UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE SHAWNEE TRIBE, Plaintiff, v. STEVEN MNUCHIN, in his official capacity as Secretary of the Treasury, *et al.*, Defendants.	Case No. 4:20-cv-290-JED-FHM

NOTICE BY DEFENDANTS OF INTENT TO OPPOSE

Given the nature of the relief requested, and the procedure by which Plaintiff has sought that relief, Defendants hereby file this notice of an intent to oppose, if necessary, the pending Ex Parte Motion for Temporary Restraining Order (ECF No. 3) ("TRO Mot."). That opposition would be based on several grounds, including the following five fundamental points.

First, there was no basis to seek relief ex parte. Counsel for Plaintiff had been in contact with counsel for Defendants yesterday morning about the prospect of filing this case. Counsel for Defendants even worked to confirm the answers to several, specific questions that Plaintiff had. Counsel for Plaintiff responded by email at 1:05 p.m. on June 17, 2020, "[Counsel,] thank you for the prompt update. I appreciate it. I'll be in touch soon." Ex. 1. That was the last that counsel for Defendants heard of this matter. Counsel was not informed that the case had been filed, nor was counsel informed that the TRO motion had been filed.

Defendants are entitled to be heard before the Court enters the drastic remedy of a TRO. *Cf.* Fed. R. Civ. P. 65(b)(1)(B) (ex parte TRO may only be issued if "the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required"). The qualifying circumstances are "extremely limited." *Vivos Therapeutics, Inc. v. Parks*, No. 20-CV-01164-CMA-NRN, 2020 WL 2029268, at *1 (D. Colo. Apr. 28, 2020) (quoting *Reno Air Racing Ass'n, Inc. v. McCord*, 452 F.3d 1126, 1131 (9th Cir. 2006)). For example, an ex parte TRO may

be appropriate where "notice to the adverse party is impossible either because the identity of the adverse party is unknown or because a known party cannot be located in time for a hearing," or where "notice to the defendant would render fruitless the further prosecution of the action." *Id.* (citing *Reno Air Racing*, 452 F.3d at 1130-31).[1] None of those circumstances applies here, and Plaintiff has no excuse for seeking this relief ex parte.

Second, payments to Tribal governments from Title V of the CARES Act are currently being litigated through five related cases in the U.S. District Court for the District of Columbia, all before the same district judge, the most similar of which is now on appeal before the D.C. Circuit.[2] That district court recently ruled that cases challenging Treasury's methodology are *unreviewable* and, in any event, are at this point unduly delayed. *See* Ex. 2 (Memorandum Opinion & Order, *Prairie Band Potawatomi Nation v. Mnuchin*, No. 1:20-cv-1491-APM (D.D.C. June 11, 2020), ECF No. 22) ("*PBPN* Order"). Plaintiff's attempt to seek relief in this Court is a transparent effort to get a second bite at the apple.[3] Thus, before this Court even entertains Plaintiff's motion, the case should be transferred to the U.S. District Court for the District of Columbia.

Third, this case has been unjustifiably delayed. Plaintiff has known for *six weeks* that the

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[1] The fact that "Defendants cannot claim any surprise by this lawsuit or the injunctive relief sought," TRO Mot. at 15, is not a "reason why [notice] should not be required." Fed. R. Civ. P. 65(b)(1)(B). Plaintiff is asking this Court to enter a TRO without even hearing from the party to be enjoined. "The stringent restrictions on the availability of ex parte temporary restraining orders reflect the fact that our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute." *CHS Ins. Servs., LLC v. Franklin*, No. 17-CV-553-JHP-JFJ, 2017 WL 9471798, at *3 (N.D. Okla. Oct. 17, 2017), *report and recommendation adopted*, No. 17-CV-553-JHP-JFJ, 2017 WL 9471671 (N.D. Okla. Nov. 3, 2017) (quoting *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cty.*, 415 U.S. 423, 439 (1974)) (alterations omitted).

[2] *See generally Confederated Tribes of the Chehalis Reservation v. Mnuchin*, No. 1:20-cv-1002-APM (D.D.C.); *Cheyenne River Sioux v. Mnuchin*, No. 1:20-cv-1059-APM (D.D.C.); *Ute Indian Tribe v. Mnuchin*, No. 1:20-cv-1070-APM (D.D.C.); *Agua Caliente Band v. Mnuchin*, No. 1:20-cv-1136-APM (D.D.C.); *Prairie Band of Potawatomi Nation v. Mnuchin*, 1:20-cv-1491-APM (D.D.C.); *see also Prairie Band of Potawatomi Nation v. Mnuchin*, No. 20-5171 (D.C. Cir.).

[3] Indeed, Plaintiff admits candidly that it simply disagrees with the result from D.D.C. *See* TRO Mot. at 14 (calling Judge Mehta's June 15, 2020, order "a ruling that defies logic and is so counterproductive as to be truly astonishing").

Treasury Department intended to use population data from the Indian Housing Block Grant ("IHBG") program. *See* U.S. Dep't of Treasury, *Coronavirus Relief Fund: Allocation to Tribal Governments* (May 5, 2020).[4] Plaintiff has known since Monday, June 15, 2020, that Judge Mehta had rejected Treasury's intention to withhold funds "to resolve any potentially adverse decision in litigation," and that the Court had instead ordered Treasury to disburse *all* of the funds, leaving Treasury the discretion only to withhold the $7.65 million potentially obtainable by the plaintiffs in that case. And Plaintiff has known since the conversation between counsel on Wednesday morning, June 17, 2020, that Treasury had decided *not* to withhold that $7.65 million—*i.e.*, that all of the money was being disbursed that day. "In such circumstances, the 'imminence' of the alleged injury, and the corresponding need for *ex parte* relief to prevent it, is less a function of the Defendants' actions and more a function of the Tribe's own unexplained delay in bringing suit." *S. Ute Indian Tribe v. U.S. Dep't of the Interior*, No. 15-cv-01303-MSK, 2015 WL 3862534, at *1 (D. Colo. June 22, 2015). "A movant's delay in seeking injunctive relief 'cuts against finding irreparable injury.'" *Id.* (quoting *RoDa Drilling Co. v. Segal*, 552 F.3d 1203, 1211 (10th Cir. 2009)).

Fourth, Plaintiff has no chance of success on the merits of its claim. Plaintiff is challenging the methodology Treasury followed to allocate funds appropriated for Tribal governments under Title V of the CARES Act. Various Tribes had previously brought suit in the D.C. district court challenging how, when, and to whom Treasury planned to distribute these funds. In one case, a Tribe asserted essentially the same claim that Plaintiff asserts here: that Treasury's methodology for allocating the funds was unlawful.[5] But the district court in D.C. rejected that Tribe's preliminary injunction motion for several reasons, including primarily that the allocation of funds under Title V of the CARES Act is committed to agency discretion and therefore unreviewable in

[4] *Available at* https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Tribal-Allocation-Methodology.pdf.

[5] *See Prairie Band of Potawatomi Nation v. Mnuchin*, 1:20-cv-1491-APM (D.D.C.); *Prairie Band of Potawatomi Nation v. Mnuchin*, No. 20-5171 (D.C. Cir.).

federal court. Ex. 2 (*PBPN* Order) at 2-3 (citing 5 U.S.C. § 701(a)(2); *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993); *Physicians for Social Responsibility v. Wheeler*, 956 F.3d 634, 642 (D.C. Cir. 2020); *Drake v. FAA*, 291 F.3d 59, 71-72 (D.C. Cir. 2002)). The Court reasoned further that the plaintiff Tribe in *PBPN* had simply waited too long to move for emergency relief. *Id.* at 3-4. Both conclusions apply equally here.

Finally, this motion is too late to obtain the relief sought. *See* TRO Mot. at 15 ("The Shawnee Tribe respectfully requests an order temporary enjoining Treasury from distributing Title V Funds that would otherwise be available to The Shawnee Tribe, or no less than $12 million."). The premise of Plaintiff's motion is that payments allocated to Indian Tribes have not yet been made. *E.g.*, *id.* at 1 (suggesting that the funds "are being disbursed ***this week***") (emphasis in original). But as Plaintiff well knows, those payments have now been made. *See* Ex. 1. After counsel spoke, but before this case was filed, Defendants reiterated that fact publicly. *See* Ex. 3 (Def. Notice, *Agua Caliente v. Mnuchin*, No. 1:20-cv-1136 (D.D.C. June 17, 2020), ECF No. 43). The only money being withheld is that which has been allocated to Alaska native corporations ("ANCs"), but withheld pursuant to a different preliminary injunction. *Id.*[6] Whether ANCs are eligible for those payments is the subject of pending cross-motions for summary judgment.

Defendants are amenable to responding to Plaintiff's motion in due course, but respectfully suggest that the case should be transferred in the first instance to The Hon. Amit P. Mehta, U.S. District Judge, in the U.S. District Court for the District of Columbia. Should this Court retain the matter, Defendants will oppose the motion on a schedule set by the Court.

Dated: June 18, 2020

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

[6] As explained further in the same notice, Treasury has also encountered a payment issue related to the Data Universal Numbering System ("DUNS") codes of two Indian Tribes. *Id.* The amount held up by this issue is roughly $1.5 million. Treasury is working with the Tribes to correct the issue and complete payment of the full amount.

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