**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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NO. 17-12535-A

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

**v.**

**SEMINOLE TRIBE OF FLORIDA, INC., et al.**
**Defendants/Appellees.**

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

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# APPELLEE SEMINOLE TRIBE OF FLORIDA INC.'S MOTION FOR SANCTIONS INCLUDING DAMAGES, FEES, AND COSTS

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**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT**

American Express Company, Defendant/Appellee, publicly traded under the ticker symbol "AXP"

Askar, Alexandra, Plaintiff/Appellant

Askar, Asker B., Plaintiff/Appellant

Askar, Awham, Plaintiff/Appellant

Askar, Bassam, Plaintiff/Appellant

Askar, Kousay, Plaintiff/Appellant

Aksar, Shera, Plaintiff/Appellant

Berkshire Hathaway, Inc., owner of more than 10% of Defendant/Appellee American Express Company, publicly traded under the ticker symbol "BRKA"

Bloom, Honorable Beth, U.S. District Judge of the U.S. District Court for the Southern District of Florida

Figueroa, Janet, Paralegal for Defendant/Appellee, Seminole Tribe of Florida, Inc.

Gillette, James E., Jr., Plaintiff/Appellant

Homer, Peter W., Counsel for Defendant/Appellee, Seminole Tribe of Florida, Inc.

Horvatis, Thomas, Plaintiff/Appellant

King, Christopher, Counsel for Defendant/Appellee, Seminole Tribe of Florida, Inc.

Lerner, Allan, General Counsel for Defendant/Appellee, Seminole Tribe of Florida, Inc.

Meloro, Bobbi, Counsel for Defendant/Appellee, Seminole Tribe of Florida, Inc.

Osceola, Honorable Moses B., Tribunal Chief Judge, Defendant/Appellee

Peterson, Donald G., Counsel for Plaintiff/Appellants

Retford, Harriet, Counsel for Defendants/Appellees, Seminole Tribe of Florida Trial Court and the Honorable Moses B. Osceola, Tribunal Chief Judge

Rothchild, Caran L., Counsel for Defendants/Appellees, Seminole Tribe of Florida Trial Court and the Honorable Moses B. Osceola, Tribunal Chief Judge

Seminole Tribe of Florida, a federally recognized Indian Tribe

Seminole Tribe of Florida, Inc., Defendant/Appellee, registered with the Florida Department of State

Seminole Tribe of Florida Trial Court, Defendant/Appellee

Weddle, Jennifer H., Counsel for Defendants/Appellees, Seminole Tribe of Florida Trial Court and the Honorable Moses B. Osceola, Tribunal Chief Judge

Weirich, Jonathan M., Counsel for Plaintiffs/Appellants

Wiggins, Richard, Plaintiff/Appellant

Pursuant to 28 U.S.C. § 1927, Fed. R. App. P. 38, and 28 U.S.C. § 1912, Appellee the Seminole Tribe of Florida, Inc. ("STOFI") hereby moves for sanctions, including an award of damages and costs, against Appellants (the "Askars") for vexatiously filing this frivolous appeal. STOFI states as follows:

The Askars filed the underlying district court action purporting to challenge a subpoena *duces tecum* issued by the Seminole Tribal Court to American Express ("AMEX"). Doc 1. The Askars contended the Tribal Court lacked authority to issue the subpoena, although the subpoena issued pursuant to a Seminole Tribal Court rule of civil procedure modeled after federal Rule 45. The Askars never bothered to raise their dispute in the Tribal Court itself, though it had very opportunity to do so—the underlying Tribal Court action was against Evans Energy, a company the Askars controlled. Bringing the action in federal court was an attempt to stonewall discovery in Tribal Court. It was also an affront to the Tribal Court's authority, as longstanding case law holds challenges to Tribal Court jurisdiction must be brought in the Tribal Court in the first instance. *See, e.g.*, *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 856 (1985). Federal courts lack subject matter jurisdiction unless and until Tribal Court remedies have been exhausted. *See id.*; *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 999 F.2d 503, 508 (11th Cir. 1993) (holding "the district court only had subject matter jurisdiction to hear challenges to the tribal court's

jurisdiction after a full opportunity for tribal court determination of jurisdictional questions.").

Facing dispositive motions to dismiss on this very basis, the Askars came up with an outrageous alternative plan: they dismissed the only indispensable parties in this case that have a stake in the subpoena *duces tecum*—STOFI, which sought the AMEX records, along with the Tribal Court and Tribal Court Chief Judge—while leaving AMEX in the case. Doc 38. AMEX, as a mere record custodian, had no interest whatsoever in the subpoena and did not even bother to appear in the district court. The Askars planned on trying to get a default judgment against AMEX that they could use to block STOFI and the Tribal Court without having to litigate threshold jurisdictional defenses fatal to the action.

The plan failed. When the district court, performing its obligation to examine its subject-matter jurisdiction, noticed that the only Defendants who had any stake in the subpoena had been voluntarily dismissed, the court dismissed the case without prejudice. Doc 39. The Askars moved to vacate that Order on the basis that AMEX, though in default, supposedly was still in the case. The district court then made its questions about the case continuing against AMEX clear: it ordered the Askars to show cause "what available relief they intend to seek against AMEX." Doc 41. The Askars had no response beyond a belated request for default judgment and rote, unsupported assertions of supposed injury taken

from the Complaint. Doc 43. The district court confirmed the dismissal, citing three virtually inarguable jurisdictional defects: the Askars had stated no cognizable claim against AMEX and therefore had no standing; had alleged no injury caused by AMEX; and had no ability to circumvent the Tribal Court exhaustion requirement for subject matter jurisdiction. Doc 45.

The Askars' appeal has two related goals—to continue to stonewall discovery in Tribal Court and exacerbate STOFI's and the Tribal Court's expenses with needless, vexatious litigation over a matter that *only* the Tribal Court can adjudicate. Sanctions are therefore appropriate on at least three separate grounds. Rule 38 of the Federal Rules of Appellate Procedure provides that frivolous appeals may merit an award of "just damages and single or double costs to the Appellee." Fed. R App. P. 38. Section 1912 provides that a court of appeals, "in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs." 28 U.S.C. § 1912. And, § 1927 provides for recovery of "excess costs, expenses, and attorney's fees reasonably incurred" whenever "any attorney or other person ... who so multiples the proceedings in any case unreasonably and vexatiously…." 28 U.S.C. § 1927. Because that is exactly what the Askars and their counsel have done in this case, STOFI should be awarded sanctions, including damages and costs.

## ARGUMENT

The Askars purport to appeal the district court's *procedure* in dismissing the case rather than the actual jurisdictional grounds that mandated dismissal. The Askars contend the district court owed them notice before dismissing their case. As detailed in STOFI's brief, incorporated herein, this argument is frivolous for at least five settled reasons.

First, it is beyond dispute that a district court not only can dismiss but must dismiss any time it appears that it lacks subject matter jurisdiction. *See, e.g.*, *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514, 126 S. Ct. 1235, 1244 (2006) *Cornelius v. U.S. Bank Nat. Ass'n*, 452 Fed. Appx. 863, 865 (11th Cir. 2011); Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action"). It can do this *sua sponte*, without any motion before it or any notice to the parties. *See Cornelius*, 452 Fed. Appx. at 865. The grounds the district court cited for its dismissal were all jurisdictional. The idea that the district court was obligated to solicit additional briefing (after multiple briefs already and an Order to show cause) and even hold an evidentiary hearing (the Askars claim they were entitled to one) before it could dismiss for lack of subject matter jurisdiction is absurd.

Second, the Askars base their arguments on case law relating to denials of Rule 55 motions for default judgment. Yet the Askars admit they never filed a

motion for default judgment (they claim the district court somehow deprived them of that opportunity, though more than two weeks passed between the clerk's entry of default and the district court's dismissal of this action, *compare* Doc 36 with 39). They only requested a default judgment after the district court dismissed the case.

Third, even if their belated, post-dismissal request for a default judgment were treated as a proper Rule 55 motion, the Askars had overwhelming notice of the deficiencies in their claim. No fewer than four briefs were filed by STOFI, the Tribal Court, and the Tribal Court judge detailing the lack of subject-matter jurisdiction due to the Askars' failure to exhaust Tribal Court remedies. Doc 21, 25, 42 and 44. Plus, the district court's show cause Order expressly told them to identify what claim they can bring against AMEX. So even if this were merely a case of a denial of a proper Rule 55 motion for default judgment, their argument for reversal is implausible.

Fourth, the Askars have no response to the actual grounds for dismissal. They have tried to shield their appeal from having to deal with those grounds by pretending this case is about a denied Rule 55 motion for default judgment. But there is no avoiding the threshold jurisdictional defects. The action was designed to stymie discovery in Tribal Court and subvert the Tribal Court's authority in spite of overwhelming federal decisional law on the exhaustion requirement. The

Askars claim to fall within a narrow exception to exhaustion reserved for cases where the Tribal Court does something "patently violative of express jurisdictional prohibitions." *See Nat'l Farmers*, 471 U.S. at 857, n.21. But issuing a subpoena *duces tecum* under its own rules of civil procedure, and in an action the Tribal Court has undisputed jurisdiction over, violates no "jurisdictional prohibition," and the Askars do not cite any. As for the lack of an alleged injury or cognizable claim against AMEX, the Askars can only cite canned, conclusory assertions that the U.S. Supreme Court has expressly rejected in determining whether a claim has been stated. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 557 (2007) (holding a plaintiff must allege more than "labels and conclusions, and a formulaic recitation of the elements of a cause of action," and mere "'naked assertions' devoid of 'further factual enhancement'" will not do).

Fifth, even without the jurisdictional defects, the Askars' outrageous plan never could have worked. The Askars voluntarily dismissed three of four parties vigorously defending their rights with respect to the subpoena *duces tecum* and expected the district court simply to grant a default judgment against the one party who could not care less. Rule 19 gives instruction on what the court should do in that circumstance: if indispensable parties "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." Fed. R. Civ. P. 19(b) (listing

factors to consider including, foremost, "the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties") (emphasis added). Either STOFI, the Tribal Court, and Tribal Judge had to be added back into the case or the case had to be dismissed. A default judgment against AMEX closing the case was never realistic.

The Askars and their attorneys have sought to "multipl[y] the proceedings … unreasonably and vexatiously" with a totally frivolous appeal. *See* 28 U.S.C. § 1927.

WHEREFORE, STOFI requests that the Court sanction the Askars and their counsel, and order them to pay reasonable attorneys' fees and costs incurred by STOFI in defending this appeal, as well as double costs.

Respectfully submitted:

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

Counsel for Defendant-Appellee hereby submits its Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements pursuant to Fed. R. App. P. 32(a), and certify:

1. This motion complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 1,580 words.
2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font, Times New Roman.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 26th day of October, 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, Donald G. Peterson, Esq. and Jonathan M. Weirich, Esq., Parrish, White & Yarnell, P.A., 3431 Pine Ridge Road, Suite 101, Naples, Florida 34109 (donpeterson@napleslaw.us, jonathanweirich@napleslaw.us, ply@napleslaw.us, karlaschooley@napleslaw.us, stephaniegassiot@napleslaw.us and chrisrelli@napleslaw.us); Caran L. Rothchild, Esq., Greenberg Traurig, P.A., 401 E. Las Olas Blvd., Suite 2000, Fort Lauderdale, Florida 33301 (rothchildc@gtlaw.com, geistc@gtlaw.com and flservice@gtlaw.com); Jennifer H. Weddle, Esq., Greenberg Traurig, LLP, 1200 17th Street, Suite 2400, Denver, Colorado 80202 (weddlej@gtlaw.com and retfordh@gtlaw.com); and via U.S. Mail to American Express Company, c/o Registered Agent, CT Corporation System, 1200 South Pine Island Road, Plantation, Florida 33324.

/s/ Peter W. Homer
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