UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

APPEAL NO. 09-5071

CROWE & DUNLEVY, P.C.,
Appellee,

v.

GREGORY R. STIDHAM
Appellant.

Appeal from United States District Court
for the Northern District of Oklahoma
Honorable Terence Kern, Presiding
Dist. Ct. No. 09-CV-095

REPLY BRIEF OF APPELLANT

Oral Argument Not Requested **September 14, 2009**

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I. This Court has jurisdiction to hear all issues raised in Judge Stidham's Brief.

In a perplexing response to Judge Stidham's jurisdictional statement, Law Firm argues in its Response Brief that, under the collateral order doctrine, this Court cannot review the district court's rulings as to (1) whether the Muscogee (Creek) Nation has jurisdiction over Law Firm[1] or (2) that Law Firm failed to join necessary parties. This argument obviously overlooks that Judge Stidham appeals as of right from the Injunction pursuant to 28 U.S.C. §1292, which necessarily involves a review of the district court's analysis of the "likelihood of success on the merits" element in awarding the Injunction.

Interestingly, *TTEA v Ysleta Del Sur Pueblo*, 181 F.3d 676 (5th Cir. 1999), which Law Firm cites in its substantive argument (Resp. Br. at 18), also supports the proposition that a federal court must review the underlying merits of a tribal jurisdiction issue in determining whether the federal court has subject matter jurisdiction to hear a tribal jurisdiction case in the first place. *Id.* at 685. Thus, it is necessary for this Court to review the district court's *Montana* analysis to determine

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[1] In arguing against appellate jurisdiction under the *Cohen* doctrine, Law Firm also makes the puzzling argument that "the district court did not conclusively determine that the Muscogee Nation lacked jurisdiction" over Law Firm. (Resp. Br. at 4.) This is simply incorrect. The district court did in fact provide an analysis of whether the Nation's courts had jurisdiction over Law Firm pursuant to the *Montana v. United States* "exceptions". (Aplt. App. at 333-35.)

whether federal subject matter jurisdiction even exists. If so, then the court must also evaluate whether the district court correctly evaluated the "merits" of that analysis in granting an Injunction.

The same is true of the joinder issue. Cases from other circuits support that a review of Judge Stidham's nonjoinder defense is a necessary part of reviewing the merits of the Injunction. For instance, in a similar procedural fact pattern in *Helzberg's Diamond Shops, Inc. v. Valley West Des Moines Shopping Ctr., Inc.*, 564 F.2d 816 (8th Cir. 1977), the 8th Circuit held that "because the denial of Valley West's motion to dismiss enters into and becomes part of the District Court's order granting preliminary injunctive relief and because the granting of preliminary injunctive relief is itself appealable, we can and will review the order denying [the] motion to dismiss." *Id.* at 818 (citing *United States v. Fort Sill Apache Tribe*, 507 F.2d 861 (Ct. Cl. 1974)).

Similarly, the Second Circuit held in *Zwack v. Kraus Bros. & Co.* that "[w]e may also review the denial of the motion to dismiss for failure to join indispensable parties since if that motion was erroneously denied the cause must be dismissed and the appeal from the injunctions would become moot." 237 F.2d 255, 261 (2nd Cir. 1956). *Accord Katz v. Lear Siegler, Inc.*, 909 F.2d 1459, 1461 (Fed. Cir. 1990) (exercising jurisdiction over joinder issue intertwined with injunction staying other

proceedings); *Klaus v. Hi-Shear Corp.*, 528 F.2d 225, 234-35 (9th Cir. 1975) (vacating two preliminary injunctions because plaintiff had failed to join indispensable parties necessary to those injunctions) *overruled on other grounds in* 967 F.2d 335 (9th Cir. 1992). Law Firm's citations to other authorities are simply misplaced because those cases involve appeals solely from the denial of a dispositive motion, which, standing alone, is interlocutory and not appealable as of right. *See, e.g., Tarrant Regional Water Dist. v. Sevenoaks*, 545 F.3d 906, 910 (10th Cir. 2008); *Mastercard Int'l Inc. v. Visa Int'l Serv. Ass'n*, 471 F.3d 377, 381 (2nd Cir. 2006); *Armijo v. Wagon Mound Pub. Schs.*, 159 F.3d 1253, 1258-59 (10th Cir. 1998) (partial denial of summary judgment).

This Court clearly has appellate jurisdiction to review *all* issues raised by Judge Stidham in his Brief because Judge Stidham appeals of as of right from a preliminary injunction that, of necessity, included a ruling on these same issues after Judge Stidham raised them in the district court.

II. *Ex parte Young* does not apply when a governmental officer allegedly violates federal "common law" standing alone.

In its Response Brief at 19-21, Law Firm argues that "an *Ex parte Young* action may proceed on the basis of federal common law." The authorities cited by Law Firm, however, do not support this proposition. For instance, while this Court's

holding in *American Petrofina Co. v. Nance*, 859 F.2d 840 (1988), did uphold a district court's application of federal "common law" established in *Texas v. New Jersey*. *Texas*, however, was decided under the Supreme Court's original jurisdiction over disputes among the states, which is established in Article III, section 2 of the Constitution. *See* 379 U.S. 674, 675 (1965). This original jurisdiction is presumably why this Court ultimately held in *American Petrofina* that the federal district court could enjoin the "state officers' *unconstitutional* actions" pursuant to *Young*. 859 F.2d at 841 (emphasis added).

Law Firm's other citations actually support Judge Stidham's argument that *Young* claims are limited to allegations that an officer has acted in an unconstitutional manner or violated a specific federal statute or regulation. For instance, in *Aroostook Band of Micmacs v. Ryan*, 404 F.3d 48, 56 (1st Cir. 2005), the First Circuit reiterated that "the best explanation of *Ex parte Young* and its progeny is that the Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution or laws." *Id.* at 56-57 (quoting *Burgio & Campofelice, Inc. v. New York State Dep't of Labor*, 107 F.3d 1000, 1006 (2nd Cir. 1997)).[2] *See also* Resp. Br. at 20, *quoting* Charles Alan Wright, et al., 17A

[2] *Aroostook* also states in dicta that a *Young* action is not available in cases, like this one, that solely involve a tribe and a private party. *Id.* at 58 (citing *TTEA, supra*, 181 F.3d 676 (cited in Resp. Br. at 18)).

Fed. Prac. & Proc. (3rd) §4232 ("A federal court is not barred ... from enjoining state officers from acting unconstitutionally, either because their action is alleged to *violate the Constitution directly or because it is contrary to a federal statute or regulation* that is the supreme law of the land.") (footnotes omitted in Resp. Br.) (emphasis added).

In sum, as the Supreme Court has said, all of the cases interpreting *Young* do not bar such an action when "the officer acted beyond the scope of his *statutory* authority or, if within that authority, that such authority is *unconstitutional*." *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 689 (1982) (emphasis added). As already established in Judge Stidham's Brief, nearly all of the authorities cited by the district court, and any additional authorities cited by Law Firm in its Response Brief, all involve *Young* claims where the tribal officer was alleged to have violated the Constitution or a specific federal law.

Ultimately, regardless of the scope of *Young*, the fact remains that Law Firm never pleaded any allegations in its Complaint that could state a *Young* claim. The only recitation of federal law in the Complaint is Law Firm's bare statement that it brings a federal question "under the Constitution, laws, or treaties of the United States, raising the federal question of the scope of adjudicative jurisdiction of the Muscogee Nation." (Aplt. App. at 7.) There is no allegation, however, not even a

vague allegation, by Law Firm as to how Judge Stidham is committing any "ongoing violation of federal law" as required by *Young*. The district court's reliance on *Young* was not supported by any reference to any specific Constitution or statutory provision that Judge Stidham could be said to have violated. Accordingly, for this reason alone, the Injunction should be vacated and the case remanded with instructions to dismiss.

Law Firm also makes a "backup" argument that, even if *Young* is inapplicable, this Court's decisions in *Burrell v. Armijo* and *Tenneco Oil Co. v. Sac & Fox Tribe of Indians* still create an exception to Judge Stidham's sovereign immunity. This a distinction without a difference. As Law Firm recognizes, *Burrell* and *Tenneco* involve allegations that the officers acted outside of the authority that their respective tribe "was capable of bestowing them", i.e., that the acts were ultra vires. *Burrell*, 456 F.3d 1159, 1174 (10th Cir. 2006); *Tenneco*, 725 F.2d 572, 574 (10th Cir. 1984). In fact, in *Burrell*, the plaintiffs brought a federal statutory claim under 42 U.S.C. §1983 against the officers, alleging that the officers were acting outside their authority by violating the plaintiffs' civil rights. 456 F.3d at 1174. *Tenneco* involved allegations that tribal ordinances relating to oil and gas leases were unconstitutional or violated federal regulations. 725 F.2d at 574. While these cases may not have referenced *Young*, these are exactly the same type of "ongoing violation of federal law" allegations necessary to plead a *Young* claim.

III. Law Firm's attempt to reinvent its "irreparable harm" on appeal should be denied.

In the district court, Law Firm made one – and only one – argument as to the "irreparable harm" it would suffer if a preliminary injunction did not issue, which was the inability to recover its legal fees from Thlopthlocco because of Thlopthlocco's sovereign immunity. (Aplt. App. at 22-23, 243-244, 300-302.) Now on appeal, Law Firm changes its argument and claims that it faced "multiple" irreparable harms. These arguments are waived because they were not raised before the district court.

In addition, the newly raised arguments are simply wrong. First, Law Firm cites to the March 9, 2009, order entered by Judge Stidham in the *Anderson* litigation that required Law Firm to show cause why it had not complied with Judge Stidham's February 5, 2009, order to repay the fees at issue to Thlopthlocco or face indirect contempt charges. This order was stricken before the district court's injunction hearing on April 16, 2009, which was done *by agreement* between Law Firm and Judge Stidham in relation to this case. (Aplt. App. at 303-04.)

Law Firm also cites to *Hicks v. Bush*, 397 F. Supp. 2d 36, 41-41 (D.D.C. 2005), for the proposition that being subjected to trial in a court lacking jurisdiction is, in and of itself, irreparable harm. *Hicks*, however, involved claims by military prisoners in Guantanamo Bay who sought to stay their military commission tribunals until the

Supreme Court ruled on the constitutionality of those tribunals (which have since been found to be unconstitutional). 397 F. Supp. 2d at 37-38, 42.

The "irreparable harm" to those litigants should the tribunals proceed was obvious – they would have been subjected to military criminal proceedings that could have resulted in harsh sentences, including capital punishment. Law Firm's predicament can hardly be equated to those of the Guantanamo Bay prisoners. Law Firm simply does not want to return attorney fees it was paid during a tribal court proceeding, and by a tribal government that may not have had the authority to pay those fees. *Hicks* and the other authorities cited by Law Firm on this issue, which are not controlling on this Court, are simply contradictory to this Court's recent pronouncement in *Port Cities Properties v. Union Pacific Railroad Co.* that a party's alleged irreparable harm must be "certain and great" and generally cannot consist of economic loss. 518 F.3d 1186, 1190 (10th Cir. 2008).

Finally, Law Firm argues that there is "no evidence" it will be able to retrieve its fees from Thlopthlocco if the fees are returned to Thlopthlocco. First and foremost, Judge Stidham did not bear the burden of producing any such evidence at the injunction hearing – it was Law Firm's burden to show that the money would never be repaid by Thlopthlocco. In any event, the evidence at the injunction hearing was crystal clear after Law Firm admitted that its contract with Thlopthlocco

contained an immunity waiver, which completely negated the *only* argument it made in favor of the irreparable harm element at that hearing. Clearly, this element was lacking and the district court should never have granted the Injunction.[3]

IV. Law Firm does not address the cases that point to Law Firm being subject to the jurisdiction of the Muscogee (Creek) Nation courts.

While Law Firm reiterates its basic argument that it should not be subject to Muscogee (Creek) Nation tribal courts' jurisdiction under *Montana* and its progeny, it does not address the specific cases that strongly indicate, under a *Montana* analysis, that Law Firm should in fact be subjected to such jurisdiction.

For instance, Law Firm does not address Judge Stidham's citation to

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[3] Law Firm's footnote 24 about this admission is disingenuous. Judge Stidham is not "changing the transcript", but reporting what actually happened (as his counsel was only a few feet from Mr. McBride when it occurred). Apparently, the court reporter simply confused the two attorneys for Thlopthlocco named "Michael" who were present in the courtroom.

Micheal Salem, Esq., Thlopthlocco's current counsel, was sitting in the audience during the hearing when this waiver was discussed. There were no microphones in the audience. As Law Firm states, Mr. McBride was seated at counsel table, where there was a microphone. Mr. Salem did not come to the lectern until requested to do so by Judge Kern to discuss the current status of the *Anderson* litigation, which was *after* Mr. McBride's admission about the immunity waiver. (*See* Aplt. App. at 302.) Further, common sense would dictate that Mr. McBride, who has been Thlopthlocco's general counsel for fourteen years (Aplt. App. at 7), would have an instant recollection of Law Firm's contract with Thlopthlocco, while Mr. Salem, who had only started representing Thlopthlocco a few weeks before the hearing, may not have known anything about Law Firm's contract.

MacArthur v. San Juan County, in which this Court specifically stated in dicta that attorneys practicing before a tribal court consent to tribal jurisdiction as officers of the court. 309 F.3d 1216, 1223 (10th Cir. 2002). In the same vein, Law Firm does not address the multitude of cases that stand for the basic proposition that any court has the power to regulate the fees earned by attorneys practicing before it. *E.g., In re Austrian & German Bank Holocaust Litigation*, 317 F.3d 91, 99 (2nd Cir. 2003); *Rosquist v. Soo Line R.R.*, 692 F.2d 1107, 1111 (7th Cir. 1982). Law Firm's argument raises the "slippery slope" that every non-Indian lawyer practicing in a tribal court would not be subject to the jurisdiction of that tribal courts, including as to ethical discipline or sanctions.

Finally, Law Firm claims that Judge Stidham has never contested its argument that the Muscogee (Creek) Nation courts have no jurisdiction over Thlopthlocco's expenditure of tribal funds. The district court, however, solely addressed this issue in relation to the tribal courts' jurisdiction over Law Firm's contract, i.e., not all third-party contracts. (*See* App. at 332-333.) From Judge Stidham's perspective, the issue of the Muscogee (Creek) Nation's jurisdiction over Law Firm's contract is simply one aspect of the Muscogee (Creek) Nation's jurisdiction over Law Firm in general as attorneys practicing before its courts. Thus, only the broader issue needed to be addressed by Judge Stidham.

Further, this issue was clearly placed before the Muscogee (Creek) Nation courts by Thlopthlocco when it accused the *Anderson* defendants of "money grabbing", changing bank authorizations, and terminating service contracts with third parties, among other things. (Aplt. App. at 134-136.) Thus, any assertion that Thlopthlocco's expenditure of tribal funds was not brought within the jurisdiction of the Muscogee (Creek) Nation courts is simply wrong. In fact, the expenditure of those funds was one of the leading reasons upon which Thlopthlocco sought injunctive relief from the tribal court.[4]

V. Conclusion

In sum, Law Firm's Response Brief does not raise any new arguments that would direct this Court toward affirming any aspect of the Injunction or the district court's decision not to dismiss this cause. Law Firm's appellate jurisdictional arguments are simply incorrect (1) because Judge Stidham appeals as of right from the Injunction and (2) due to the overwhelming authority of the federal appellate decisions cited herein on this issue.

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[4] Law Firm has repeatedly argued in this case that the *Anderson* complaint did not allow for any claim other than those allowed under Thlopthlocco's express immunity waiver. In reality, by filing suit as a plaintiff, Thlopthlocco opened the door to any claim that could have been brought in "recoupment" against it. *Berrey v. ASARCO Inc.*, 439 F.3d 636, 643 (10th Cir. 2006). As Thlopthlocco made demand for attorney fees, costs, expenses and punitive damages, it opened itself to judgment or equitable relief relating to its own attorney fees. (App. at 146.)

Further, contrary to its insinuations in its Response Brief, Law Firm never raised any specific allegation in its Complaint of an "ongoing violation of federal law" as required to plead a *Young* claim. Thus, this case should have been dismissed due to the immunities enjoyed by Judge Stidham.

Finally, there simply was no evidence presented to the district court that proved Law Firm would have suffered any "certain and great" irreparable harm without a preliminary injunction. As to the underlying merits, there is no doubt that the Muscogee (Creek) Nation courts had jurisdiction over Law Firm, as attorneys practicing in those courts, to regulate Law Firm's activities, including the payment of fees to it by its client, Thlopthlocco. Accordingly, this Court should vacate the Injunction and remand with instructions to the district court to dismiss this cause.

Respectfully Submitted,

/s/Michael A. Simpson

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Certificate of Compliance

I hereby certify that (1) this brief complies with the type-volume limitation of Fed. R. App. Proc. 32(a)(7)(B) because this brief contains 10,489 words, excluding the parts of the brief exempted by Fed. R. App. Proc. 32(a)(7)(B)(iii), and (2) this brief complies with the typeface requirements of Fed. R. App. Proc. 32(a)(5) and the type style requirements of Fed. R. App. Proc. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word Perfect 11 in Times New Roman 14-point font.

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Certificate of Service

This is to certify that on this, the 14th day of September 2009, a true, correct, and exact copy of the above and foregoing instrument was mailed with proper postage thereon fully prepaid to:

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