

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI (Northern (Jackson))**

HOWARD BROWN and	)	
BRANDON SIBLEY,	)	
	)	
Plaintiffs,	)	
	)	
V.	)	Civil Action No. 3:22-cv-00256-DPJ-FKB
	)	
CHOCTAW RESORT	)	
DEVELOPMENT ENTERPRISE,	)	
ET AL.,	)	
	)	
Defendants.	)	
	)	

RESPONSE TO PLAINTIFFS' MOTION TO SHOW CAUSE (DOC. 18)

COME NOW the Defendants by and through their counsel of record, C. Bryant Rogers, VanAmberg, Rogers, Yepa, Abeita, Gomez & Wilkinson, LLP, and hereby submit their Response to Plaintiffs' Motion to Show Cause (Doc. 18).

1. Defendants' basic response to Plaintiffs' Doc. 18 Motion and their Supporting Memorandum (Doc. 19), is that well-founded legal arguments made by Defendants through their counsel do not constitute false statements of material fact or law even if Plaintiffs do not understand them or just will not accept them, nor does Defendants' counsel's refusal to acquiesce in or accept various of Plaintiffs' truly unhinged legal arguments, constitute the making of false statements to this Court; and, that none of Defendants' legal contentions (including arguments countering Plaintiffs' arguments) here attacked by Plaintiffs are improper or unfounded. Defendants also view this Motion to be an attempt to bolster their prior response to Defendants pending Motions, in effect a sur-reply filed without leave of the Court; and, as

such all substantive arguments there presented about the validity of their claims should be disregarded by the Court.

2. We call to the attention of the Court that Plaintiffs used the same approach to contend that Defendants' counsel made a "material false statement of fact and law" in violation of New Mexico Rule of Professional Conduct 16-401(A) in arguing (Doc. 7, pp. 4 and 18) that Plaintiffs' hotel reservation for a stay at the Tribe's Golden Moon Hotel and Casino was a form of consensual relationship that anchors the Choctaw Court's jurisdiction under the *Montana* test. That was the basis for a New Mexico State Bar Complaint Plaintiffs' filed on or about August 4, 2022, a copy of which they attached to their Doc. 18 Motion to Show Cause and referenced in § III of that Motion.

3. A true and correct copy of Defendants' counsel's August 17, 2022 response to that New Mexico State Bar Complaint is attached hereto as **Exhibit A**. The New Mexico State Bar disciplinary counsel's August 19, 2022 rejection of that Complaint is attached hereto as **Exhibit B**, the grounds for which rejection were summarized as follows:

In response to your complaint Mr. Rogers states that making a well-founded legal argument – even one disputed by the opposing side – does not constitute making a false statement of material fact or law. We agree. ...

4. Plaintiffs' Doc. 18 Motion to Show Cause repeats the same unfounded argument regarding their hotel reservation (Doc. 18, ¶ 8) and now makes other legally incoherent or nonsensical assertions respecting various other legal arguments Defendants have made in this case, paralleling similar ludicrous accusations set out in an unhinged diatribe of Plaintiff Sibley in a You Tube video recently posted at <https://youtube/TGL5mRO17MU>.

These accusations against Defendants' counsel are based on Plaintiffs' fanciful (indeed farcical) views rooted in Plaintiffs' fundamental ignorance of even the most basic of the

applicable legal concepts involved. The portion of Mr. Sibley's incoherent diatribe that addresses Defendants' counsel's work in this case begins at about the 43-minute mark of that You Tube presentation. Again, none of the alleged "lies" Mr. Sibley identifies were lies, but were good faith legal arguments that Plaintiffs do not understand or which they just will not accept.

5. On August 26, 2022, Plaintiff Gary Brown sent Defendants' counsel the email attached hereto as **Exhibit C**¹ and a new New Mexico State Bar Complaint which he has just filed. The New Mexico State Bar's inquiry regarding that new Complaint is attached hereto as **Exhibit D**. That Complaint is basically arguing that Defendants' counsel's refusal to acquiesce in Plaintiffs' argument that the Tribe's receipt of federal Covid-19 funds (or the fact that the Tribe's mask mandate to some extent paralleled other federal or tribal mask mandates) somehow converted the tribal laws and actions Plaintiffs' complain of into state laws and actions (the same argument made at Doc. 18, ¶ 10, pp. 4-6); and, that Defendants' counsel's failure to concede the validity of these ludicrous arguments evidences conduct by Defendants' counsel constituting the making of a false statement of material fact or law in violation of New Mexico Rule of Professional Conduct 16-401(A) and threaten to keep filing bar complaints of similar ilk until Defendants' counsel changes his behavior. Plaintiffs seem to view the filing of frivolous and unfounded Bar Complaints as a part of their litigation strategy in this case. The undersigned's response to Plaintiffs' new Bar Complaint is attached hereto as **Exhibit E**.

6. Plaintiffs' contend (Doc. 18, ¶ 9) that Defendants' invocation of *Williams v. Lee*, , 358 U.S. 217 (1959) (Doc. 7, pp.4-5, 16-17 and Doc. 11, ¶ 14) as an alternative basis for supporting the exercise of Choctaw Court jurisdiction over any suit involving Plaintiffs' present

¹ That email also again asked when Defendants would be filing their Rule 26 disclosures. Defendants' counsel has previously addressed this issue with Plaintiffs' explaining that based on this Court's Stay Order of June 21, 2022, explaining that all those processes were stayed. See, documents marked **Exhibits F and G** (not previously filed of record).

claims against Defendants that might be filed there in exhaustion of their tribal remedies was improper and were made “to delay proceedings, exhaust the Plaintiffs’ resources and time, harass the Plaintiffs, obfuscate the truth, and ultimately mislead and waste the court’s time.” What Plaintiffs’ fail to grasp or just ignores is that *Williams v. Lee* is the controlling U.S. Supreme Court decision establishing that tribal courts (rather than state courts) are the proper forum to hear suits filed by non-Indians against tribal parties for claims arising from the tribal parties’ on-reservation conduct. *Plains Commerce Bank v. Long family Land & Cattle Company, Inc.*, 554 U.S. 316, 333 (2008) (*Williams v. Lee* “involved regulation of non-Indian activities on the reservation that had a discernable effect on the tribe or its members. [*Williams v. Lee*] concerned a tribal court’s jurisdiction over a contract dispute arising from the sale of merchandise to an Indian on the reservation); *Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138, 160-161 and n.1 (1984) (*Williams v. Lee* remains the controlling law and makes tribal courts rather than state courts the proper forum for hearing suits brought by non-Indians against tribal parties based on the tribal parties’ on-reservation conduct). There is nothing false or improper or obfuscatory about making that argument to this Court and none of these contentions provide any basis for Plaintiffs’ to evade their duty to exhaust their tribal remedies.

7. In ¶ 10 of their Doc. 18 Motion, Plaintiffs’ challenge Defendants’ arguments (set out in detail in Docs. 4 and 5) that Plaintiffs have not pled a valid claim under 42 U.S.C. § 1983. They contend that the fact that the Tribe’s mask mandate parallels similar state and CDC mask mandates or guidance and that the Tribe’s receipt of federal aid to address the Covid emergency (none of which funding information is in the record or referenced in Plaintiffs’ Complaint or otherwise properly before the Court) somehow converts tribal law and action into state law and action for purposes of their § 1983 claim. These are on their face obviously

fallacious legal arguments attempting to get around the fundamental flaw in their § 1983 claim: The actions they complain of were tribal actions taken under color of tribal law, not state actions taken under color of state law. None of Defendants’ arguments pointing out this fatal defect in Plaintiffs’ attempted § 1983 claim involve any “false statements of material fact or law” and they were properly made to call this irremediably defect in Plaintiffs’ Complaint to the attention of the Court, not to mislead the Court;² and none of these contentions provide any basis for Plaintiffs’ to evade their duty to exhaust their tribal remedies.

8. Plaintiffs’ newly expressed “belief” that they may have a *Bivens* claim if their § 1983 claim fails (¶ 10(b)(iii) of their Doc. 18 Motion) is both irrelevant to the present proceedings (since they did not plead a *Bivens* claim), and a dead letter for several other reasons. First, the U.S. Supreme Court has now foreclosed new *Bivens* claims grounded in the kinds of circumstances Plaintiffs’ allege. *Egbert v. Boule*, 142 S.Ct. 1793 (2022), holding that the court will not allow future *Bivens* claims beyond cases based on the narrow *Bivens* claim categories previously recognized (Fourth Amendment, Eight Amendment and sex discrimination based due process claims) which do not include claims based on alleged violations of First Amendment rights. Second, *Bivens* claims require allegations that some U.S. Constitutional right has been violated by a federal official or employee, *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). Yet (as Defendants have previously shown, Doc. 7, p. 9, n.3 and Doc. 11, p. 2, n.2 and Doc. 12, ¶ 6), none of the U.S. Constitutional provisions Plaintiffs’ rely on apply to or constrain the actions of Indian tribes or their officials and employees; *Id.* and, alleged violations of the analogous provisions applicable to Indian tribes set out at 25 U.S.C. § 1302 are not

² Based on this Court’s Doc. 17 Order and Defendants’ Supplemental Briefing at Doc. 22, it is now likely that any ultimate ruling on the validity of Plaintiffs’ § 1983 claims will be decided in the Choctaw Court rather than in this Court.

actionable in this Court. This is the plain and controlling holding of *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61, 65-72 (1978):

As we have repeatedly emphasized, Congress' authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly restrained. See *Lone Wolf v. Hitchcock*, 187 US 553, 565, 47 L Ed 299, 23 S Ct 216 (1903). Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of § 1302, in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions. But unless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that § 1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers.

Again, nothing in these arguments gives Plaintiffs any basis for evading their duty to exhaust tribal remedies

9. Plaintiffs next argue at ¶ 11 of their Doc. 18 Motion that their utterly frivolous federal grand jury argument somehow supports their attempt to evade their duty to exhaust their tribal remedies. The legal nonsensicality of this argument merits no further response except to say that it too gives Plaintiffs no basis for avoiding their duty to exhaust tribal remedies. In re their reference to the *National Farmers Union* exceptions to exhaustion, nothing that has occurred invokes any of those exceptions. See, Defendants' evolved position Plaintiffs' duty to exhaust their tribal remedies even as Plaintiffs' § 1983 claims as set out at Doc. 22. See, note 1, *supra*.

10. At ¶ 12 of Plaintiffs' Doc. 18 Motion Plaintiffs' attempt to avoid the fact that they did not plead that they were subjected to any form of adverse differential (discriminatory) treatment on account of their religion, race or national origin, but instead claim they should have been given special rights (based on their religious belief, their race and national origin) to escape the same mask mandate as applied to all other adults entering the Tribe's Golden Moon facility).

Defendants clearly pointed this out at Doc. 12, pp. 2-6). Plaintiffs’ “attack” this point by segueing to an utterly irrelevant diatribe about the word “patron” and castigate Defendants for not acknowledging the mask mandate exception for children under two years old. None of that drivel rebuts the fact that no claim of religion or race or national origin discrimination was actually pled. Finally, Plaintiffs’ dissertation ¶ 12 f-g on why the Tribe’s face coverings rule (which permits masks and “carves, bandanas, or other suitable fabrics”) was not a good idea does nothing to overcome their duty to exhaust tribal remedies.

11. At ¶ 13 of their Doc. 18 Motion, Plaintiffs’ again try to overcome Defendants’ showing that their real claim is that they were denied due process and the “right to exercise their religious beliefs” and equal protection rights based on their race or national origin, (¶ 13, a-b). But those claims are all based on the U.S. Constitution’s Bill of Rights which is not applicable to the Tribal Defendants (*Santa Clara Pueblo v. Martinez, supra*) and their invocation of 25 U.S.C. § 1302—as to which no private right of action in the federal courts exists—also does nothing to advance their case. *Id.*, and none of which arguments provide any ground for evading Plaintiffs’ duty to exhaust their tribal remedies.

12. Further, Plaintiffs’ new Title VI (42 U.S.C. § 2000d) argument is also fundamentally misplaced. Again, § 2000d forbids adverse differential discriminatory treatment based on religion, race or national origin. It does not forbid treating all similarly situated hotel guests the same. *See*, Doc. 12, ¶ 5, pp. 2-5; and, in the present context, Plaintiffs’ claims reduce to the unhinged contention that they had both a religious based right of exemption from the Tribe’s mask mandate and a race or national origin based on a “non-Indian person’s” exemption from that mandate. As shown, these are not “discrimination” claims actionable under any of the laws or constitutional provisions they rely upon. Also, Plaintiffs did not plead a claim under 42

U.S.C. § 2000d and did not allege in the Complaint that the Tribe's Golden Moon Hotel and Casino (a commercial operation) actually received any federal aid. And, in any event, even if such claims had been pled, they would have been a waste of this Court's time since Title VI (42 U.S.C. § 2000d) does not apply to Indian tribes or their instrumentalities. 42 U.S.C. § 1490t:

Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) and title VIII of the Civil Rights Act of 1968 (42 U.S.C. 3601 et seq.) shall not apply to actions by federally-recognized Indian tribes (including instrumentalities of such Indian tribes) under this Act.

In any event, none of these obfuscatory arguments provide Plaintiffs any grounds to evade their duty to exhaust their tribal remedies. All of those arguments can be raised in the Choctaw Court.

13. At ¶ 14 of their Doc. 18 Motion, the circumstances when the Tribe's sovereign immunity defense is available. But, Defendants have not pled a sovereign immunity defense in this Court and nothing in this argument provides Plaintiffs any basis for evading their duty to exhaust tribal remedies.

14. Plaintiffs' Memorandum (Doc. 19) supporting this Motion starts with another unfounded diatribe asserting that "Defendants' counsel has engaged in duplicity, obfuscation, stonewalling and untruthful statements ... in an attempt to mislead this this Court." Doc. 19, p.1. Plaintiffs' then assert "Defendants' counsel has yet to enter any evidence in the record, from any that could testify with first-hand knowledge as to the incident in question." *Id.* What Plaintiffs' continue to ignore is that the only evidence properly before this Court on Defendants' pending Motions are the facts alleged by Plaintiffs (taking them as true), plus the other ancillary matters otherwise properly before the Court on such Motions. (Doc. 7, pp. 6-7). That includes Plaintiffs' video of the incident at the Golden Moon which Plaintiffs filed on 7/27/2022 (Doc. 14) and which was apparently intended to be a part of their Complaint as Exhibit B. (*See*, Doc. 15). Plaintiffs then reference (at ¶ 2) and discuss at ¶ 3(4) of their Doc. 18 Motion a Rule 56(c)(1)

standard for establishing factual contentions that is utterly irrelevant to the pending Motions, none of which arguments give Plaintiffs any basis for evading their duty to exhaust tribal remedies.

15. Plaintiffs' Memorandum (Doc. 19, pp. 2-6) next turns to a recitation on the circumstances in which Rule 11 Sanctions may be warranted and an utterly unfounded claim that Defendants' counsel has engaged in conduct which warrants Rule 11 sanctions. Of course, Plaintiffs ignore the admonition at Fed. R. Civ.P. 11(c)(2) that any motion for Rule 11 sanctions must be separately served but not filed in this Court until the 21 day period for retraction has elapsed.

16. Plaintiffs' have repeatedly leveled serious but utterly unfounded charges against Defendants' counsel in their Doc. 18 Motion. *See in particular*, ¶ 11.a.ii:

Defendants' Counsel is willing to obfuscate, stonewall, lie, and even pervert the truth by intentionally using litigation as a tactic for warfare with willful, vindictive, negligent, and frivolous behavior that violates multiple rules of ethics and his code of professional conduct.

And, in their judicial notice argument at III, p. 13:

Plaintiffs request that this Honorable Court take Judicial Notice pursuant to FRCP Rule 201 that Counsel for the Defendants has committed fraud upon this court, in a feeble attempt to mislead the court with untruthful statements and cover up crimes committed by the Defendants collectively.

And, in their conclusion:

Defendants' Counsel has intentionally tried to mislead this court, and is currently engaged in litigious warfare attacking and mocking the merits of this case, the truth, and this honorable court. Counsel should be ashamed of the behavior pointed out in this document.

17. Further, Plaintiffs' have asked this Court to take "judicial notice" of this alleged misconduct and on that basis to impose Rule 11 sanctions on Defendants' counsel. Defendants agree that this Court has the power when confronted with obvious misconduct by a counsel or

pro se party to *sua sponte* impose appropriate Rule 11 sanctions, without requiring the wronged party or counsel to use the separate motion procedure of F.R.Civ.P. Rule 11(c)(2). In the circumstances of this case, where Plaintiffs' repeated false and unsupported accusations that Defendants' counsel—has systematically lied to this Court are clear and fallacious on the face of their pleadings, that the Court should consider *sua sponte* imposing Rule 11 sanctions upon Plaintiffs via the *sua sponte* show cause procedures now authorized by that rule. Defendants believe this Court—given the continuous barrage of such utterly false and scurrilous falsehoods leveled at Defendants' counsel has more than sufficient grounds to exercise this *sua sponte* authority to impose Rule 11 sanctions against Plaintiffs. *Jenkins v. Methodist Hospital of Dallas, Inc.*, 478 F.3d 255, 263-265 (5th Cir. 2007) (district court properly imposed sanctions against attorney *sua sponte* without any party initiated Rule 11 motion for the attorney's misrepresentation of the law in a brief and refusal to promptly correct that misrepresentation when identified in other party's reply brief—using Rule 11 show cause procedure).

18. For the reasons set out above, nothing that has occurred in this case constitutes any basis for imposing Rule 11 sanctions upon Defendants' counsel. However, such scurrilous and utterly unfounded accusations warrant the imposition of Rule 11 sanctions against Plaintiffs even though they claim to be *pro se*. See, *Ottara v. Travelers*, 2012 WL 3062300 (S.D. MS); *Ellis v. Clarksdale Public Utilities*, 2021 WL 4317670 (N.D. Miss.). All are based on the ridiculous premise that Defendants' counsel's making legal arguments Plaintiffs just disagree with or just will not accept or on Defendants' counsel's refusal to acquiesce in Plaintiffs' own unfounded legal arguments constitute false statement are lies by Defendants' counsel.

19. Finally, it appears from other information obtained by Defendants and from the several statutory and case law references liberally sprinkled throughout Plaintiffs' filings, *e.g.* in

particular their Docs. 18 and 19 filings *and see* their references to U.S. Supreme Court’s recent *Castro Huerta* case, *Bivens* and 42 U.S.C. § 2000d, that Plaintiffs are actually receiving ghost writing assistance from an attorney who has sought to facilitate Plaintiffs’ legal arguments before this Court while seeking to avoid compliance with the ethical and other rules which prohibit that behavior. *Dionisio v. Southern Financial Systems, Inc.*, 2022 WL 2825979 (S.D. MS) (“Ghost-writing by an attorney of a *pro se* plaintiff’s pleadings has been condemned as both unethical and a deliberate evasion of the responsibilities imposed on attorneys by Federal Rule of Civil Procedure 11.”), and cases there cited. *See in particular*, the detailed analysis in *Johnson v. Bd. Of County Commissioners*, 868 F.Supp. 1226, 1231-1232 (D. Colo. 1994).

In light of the above and the Affidavit of Matt Perkins, Executive Vice-President of Marketing & Hotel Operations, CRDE (**Exhibit F**), Defendants request that Plaintiffs and Ms. McMullan be asked by the Court to state under oath whether she is in fact ghost writing some or all of Plaintiffs’ filings in this Court; and, if that is found to be true, that the Court *sua sponte* impose appropriate Rule 11 sanctions upon all of them.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed to the Plaintiffs by United States Mail, postage prepaid, on September 2, 2022.

/s/ C. BRYANT ROGERS

C. BRYANT ROGERS