IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RHONDA LEONA BROWN FLEMING and THE HARVEST INSTITUTE FREEDMEN FEDERATION, LLC,	)	
Plaintiffs,	)	
v.	)	
	)	Case No. 19-cv-01397 (TFH)
THE CHEROKEE NATION, CHEROKEE NATION ELECTION COMMISSION, BILL JOHN BAKER, DAVID BERNHARDT, Secretary of the Interior, and TARA MACLEAN SWEENEY, Assistant Secretary-Indian Affairs.	)	
Defendants.	)	

TRIBAL DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Tribal Defendants, by and through undersigned counsel, respectfully oppose Plaintiff Rhonda Leona Brown Fleming's Motion for A Temporary Restraining Order and Preliminary Injunction ("Plaintiff's Motion"). ECF, No. 2. First, Plaintiff has failed to establish that the Court has jurisdiction over this request. Second, Plaintiff wholly fails to establish that she satisfies any of the four factors warranting the extraordinary relief requested here.

INTRODUCTION

Plaintiff's Motion is centered on the flawed assertion that the "by blood" language contained in Article VII, Section 2 of the Cherokee Nation Constitution is enforceable. It is not. Cherokee Freedmen enjoy all rights and incidents of Cherokee citizenship equal to those of Native Cherokees under federal law, tribal law, and tribal electoral processes. This Court has established that "Cherokee Freedmen have a present right to citizenship in the Cherokee Nation that is coextensive with the rights of native Cherokees." Such rights include all rights and

incidents associated with running for office, including the generally applicable constitutional residency requirement.

ARGUMENT

I. The Court Lacks Subject Matter Jurisdiction to Grant Plaintiff's Request.

Plaintiff has failed to provide a waiver of sovereign immunity allowing any alleged claims to proceed against Tribal Defendants and such failure precludes this Court from issuing a temporary restraining order here. Under the doctrine of tribal sovereign immunity, an Indian tribe is immune from suit unless Congress has authorized the suit or the tribe has waived its immunity. Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 754 (1998). As such, any waiver of a tribe's sovereign immunity, whether by Congress or by the tribe itself, "cannot be implied but must be unequivocally expressed." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978). In invoking the Court's jurisdiction, Plaintiffs had the burden to point to an express waiver of sovereign immunity with regard to the Tribal Defendants which would allow their claims to proceed. Plaintiff has wholly failed to meet this burden, therefore the Plaintiff's Motion should be denied.

II. Plaintiff has Failed to Establish Any of the Elements Required for Issuing a Temporary Restraining Order.

A temporary restraining order is an extraordinary remedy. To obtain such relief, a Plaintiff must show "that [she] is likely to succeed on the merits, that [she] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [her] favor, and that an injunction is in the public interest." Sherley v. Sebelius, 644 F.3d 388, 392 (D.C. Cir. 2011) (quoting Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); Hall v. Johnson, 599 F. Supp. 2d 1, 3 n.2 (D.D.C. 2009) (noting that "[t]he same standard applies to both temporary restraining orders and to preliminary injunctions").

A. Plaintiff has Not Established a Substantial Likelihood of Success on the Merits.

i. Plaintiff's Request is Barred by the Doctrine of Res Judicata.

The Plaintiff cannot meet her burden in establishing that she is likely to succeed on the merits because her request is barred by res judicata. Res judicata generally "prevent[s] a litigant from bringing before the court a legal claim or issue that another tribunal has already resolved." Massey v. Am. Fed'n of Gov't Employees, 253 F. Supp. 3d 42, 47 (D.D.C. 2017) (citing Taylor v. Sturgell, 553 U.S. 880, 892, 128 S.Ct. 2161, 171 L.Ed.2d 155 (2008)). In proving that a final judgment in a prior case precludes the plaintiff from litigating an issue in the present case, the defendant must demonstrate that "the same issue now being raised [was] contested by the parties and submitted for judicial determination in the prior case[;] the issue [was] actually and necessarily determined by a court of competent jurisdiction in that prior case[; and] preclusion in the second case [does] not work a basic unfairness to the party bound by the first determination." Martin v. U.S. Dep't of Justice, 488 F.3d 446, 454 (D.C. Cir. 2007) (alterations in original) (quoting Yamaha Corp. of Am. v. United States, 961 F.2d 245, 254 (D.C. Cir. 1992)).

Here, Plaintiff's Motion is almost identical to her prior request for a temporary restraining order filed in a previously dismissed case regarding the exact same issues, which was denied for failure to show irreparable harm. See Fleming v. Cherokee Nation, No. CV 18-02041 (TFH), (D.D.C. May 14, 2019), ECF, No. 7, Opinion and Order. When comparing Plaintiff's Motion here to her previous request, it appears that Plaintiff's Counsel changed roughly two paragraphs in the introduction but failed to make any changes to his legal arguments. Though Tribal Defendants did not have an opportunity to contest the previous request—through either

written motion or oral argument—prior to its denial,[1] Tribal Defendants adamantly contested any entitlement to Plaintiff's requested relief throughout the course of that litigation. Further, preclusion here is warranted because Plaintiff's Counsel only reasserts arguments already deemed deficient in a final order by this Court. For these reasons, Plaintiffs cannot establish that she has a substantial likelihood of success on the merits and her Motion should be denied under the doctrine of res judicata.

ii. Plaintiffs Do Not Allege a Violation of this Court's Order.

Plaintiffs fail to cite to any violation of Judge Hogan's [248] Memorandum Opinion or [257] Order and Judgment in Cherokee Nation v. Nash, 267 F. Supp. 3d 86 (D.D.C. 2017). The question of whether Cherokee Freedmen may seek the office of Principal Chief was finally decided in the affirmative by this very Court. This Court's [257] Order and Judgment held that "[a]ny Cherokee Freedmen descendent who qualifies for citizenship in the Cherokee Nation shall have all the benefits of privileges of such citizenship on the same terms as other citizens of the Cherokee Nation." Cherokee Nation v. Nash, 267 F. Supp. 3d 86 (D.D.C. 2017).

In appropriate deference to this Order, the Cherokee Nation Supreme Court has incorporated the same into Cherokee law by holding:

> [t]he memorandum opinion issued August 30, 2017 by the District Court of the District of Columbia in case no. 13-01313 is enforceable within and against the Cherokee Nation, and that therefore the Cherokee Nation Registrar, and the Cherokee Nation government and its offices, are directed to begin processing the registration applications of eligible Freedmen descendants, and that such **Freedmen descendants, upon registration as Cherokee Nation citizens shall have all the rights and duties of any other native Cherokee, including the right to run for office.** Because it violates the Treaty of 1866 between the Cherokee Nation and the United States, the 2007 amendment to the Constitution that purported to limit citizenship within the Cherokee Nation to Cherokees

[1] The Court vacated the scheduled telephone hearing and denied Plaintiff's Motion for Temporary Restraining Order on its own accord. Fleming v. Cherokee Nation, No. CV 18-02041 (TFH), (D.D.C. May 14, 2019), ECF, No. 7, Opinion and Order.

> by blood, Delaware Cherokees and Shawnee Cherokees is held to be void and without effect.

Exhibit 1, (Preliminary Order Granting Declaratory Action and Petition for Writ of Mandamus, In re: Effect of Cherokee Nation v. Nash and Vann v. Zinke, SC 17-07 (2017) (emphasis added).

What is more, it is evident that this Court's Order has been appropriately incorporated into the electoral processes of the Nation. On February 21, 2019, the Cherokee Nation Election Commission ("Election Commission") considered a challenge to the eligibility of Ms. Fleming's candidacy for chief. In its Decision, the Election Commission found that Ms. Fleming "[wa]s not eligible to be a candidate for Chief, because she d[id] not meet the 270 days residency requirements within the jurisdictional boundaries of the Cherokee Nation for the Cherokee Nation 2019 General Election." Id. Further, the Election Commission specifically declared "that any challenge to [Ms. Fleming] that she is not Cherokee by blood has no validity and **Cherokee Freedmen Citizens are eligible to run for office if they meet all other requirements for the office**, applicable to all Cherokee Citizens." Exhibit 2 (Cherokee Nation Election Commission's Decision in Eligibility Hearing No. 2019-5) (emphasis added). On appeal, the Cherokee Nation Supreme Court declared Ms. Fleming ineligible solely "because she d[id] not comply with the **constitutional residency requirements** for the office of Principal Chief." Exhibit 3 (Cherokee Nation Supreme Court Order in SC-2019-02) (emphasis added).

The rights of Cherokee Freedmen have been adjudicated by this Court and this Court's final order establishing that Cherokee Freedmen enjoy all rights and incidents of Cherokee citizenship equal to those of Native Cherokees has been incorporated both into Cherokee law and its electoral processes. The constitutional residency requirement is one generally applied to any candidate seeking the office of Principal Chief and Plaintiffs can point to no instance in which Tribal Defendants have attempted to apply the "by blood" provision to any aspect of Ms.

Fleming's eligibility. Thus, she has failed to establish a likelihood of success on the merits warranting a temporary restraining order.

B. Plaintiff has Not Established the Potential for Irreparable Harm Absent a Temporary Restraining Order

Notwithstanding the fact that Plaintiff's Counsel recycled his irreparable harm arguments verbatim from his prior motion, which was summarily denied for a failure to show the same, Plaintiff's discussion of irreparable harm is merely a litany of citations that are irrelevant to the issue at hand. The "D.C. Circuit 'has set a high standard for irreparable injury.'" Jones v. D.C., 177 F.Supp. 3d 542, 545 (D.D.C. 2016) (quoting Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 297 (D.C. Cir. 2006)). Plaintiff has failed to allege a violation of this Court's order in Nash, therefore there is simply no injury to remedy. As such, Plaintiff has failed to meet the high standard of irreparable harm.

C. The Balance of Equities Weighs Decidedly Against Granting Plaintiff's Motion.

Plaintiff's discussion of the balance of equities is equally lacking. To be sure, it appears that Plaintiff's seek to delay the upcoming Principal Chief Election of the largest federally recognized Indian tribe in the United States because an individual could not be bothered to conduct a proper inquiry into the requirements of the political office she sought. A basic review of the relevant laws and requirements for running for the office of Principal Chief of the Cherokee Nation would have likely dispelled any alleged confusion Plaintiff had. As such, the equities weigh heavily in favor of denying Plaintiff's Motion.

D. The Granting of Plaintiff's Motion is not in the Public Interest.

As Plaintiff's aptly cite, "[t]he public has an extraordinary interest in preventing denial or abridgement of the right to vote." Sec'y of Labor v. Fitzsimmons, 805 F.2d 682, 692 (7th Cir. 1986). Ironically, the granting of Plaintiff's Motion would result in interfering with the rights of

thousands of Cherokee citizens to exercise their vote for the eligible Principal Chief Candidates in the upcoming June 1, 2019 election. Indeed, granting this request would interfere with the right of many Cherokee Freedmen to exercise their first votes in a Principal Chief Election. Plaintiff's public interest arguments insofar as they are based on the "by-blood" language of the Constitution are irrelevant as no candidate has been declared ineligible under the same. Accordingly, because granting Plaintiff's Motion would interfere with the voting rights of thousands of Cherokee citizens, it is not in the public interest.

CONCLUSION

Instead of making a basic inquiry into the requirements for the political office she sought, Plaintiff decided to petition this Court for a ruling seemingly identical to that it previously issued in Nash, with an added attempt to make an end run around the residency requirement generally applicable to all candidates for Principal Chief. Plaintiff has failed to point to an express waiver of sovereign immunity before invoking this Court's jurisdiction and Plaintiff's Motion fails to adequately show that she meets any of the factors required to warrant the extraordinary relief of a temporary restraining order. For these reasons, Plaintiff's Motion for A Temporary Restraining Order and Preliminary Injunction should be denied. A proposed Order consistent with this opposition is attached.

Dated: May 20, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of May, 2019, I electronically transmitted the above motion to the Court via ECF for filing and also electronically transmitted a copy of the same via email to the following:

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