jurisdiction has a "legally protected interest in the suit." *Yellowstone County v. Pease*, 96 F.3d 1169, 1172 (9th Cir. 1996) (*citing Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir.1990)); *see also Florida Wildlife Fedn. Inc. v. U.S. Army Corps of Engineers*, 859 F.3d 1306, 1316 (11th Cir. 2017). In the context of tribal jurisdiction, *Pease* is particularly relevant and instructive.

In *Pease*, the controversy before the 9th Circuit Court of Appeals was whether Yellowstone County was required to join the Crow Tribe of Indians ("Crow Tribe") as indispensable parties to a declaratory suit the county filed in federal court against Carl Pease, a member of the Crow Tribe, challenging the Crow Tribe's decision that Pease did not have to pay property taxes on his land. *Pease*, 96 F.3d at 1171. The Crow Tribe tribal court heard the issue and decided that it had jurisdiction over the matter, which was subsequently challenged by the county in federal court without joining the Crow Tribe. *Id*. The Court of Appeals concluded that the Crow Tribe was not a necessary party under Rule 19(a), for two reasons analogous to the instant matter.

First, although *Pease* argued that the scope of the Crow Tribe's jurisdiction was implicated in the federal lawsuit, the Court of Appeals rejected that contention because questions of tribal court jurisdiction raise "a federal question that is clearly within the jurisdiction of a federal district court." *Pease*, 96 F.3d at 1172; *see also FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314 (9th Cir. 1990) ("[F]ederal courts are the final arbiters of federal law, and the question of tribal court jurisdiction is a federal question."). Because the question of tribal jurisdiction is a federal question, the Court of Appeals held that the Crow Tribe did not need to be joined in light of the well-settled principle "that tribal judges, like state judges, are expected to comply with binding pronouncements of the federal courts." *Pease*, 96

F.3d at 1173; *see also In re Justices of Supreme Court of Puerto Rico*, 695 F.2d 17, 23 (1st Cir. 1982).

Second, because the Court of Appeals determined that the suit did not involve the Crow Tribe's authority to tax its own land and the true issue was whether the Crow Tribe could properly exercise jurisdiction over non-tribal entities, it did not have a legally protected interest in the outcome of the suit for the same reasons that the tribal court was not required to be joined in the first part of the analysis. *Pease*, 96 F.3d at 1173 ("Clearly, the County can seek to have the judgment obtained by Pease vacated on jurisdictional grounds without naming the tribal court as a defendant.").

Finally, the Court of Appeals noted that the Crow Tribe had no connection with the county plaintiff by virtue of an express agreement or other protectable interest and, therefore, was not a necessary party. *Id.* ("Third, unlike other cases where courts have concluded that tribes are necessary parties under Rule 19(a), here the Tribe cannot demonstrate that it is a party to a relevant commercial agreement, lease, trust, or treaty with one of the parties to the lawsuit.").

The *Pease* case is directly analogous to this matter and, in particular, to rebut the Tribal Defendants' arguments concerning their status as indispensable parties. Here, the Appellants are non-Indians whose information is located outside of

Seminole Tribal land and they are otherwise completely unrelated to the Tribe.[2] As has been previously shown, the Tribal Court is patently without jurisdiction to issue or enforce the subject subpoenas or otherwise compel the Appellants or AMEX to act. This issue of jurisdiction is clearly a federal question and, as such, the Tribal Defendants are "are expected to comply with binding pronouncements of the federal courts." *Pease*, 96 F.3d at 1173.

Further, the Tribal Defendants should be estopped from arguing their status as indispensable parties because they have repeatedly argued that they cannot be joined due to sovereign immunity. *See* Answer Brief, Seminole Tribe of Florida Tribal Court, at p. 17 – 18 ("III. The Tribal Court is an Indispensable Party to this Litigation, and Cannot Be Sued Because of Tribal Sovereign Immunity"). Sovereign immunity cannot be used as both a shield and a sword. The Tribal Defendants have used this argument to place the Appellants and this Court in an impossible situation. On the one hand, the Tribal Defendants maintain that Appellants must exhaust tribal remedies before bringing an action in federal court. Then in the same paragraph, they unequivocally proclaim that sovereign immunity applies to shield them from suit and the hypothetical federal suit after exhaustion would be dismissed in light of the inability to join immune parties. Thus, the Tribal Defendants effectively argue

[2] Appellee's arguments that Evans Energy Partners, LLC is an "Askar" company is incorrect and irrelevant. *See* Answer Brief, Seminole Tribe of Florida, Inc., at p. 16.

that the federal courts will never have jurisdiction to decide a question relating to tribal jurisdiction unless the Tribal Defendants affirmatively consent to suit. This is precisely the "absurd result" the Court of Appeals in *Pease* wisely rejected. *Pease*, 96 F.3d at 1173 ("[C]oncluding that courts are necessary parties under Rule 19(a) whenever their jurisdiction is challenged would lead to absurd results.").

As a final aside, the underlying case in *Pease* did involve, at least in part, some form of exhaustion of tribal remedies before the county sued in federal court. *Pease*, 96 F.3d at 1171. However, this difference does not alter *Pease*'s applicability to this action for two reasons. First, factually, *Pease* involved a question that touched upon the Crow Tribe's jurisdiction to regulate its own members. This is not a consideration in this matter as the only jurisdiction being challenged is whether the Seminole Tribal Court can issue and enforce a subpoena against non-tribal entities and persons. Second, and ironically, the Tribal Defendants' insistence that the Tribal Court be permitted to assess and decide its own jurisdiction has already been satisfied as the Tribal Court itself issued an Order on July 5, 2017 quashing all but one of the subpoenas due to a lack of jurisdiction to enforce them. *See* Opinion and Order, July 5, 2017, *Seminole Tribe of Florida, Inc. d/b/a Askar Energy v. Evans Energy Partners, LLC*, 2016-CV-0013. The analysis in *Pease* is relevant and instructive in this matter. The Tribal Defendants are not indispensable parties under Rule 19. Thus, the District Court is not precluded from granting relief to the

Appellants against AMEX and the District Court erred in *sua sponte* dismissing this suit.

CONCLUSION

For all the reasons enumerated herein and within the Initial Brief, this Honorable Court should reverse the District Court's Orders of Dismissal and Denying the Appellants' Motion to Vacate, and remand this matter for further proceedings.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B), Fed. R. App. P. This certificate was prepared in reliance on the word count from the word processing system (Microsoft Word) used in this brief. More specifically:

1. This brief contains 3817 words, exclusive of portions exempt by Rule 32(f) Fed. R. App. P.
2. This brief was prepared in proportionally-spaced typeface using Microsoft Word in Times New Roman, 14 point font.

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I HEREBY CERTIFY that on this 16th day of November, 2017, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants: Caran L. Rothchild, Esq. [rothchildc@gtlaw.com] [geistc@gtlaw.com] [flservice@gtlaw.com], Greenberg Traurig, P.A., 401 E. Las Olas Blvd., Suite 2000, Fort Lauderdale, Florida 33301; Jennifer H. Weddle, Esq. and Harriet Retford, Esq. [weddlej@gtlaw.com] [retfordh@gtlaw.com], Greenberg Traurig, LLP, 1200 17th Street, Suite 2400, Denver, Colorado 80202; and Peter W. Homer, Esq. [phomer@homerbonner.com], Homer Bonner Jacobs, P.A., 1200 Four Seasons Tower, 1441 Brickell Avenue, Miami, Florida 33131. The foregoing document was also furnished via First Class U.S. Mail to: American Express Company, c/o Registered Agent, CT Corporation System, 1200 South Pine Island Road, Plantation, Florida 33324.

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