Case No. 09-5071

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CROWE & DUNLEVY, P.C.,

Plaintiffs-Appellees,

v.

GREG STIDHAM,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Oklahoma
Case No. 09-CV-095 TCK-PJC
Honorable Terence Kern

RESPONSE BRIEF OF PLAINTIFFS-APPELLEES

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ORAL ARGUMENT NOT REQUESTED

CORPORATE DISCLOSURE STATEMENT

Crowe & Dunlevy, P.C., Plaintiffs-Appellees, have no parent corporations, and there is no publicly held corporation that owns 10% or more of its stock.

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STATEMENT OF PRIOR OR RELATED APPEALS

There are no prior or related appeals.

STATEMENT OF JURISDICTION

Plaintiff/Appellee Crowe & Dunlevy, P.C. ("Crowe") filed the underlying lawsuit against Gregory R. Stidham, a special district judge of the Muscogee (Creek) Nation District Court seeking declaratory and injunctive relief. (APLT. APP. 7-15.) In its Complaint, Crowe alleged that the courts of the Muscogee (Creek) Nation ("Muscogee") lacked jurisdiction over Crowe; lacked jurisdiction over the expenditure of funds by Thlopthlocco Tribal Town, a separate federally recognized tribe ("Thlopthlocco"); lacked jurisdiction over contracts between Thlopthlocco and third parties, including Crowe; and, for each of these reasons, lacked the jurisdiction to enter orders relating to Crowe and fees paid to it by its client. COMPL. ¶¶ 20-21 (APLT. APP. 11). The district court below had jurisdiction over the dispute pursuant to 28 U.S.C. § 1331, as the action raised the federal question of the scope of the adjudicative jurisdiction of the Muscogee Nation. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, --- U.S. ---, 128 S. Ct. 2709, 2716 (2008).

Crowe moved for a preliminary injunction on March 9, 2009 (APLT. APP. 17), and, on March 16th, Appellant filed a motion to dismiss for lack of jurisdiction, judicial immunity, failure to join indispensable parties, and venue (APLT. APP. at 84-85). On April 24, 2009, the district court denied Appellant's motion to dismiss in its entirety and granted Crowe's motion for a preliminary

injunction. ORDER at 24. Appellant has appealed the denial of the motion to dismiss on all grounds, except for lack of venue, and has appealed the granting of a preliminary injunction in favor of Crowe.

This Court has jurisdiction over Appellant's appeal of the preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1).

This Court does not, however, have jurisdiction over the entirety of Appellant's appeal of the denial of his motion to dismiss. Under the collateral order doctrine, this Court only has jurisdiction over Appellant's assertions that the trial court improperly applied *Ex parte Young* to deny sovereign immunity and denied judicial immunity. A denial of a motion to dismiss normally is not a final appealable order. *Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 515 (10th Cir. 1998). Under a narrow exception called the collateral order doctrine, however, the denial of the motion can be deemed a "final order" under 28 U.S.C. § 1291 if and only to the extent it (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the case; and (3) is effectively unreviewable on appeal from the final judgment. *Osage Tribal Council ex rel. Osage Tribe of Indians v. United States Dep't of Labor*, 187 F.3d 1174,

1179 (10th Cir. 1999) (earlier citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)).[1]

This Court may consider the trial court's denial of sovereign immunity based on *Ex parte Young*. A denial of tribal sovereign immunity meets the third *Cohen* factor and is immediately appealable when it also meets the other two requirements. *Id*. at 1179-80 ("for the order [denying sovereign immunity] to be immediately appealable under the collateral order doctrine, it must also satisfy two additional criteria: the remaining first and second *Cohen* factors"). Because an inquiry into whether a suit lies under *Ex parte Young* does not include an analysis of the merits of the claim -- but merely a determination as to whether the allegations are sufficient -- it is separate from the underlying merits, satisfying the second *Cohen* factor. *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1090 (9th Cir. 2007); *see also Opala v. Watt*, 454 F.3d 1154, 1157 (10th Cir. 2006) (finding the denial of sovereign immunity under *Ex parte Young* to be a collateral order). The first *Cohen* factor is satisfied, because the Court conclusively determined that *Ex parte Young* allows the suit to go forward.

For the same reasons, this Court may also consider the trial court's denial of judicial immunity based on the allegations in Crowe's Complaint. *Cf. Valdez v.*

[1] This Court sometimes refers to these three requirements as the "*Cohen* factors." *Osage Tribal Council*, 187 F.3d at 1179.

City & County of Denver, 878 F.2d 1285, 1287 (10th Cir. 1989) (denial of absolute quasi-judicial immunity).

Stidham's arguments, however, that he in fact had jurisdiction over Crowe (and Crowe's fee agreement) is not "completely separate from the merits of the case," *Osage Tribal Council*, 187 F.3d at 1179, and cannot be considered in this appeal. Indeed, the existence of this jurisdiction is the crux of all of Crowe's claims. *E.g.*, COMPL. at 8 (APLT. APP. 14 (seeking a declaratory judgment that the Muscogee courts do not have jurisdiction, *inter alia*, over Crowe, and seeking injunctions enjoining Appellant from enforcing orders as they relate to Crowe).) Moreover, the district court did not conclusively determine that the Muscogee Nation lacked jurisdiction, so the first *Cohen* factor is lacking, as well.

Similarly, an order denying dismissal for failure to join an indispensable party normally does not qualify as a collateral order, unless it is part of an already appealable issue. *Mastercard Int'l Inc. v. Visa Int'l Serv. Ass'n*, 471 F.3d 377, 384 (2d Cir. 2006). The Supreme Court has stated that pendent claims are appealable "if, and only if, they too fall within Cohen's collateral-order exception to the final-judgment rule." *Abney v. United States*, 431 U.S. 651, 663 (1977). But, this Court may exercise its discretionary and disfavored pendent jurisdiction "only 'where the otherwise nonappealable decision is "inextricably intertwined" with the appealable decision, or where review of the nonappealable decision is "necessary to ensure

meaningful review" of the appealable one.'" *Tarrant Regional Water Dist. v. Sevenoaks*, 545 F.3d 906, 915 (10th Cir. 2008). A pendent claim is inextricably intertwined "only if the pendent claim is coterminous with, or subsumed in, the claim before the court on interlocutory appeal--that is, where appellate resolution of the collateral appeal *necessarily* resolves the pendent claim as well." *Armijo v. Wagon Mound Pub. Schs.*, 159 F.3d 1253, 1264-65 (10th Cir. 1998). Appellant's argument that other Muscogee judges are necessary parties to the litigation is not inextricably intertwined with the appealable *Ex parte Young* and judicial immunity issues; this Court can analyze the latter two without addressing the issues related to Fed. R. Civ. P. 19. *See Tarrant*, 545 F.3d at 915 ("We can -- and did -- engage in that analysis [of sovereign immunity] without addressing the issues related to *Younger* abstention . . . . Thus, we decline to exercise [pendent] jurisdiction over the appeal to the refusal to abstain.").

These portions of the appeal should be dismissed.

STATEMENT OF ISSUES

1. Did the district court err in denying Appellant's motion to dismiss upon finding that Crowe's Complaint satisfied *Ex parte Young*, 209 U.S. 123 (1908)?

2. Did the district court err in denying Appellant's motion to dismiss for judicial immunity?

3. Did the district court abuse its discretion in finding irreparable harm and, therefore, err in granting Crowe's application for a preliminary injunction?

STATEMENT OF THE CASE

This saga began in the middle of pending tribal-court litigation with an ordinary, but untimely early, application for an award of attorney's fees and resulted in an extraordinary order directed against nonparty attorneys, effectively invalidating their contract and demanding the refund of 20 months of earned fees or face contempt of court.

In the litigation brought by Thlopthlocco before the Muscogee court, the defendants sought an order requiring Thlopthlocco to pay their attorney's fees, as well as its own. The issue of Thlopthlocco's payment of its own fees to Crowe was not placed in issue by any party to the litigation, nor were the millions of dollars paid out to other third parties in the ongoing conduct of its business affairs over the preceding years. Appellant Judge Stidham granted the application for fees and ordered Thlopthlocco to pay attorneys for both sides of the litigation. Thlopthlocco (not Crowe) appealed the order and the Supreme Court reversed it as premature, but decided *sua sponte*, without notice, hearing, evidence, or authority -- but on the basis of fairness -- to require Thlopthlocco to stop paying Crowe and to obtain the return of all fees previously paid by Thlopthlocco to its attorneys in the course of the litigation.

Then, on February 5, 2009, Appellant Judge Stidham took an even bigger leap. Despite the fact that no claim had ever been made against Crowe in any jurisdiction, that the tribal court lacked jurisdiction over the subject matter, or even that Crowe was not a party to any litigation before him -- Judge Stidham directly ordered Crowe to return almost two years worth of legal fees to its client (who did not want them).

So, on February 24, 2009, Plaintiff/Appellee Crowe filed a Complaint seeking a preliminary injunction, permanent injunction, and declaratory judgment. COMPL. (APLT. APP. 7-15). In that Complaint, Crowe sought a declaratory judgment that the Muscogee courts do not have jurisdiction over Crowe and do not have jurisdiction over the agreements between Crowe and its client, a federally-recognized Indian tribe (Thlopthlocco) and did not have jurisdiction over the expenditure by Thlopthlocco of its governmental funds. *E.g.*, COMPL. ¶ 26 (APLT. APP. 12). Crowe specifically sought a declaratory judgment that the Muscogee courts did not have jurisdiction to issue two orders as they related to Crowe -- a January 16, 2009 order of the Muscogee Supreme Court and Appellant's February 5, 2009 Order, which purported to enforce the January 16 Order. *Id.* Crowe also sought preliminary and permanent injunctions to maintain the status quo and prevent Appellant from enforcing his February 5 Order or otherwise attempting to

enforce the January 16 Order against Crowe. COMPL. ¶¶ 29, 35 (APLT. APP. 13-14).

On March 6, 2009, Crowe learned that Appellant had orally ordered Crowe and one of its attorneys, D. Michael McBride III, to appear at a hearing on April 3rd and show cause why they had not complied with the February 5 Order. MCBRIDE AFF. ¶ 21 (APLT. APP. 37). So, on March 9th, Crowe filed its application for a preliminary injunction. (APLT. APP. 17-83.) Crowe argued that it had a likelihood of success on the merits (that the Muscogee courts lacked jurisdiction), that it would suffer irreparable harm, and that the other requirements for an injunction to preserve the status quo were met. (*Id*.) Crowe simultaneously moved for a temporary restraining order or, alternatively, to expedite the hearing on its application in light of the April 3 show-cause hearing. (APLEE. SUPP. APP. 1-4.) The district court granted the motion for expedited consideration and set an accelerated briefing schedule. (APLEE. SUPP. APP. 5, corrected at APLT. APP. 3 (docket #15).) On that same day, Appellant filed a written order in the Muscogee courts requiring McBride or other Crowe attorneys to appear and show cause as to why they should not be held in contempt of court. (APLT. APP. 253-54.)

On March 16, 2009, Appellant filed a motion to dismiss Crowe's complaint and application for preliminary injunction. (APLT. APP. 85-228.)[2] In his motion, Appellant argued that he was protected by judicial and sovereign immunity, that the Muscogee court had jurisdiction over Crowe, that Crowe had failed to join indispensable parties, that venue was not proper, and that Crowe was not entitled to injunctive relief. (*Id*.) Crowe responded to the motion to dismiss and filed its reply in support of the application for preliminary injunction on March 18, 2009. (APLT. APP. 231-54.) Crowe also moved, over Appellant's objection, to expedite the remaining briefing in light of the April 3rd show-cause hearing and possibility of contempt being entered at that hearing. (APLEE. SUPP. APP. 6-8.) The Court granted expedited briefing by minute order and set the hearing for March 30, 2009. (APLT. APP. 4 (docket #23 & 24).) Appellant filed his reply brief on March 26, 2009. (APLT. APP. 255-66.) The hearing was later reset (APLT. APP. 4-5 (docket #27)) and ultimately took place as an oral argument hearing on April 16, 2009

[2] Many of the documents contained in the copy of the Appellant's Appendix delivered to Crowe do not show the district court's file or electronic stamp. 10th Cir. R. 30.1(C)(1). Crowe has determined that Appellant has omitted a page between APLT. APP. 166 and 167. As the missing page is from a case attached to an exhibit to an exhibit to Appellant's brief below (a 129-page document in total) and neither party cites this page, Crowe has not reprinted the correct filing in the Supplemental Appendix. Crowe has also determined that Appellant included a modified copy of the *Stipulation for Purposes of the Hearing* (APLT. APP. 267-70). Crowe is including a clean copy of this filing in the Supplemental Appendix. (APLEE. SUPP. APP. 9-11.) Crowe is not currently aware of any other discrepancies in the Appendix.

(APLT. APP. 272-310).[3] On April 24, 2009, the district court entered an order denying Appellant's motion to dismiss and granting a preliminary injunction in favor of Crowe, preserving the status quo. ORDER at 24. On May 5, 2009, Appellant filed his Notice of this appeal. (APLT. APP. 337-38.)

STATEMENT OF FACTS[4]

Plaintiff/Appellee Crowe is a longstanding Oklahoma law firm whose many clients include Thlopthlocco Tribal Town, a federally recognized Indian Tribe ("Thlopthlocco"). MCBRIDE AFF. ¶¶ 2-3 (APLT. APP. 33). D. Michael McBride III, a member of Crowe, has represented Thlopthlocco as its counsel for the past fourteen years and as its general counsel for the past decade. MCBRIDE AFF. ¶¶ 3-4 (APLT. APP. 33).

In the 1930s, the United States officially recognized Thlopthlocco as a separate and distinct sovereign Indian band, and the Constitution and By-Laws of the Thlopthlocco Tribal Town Oklahoma (the "Thlopthlocco Constitution") were ratified in 1939. MCBRIDE AFF. ¶¶ 5-6 & EXS. A-1 & A-2 (APLT APP. 33-34, 40-

[3] As represented to the district court at oral argument, to allow this date to be reset, Judge Stidham had agreed to postpone the show cause hearing until after the federal district court ruled on the motion to dismiss and application for preliminary injunction. 4/15/09 TR. at 32:15-33:7 (APLT. APP. 303-04).

[4] The only evidence before the district court consisted of the affidavit of D. Michael McBride, III the attachments to that affidavit, and other orders of the Muscogee courts. In the *Stipulation*, the parties agreed that the facts set forth in Mr. McBride's affidavit were uncontroverted. (APLEE. SUPP. APP. 9-11.)

45, 47-53). Pursuant to the Thlopthlocco Constitution, the governing body of the Thlopthlocco is the "Business Committee," which has the power to transact business and to otherwise speak or act on behalf of Thlopthlocco on all matters in which the tribe is empowered to act. THLOP. CONST. art. V, §§ 4, 7 (APLT. APP. 50). The ten-person Business Committee consists of five elected officers and five appointed advisory council members. THLOP. CONST. art. V, §§ 1, 3-4 (APLT. APP. 49-50). The current Thlopthlocco government -- with one notable exception -- has been in place since February 10, 2007. MCBRIDE AFF. ¶¶ 8, 16-17 (APLT. APP. 34-35, 36-37). This Business Committee has a budget of over $3.6 million and oversees other tribal government committees, 50 tribal employees, and 125 casino employees. MCBRIDE AFF. ¶ 7 (APLT. APP. 34). On a daily basis the Thlopthlocco government provides or administers essential social services to its citizens, including utility assistance, emergency assistance, housing and rehabilitation services, childcare, educational help, and healthcare. (*Id*.) The Thlopthlocco government also manages and protects over 2,000 acres of tribal trust lands in Hughes and Okfuskee counties and deals with Indian Child Welfare cases that impact Thlopthlocco tribal families. (*Id*.) Thlopthlocco is the second largest employer in Okfuskee County, one of the poorest areas of Oklahoma. (*Id*.)

On June 5, 2007, Thlopthlocco became aware that one member of its Business Committee, Town King/Mekko Nathan Anderson, had attempted a *coup*

d'etat. MCBRIDE AFF. ¶ 9 (APLT. APP. 35). After Anderson and the other Business Committee members had been serving for about five months, Mr. Anderson declared himself the only valid leader and went on to "appoint" a new government. (*Id*.) This unilateral action was unconstitutional, invalid, and had no legal effect. THLOP. CONST. art. VI (APLT. APP. 50). However, Mr. Anderson and his co-conspirators had taken other, more disturbing actions, such as attempting to access Thlopthlocco bank accounts, issuing "resolutions" on Thlopthlocco letterhead, "firing" casino employees, and otherwise interfering with Thlopthlocco's legitimate business interests. MCBRIDE AFF. ¶ 11 (APLT APP. 35-36).

While Thlopthlocco is a separate federally-recognized tribe, it has an historical relationship with the Muscogee (Creek) Nation[5] and many of its members have dual citizenship with Muscogee.[6] MCBRIDE AFF. ¶ 12 (APLT. APP.

[5] According to the 1937 Kirgis report, the Creeks were originally a confederacy composed of a number of tribes, called "Talwa" or tribal towns. (APLT. APP. 40.) The Federal Government originally dealt with each Talwa separately but later tried to force a single Creek government on the tribes. (APLT. APP. 40-41.) As many other tribes have done, Thlopthlocco resisted this pressure, maintaining the old ways, resulting in its recognition as a federally recognized tribe. (APLT. APP. 41-45.)

[6] Appellant repeatedly states that all Thlopthlocco citizens are eligible to be members of the Muscogee Nation. (*E.g.*, Aplt. Br. at 29.) There is no support in the record for this assertion and it is, in any event, irrelevant to the district court's ruling below. Appellant's brief contains numerous other statements lacking factual support or citations to the record, Fed. R. App. P. 28(a)(7). Crowe understands that such unsupported statements will be ignored and does not point out every such instance.

36). Thlopthlocco has never authorized Muscogee courts to exercise jurisdiction over its laws, but it has, in some cases, waived its sovereign immunity and consented to jurisdiction in lawsuits directed at dual Thlopthlocco-Muscogee citizens. MCBRIDE AFF. ¶ 13 (APLT. APP. 36).

Particularly concerned that Mr. Anderson's actions might cause confusion with its banks, professional services providers, vendors, contracting parties, other third parties, and governments, Thlopthlocco resolved to seek the aid of the Muscogee courts for the limited purpose of enjoining these unlawful actions. MCBRIDE AFF. ¶¶ 10-11 (APLT. APP. 35). So, on June 7, 2007, Thlopthlocco conferred on the Muscogee court limited jurisdiction and granted a narrow waiver of sovereign immunity "on a limited basis only for the purposes of adjudicating this dispute only, only for claims brought by" Thlopthlocco (to enjoin Mr. Anderson and his fellow defendants (all dual citizens) from interfering with the functioning of Thlopthlocco or impersonating governmental officials) and "only for injunctive or declaratory relief." MCBRIDE AFF. ¶ 10 & EX. A-3, THLOP. BUS. CTTE. RES. NO. 2007-21 (APLT. APP. 35, 55-56). The waiver explicitly did not include election disputes. MCBRIDE AFF. EX. A-3 (APLT. APP. 56). On June 11, 2007, Thlopthlocco filed its *Verified Complaint and Application for Emergency*

Injunction in the Muscogee District Court (the "Muscogee Lawsuit").[7] MCBRIDE AFF. ¶ 14 (APLT APP. 36); THLOP. COMPL. (APLT. APP. 124-217 (with waiver attached at APLT. APP. 192-93)). Thlopthlocco was represented in this lawsuit by its general counsel, Mr. McBride, and other members of Crowe. MCBRIDE AFF. ¶ 9 (APLT. APP. 35). Crowe regularly billed Thlopthlocco for the fees incurred in the Muscogee Lawsuit, and Thlopthlocco paid those bills. MCBRIDE AFF. ¶ 22 (APLT APP. 37). On June 11, 2007, the Muscogee District Court entered an order restraining Mr. Anderson and his fellow defendants from interfering with Thlopthlocco or holding themselves out as representing Thlopthlocco. MCBRIDE AFF. ¶ 15 & EX. A-4 (APLT. APP. 36, 58-63). With the exception of six days in June 2007, that restraining order has remained in effect. MCBRIDE AFF. ¶ 15 (APLT APP. 36). The current ten-member Business Committee has acted for Thlopthlocco from February 10, 2007, onwards -- with the exception of Mr. Anderson, who was removed from office by a majority vote of tribal members on July 28, 2007, pursuant to the Thlopthlocco Constitution's Grievance process. MCBRIDE AFF. ¶¶ 8, 16-17, THLOP. CONST. Art. VI (APLT APP. 34, 36-37, 50).

The Muscogee Lawsuit had been pending for over a year when, on September 11, 2008, Appellant granted a motion of defendants to have their fees

[7] Appellant likes to say "the Law Firm filed," "the Law Firm appealed," or even "the Law Firm placed the issue . . . before the Supreme Court." (*E.g.*, Aplt. Br. at 9.) As the record shows in the text above, Crowe was merely Thlopthlocco's attorney. Thlopthlocco was the only plaintiff in the Muscogee Lawsuit.

paid by Thlopthlocco. MCBRIDE AFF. ¶ 18 (APLT. APP. 37); 9/11/08 OPINION & ORDER (APLT. APP. 218-22). Thlopthlocco appealed this order to the Muscogee Supreme Court, which reversed the order as premature on January 16, 2009 (the "January 16 Order"). MCBRIDE AFF. ¶ 19 & EX. A-5 (APLT. APP. 37, 65-67). However, the Muscogee Supreme Court went on to state that, "[i]n the interest of fairness," no party should be entitled to attorney's fees during the pendency of the Muscogee Lawsuit. MCBRIDE AFF. EX. A-5 (APLT. APP. 65). Although no claim had been made regarding Thlopthlocco's payment of its own legal fees, the court then ordered that any fees already paid by Thlopthlocco to its attorneys be returned and re-deposited into the treasury.[8] (*Id*.) Thlopthlocco filed a petition for rehearing with the Muscogee Supreme Court on January 26, arguing among other things that the January 16 Order was beyond the jurisdiction of the Muscogee courts. The court summarily denied the petition on February 12, 2009. MCBRIDE AFF. ¶ 19 & EX. A-6 (APLT. APP. 37, 69-70).

On February 5, 2009, "in conformance" with the January 16 Order, Judge Stidham issued an order directly to Crowe, ordering it "to return all attorneys' fees paid from the Thlopthlocco Treasury with proof of repayment furnished to this court on or before February 20, 2009" (the "February 5 Order"). MCBRIDE AFF. ¶

[8] The order also called into question the Thlopthlocco government's ability to expend any tribal funds but singled out its attorney fee payments for immediate refund. (APLT. APP. 65.)

20 & EX. A-7 (APLT. APP. 37, 72-73). On February 24, 2009, Crowe filed the instant lawsuit. (APLT. APP. 7-15.) On March 6, 2009, Judge Stidham, after reportedly acknowledging this lawsuit, found that Crowe had not complied with his February 5 Order and orally ordered that Crowe appear for a "show cause" hearing. MCBRIDE AFF. ¶ 21 (APLT. APP. 37). Crowe filed an application for preliminary injunction on March 9th (APLT. APP. 17-83) and, on that same day, Judge Stidham filed a written order finding that,

> Plaintiff's counsel Michael McBride & CROWE & DUNLEVY has wholly failed, refused and neglected to comply with this Court's Order to forthwith return all attorneys' fees paid from the Thlopthlocco Treasury with proof of repayment on or before February 20, 2009

and ordering that, on Friday, April 3, 2009, at 10:00 a.m.,

> Plaintiff's counsel, Michael McBride, or representatives of CROWE & DUNLEVY, appear and show cause why they should not be held in indirect contempt of court for their wilfull [*sic*] failure to comply with this Court's earlier Order which was issued in compliance with the Order of the Supreme Court of the Muscogee (Creek) Nation.

3/9/09 ORDER (APLT. APP. 253-54).

SUMMARY OF ARGUMENT

The district court properly found that Appellant was not entitled to invoke the Muscogee Nation's sovereign immunity where the complaint alleged that he acted outside the tribe's jurisdiction. Appellant could not invoke judicial immunity in a suit brought against him in his official capacity and in any suit seeking prospective injunctive and declaratory relief. The district court did not abuse its

discretion in finding that Crowe had demonstrated a substantial risk of irreparable harm and, thus, properly granted the requested injunction.

ARGUMENT AND AUTHORITIES

I. The District Court Properly Denied Stidham's Motion to Dismiss

A. Standard of Review

The trial court's determinations of (the lack of) sovereign immunity under *Ex parte Young* and judicial immunity are subject to *de novo review* based on the allegations in Crowe's Complaint. *Sac & Fox Nation v. Hanson*, 47 F.3d 1061, 1063 (10th Cir. 1995) (noting that questions of sovereign immunity are subject to *de novo* review); *Nevitt v. Fitch*, 68 Fed. App'x 180, 181 (10th Cir. 2003) (unpublished) ("This court reviews *de novo* a district court's dismissal of a complaint on judicial immunity grounds, using the same standards it employs when reviewing a dismissal under Fed. R. Civ. P. 12(b)(6).").[9]

B. The District Court properly found that *Ex parte Young* applies to Crowe's claims

1. *Ex parte Young* applies when a tribal officer is acting in violation of the federal common law, which is the supreme law of the land.

Appellant apparently concedes that *Ex parte Young* provides an exception to tribal immunity but asserts that such an action cannot be based on federal common

[9] The Fed. R. Civ. P. 19 decision is not properly part of this appeal. However, if it were, this Court generally reviews a Rule 19 decision for abuse of discretion, while reviewing *de novo* any legal conclusions underlying that decision. *Sac & Fox Nation v. Norton*, 240 F.3d 1250, 1258 (10th Cir. 2001).

law (as opposed to a federal statute or the Constitution). The latter argument is incorrect.

This Court has implicitly held,[10] and multiple Courts of Appeals have explicitly found that *Ex parte Young* applies in suits against tribal officials. *Vann v. Kempthorne*, 534 F.3d 741, 749 (D.C. Cir. 2008) ("*Ex parte Young* . . . and related cases have come to apply to questions of tribal sovereign immunity."); *TTEA v. Ysleta del sur Pueblo*, 181 F.3d 676, 680 (5th Cir. 1999) ("There is no reason that the federal common law doctrine of tribal sovereign immunity, a distinct but similar concept, should extend further than the now-constitutionalized doctrine of state sovereign immunity."); *Tamiami Ptrs., Ltd. v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1050-51 (11th Cir. 1995) ("That doctrine [of *Ex Parte Young*] . . . applies in suits brought against tribal authorities in their official capacities."); *N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458, 460 (8th Cir. 1993) ("*Ex parte Young* applies to the sovereign immunity of Indian tribes, just as it does to state sovereign immunity."); *Burlington*

[10] While it does not reference *Ex parte Young*, multiple courts have interpreted *Tenneco Oil Co. v. Sac & Fox Tribe of Indians*, 725 F.2d 572 (10th Cir. 1984), as applying the doctrine to tribes. *See Vann v. Kempthorne*, 534 F.3d 741, 749 (D.C. Cir. 2008); *N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458, 460 (8th Cir. 1993) ("The Tenth Circuit applied this [*Ex parte Young*] exception in *Tenneco* . . . ."). And, in *Burrell v. Armijo*, this Court cited Ninth Circuit case law that applied *Ex parte Young* to tribal officials. 456 F.3d 1159, 1174 (10th Cir. 2006) (citing *Burlington N.R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir. 1991)).

N. R.R. Co. v. Blackfeet Tribe, 924 F.2d 899, 901 (9th Cir. 1991) ("tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law"), *overruled on other grounds by Big Horn County Elec. Co-op, Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000). *Cf. Santa Clara Pueblo v. Martinez*, 436 U.S 49, 59 (1978) ("As an officer of the Pueblo, petitioner Lucario Padilla is not protected by the tribe's immunity from suit." (citing, *inter alia*, *Ex parte Young*).

Appellant incorrectly asserts that *Ex parte Young* does not apply to violations of federal common law. The Tenth Circuit has held that an *Ex parte Young* action may proceed on the basis of federal common law. *Am. Petrofina Co. v. Nance*, 859 F.2d 840, 841-42 (10th Cir. 1988). In *American Petrofina*, the trial judge declared amendments to an Oklahoma statute to be preempted by the federal common law established in an earlier case, *Texas v. New Jersey*, 379 U.S. 674 (1965), and granted a preliminary injunction preventing members of the Oklahoma Tax Commission from enforcing the amendments. 859 F.2d at 841. The defendants appealed, asserting state sovereign immunity under the Eleventh Amendment. *Id*. The Tenth Circuit rejected this argument, citing *Ex parte Young* and the federal common law announced by the Supreme Court in *Texas*. *Id*. at 841-42; *see also Aroostook Band of Micmacs v. Ryan*, 404 F.3d 48, 63 (1st Cir. 2005) ("inherent tribal sovereignty is a federal common law right that . . . is . . . a

proper basis for an *Ex parte Young* action"), *overruled on other grounds by Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 25 (1st Cir. 2006) (overruling *Aroostook's* distinction between sovereignty and sovereign immunity).

This is not a surprising result. An *Ex parte Young* action can assert that the officer's actions violate a federal statute, because such actions would violate the Supremacy Clause, U.S. Const. art. VI, cl. 2. *See, e.g.,* Charles Alan Wright, et al., 17A Fed. Prac. & Proc. Juris. (3d) § 4232 ("A federal court is not barred by the Eleventh Amendment 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)). The Supremacy Clause, which states that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made . . .shall be the supreme Law of the Land," applies equally to Indians and Indian tribes. *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620-21 (1870). And, judicially created, or recognized, federal common law has long been held to be the supreme law of the United States.[11] *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 314 (1955) ("States can no more override such judicial rules validly fashioned than they can override Acts of

[11] Tribal sovereignty or sovereign immunity is itself a matter of federal common law, and tribes often use the supremacy of this law to defeat state encroachment. *Three Affiliated Tribes v. Wold Eng'g*, 476 U.S. 877, 890 (1986).

Congress."). Therefore, when Crowe alleged that Judge Stidham was acting outside the scope of his authority, as defined by federal law, Crowe's allegations fell within the *Ex parte Young* doctrine, and Judge Stidham could not assert the tribe's sovereign immunity. *See, e.g., BNSF Ry. Co. v. Ray*, 297 Fed. App'x 675, 677 (9th Cir. 2008) (unpublished) ("Because Plaintiffs have alleged an ongoing violation of federal law--the unlawful exercise of tribal court jurisdiction--and seek prospective relief only, tribal sovereign immunity does not bar this action."); *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007) (finding *Ex parte Young* requirements "[c]learly" met where plaintiff alleged that the defendants were "seeking to enforce an unauthorized tax against BNSF that the Tribe lacks the jurisdiction to impose"); *Tamiami Ptrs., Ltd. v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1044, 1051 (11th Cir. 1995) (allowing *Ex parte Young* suit to go forward where one of the allegations was that "the Tribal Court had exceeded its jurisdiction").

2. Crowe's Complaint meets the requirements of *Ex parte Young*, and Judge Stidham cannot invoke the Muscogee Nation's sovereign immunity.

In determining whether *Ex parte Young* applies, the Court need only look at Crowe's Complaint. Sovereign immunity will not bar suit against state (or tribal) officials, so long as the complaint (1) seeks only declaratory and injunctive relief, rather than monetary damages for the alleged violations of federal law; and (2) is

aimed against the officers acting in their official capacities, rather than against the State (or tribe) itself.[12] *Hill v. Kemp*, 478 F.3d 1236, 1255-56 (10th Cir. 2007); *see also Harris v. Owens*, 264 F.3d 1282, 1289 (10th Cir. 2001) ("at this stage, the question is not whether the state officials 'actually violated federal law'; rather, it is whether the plaintiffs have stated a 'non-frivolous, substantial claim for relief' under federal law"). In determining whether the doctrine of *Ex parte Young* avoids sovereign immunity, "a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002). Crowe's Complaint meets these requirements, suing Judge Stidham as "an acting special district judge for the Muscogee (Creek) Nation District Court." COMPL. ¶ 2 (APLT. APP. 7). The Complaint also sets forth the underlying facts and then alleges that the "Muscogee courts, therefore, do not have jurisdiction over Crowe; do not have jurisdiction over the expenditure of Thlopthlocco funds; and do not have jurisdiction over contracts between Thlopthlocco and third parties, including Crowe." COMPL. ¶¶ 4-20 (APLT. APP. 8-11). Crowe further alleges that "Muscogee did not have the power to issue either

[12] *Ex parte Young* proceeds on the "admitted fiction that a suit seeking an injunction against a state employee seeking to do his or her job is (somehow) different in substance than a suit against the state itself." *Hill v. Kemp*, 478 F.3d 1236, 1256 (10th Cir. 2007) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984)).

the January 16 Order or February 5 Order" and "Judge Stidham acted outside the scope of his authority in enforcing the January 16 Order and issuing the February 5 Order." COMPL. ¶ 21 (APLT. APP. 11). Crowe then seeks declaratory judgment as to this lack of jurisdiction, as well as a judgment that the January 16 and February 5 Orders were null and void as they related to Thlopthlocco's attorney's fees. COMPL. ¶¶ 25-27 (APLT. APP. 12). And, Crowe seeks only prospective relief (not damages), asking for preliminary and permanent injunctions, enjoining Judge Stidham from enforcing the January 16 and February 5 Orders as they relate to Crowe. COMPL. ¶¶ 29, 35 (APLT. APP. 13-14). This is exactly the sort of prospective relief envisioned in an *Ex parte Young* action. *See Verizon Md.*, 535 U.S. at 645 ("The prayer for injunctive relief--that state officials be restrained from enforcing an order in contravention of controlling federal law--clearly satisfied our 'straightforward inquiry.'"); *Tarrant Regional Water Dist. v. Sevenoaks*, 545 F.3d 906, 912-13 (10th Cir. 2008) ("The relief sought by TRWD--namely, a declaratory judgment that the laws at issue are unconstitutional and cannot be enforced to the detriment of TRWD, as well as an injunction prohibiting the defendants from enforcing those laws--is clearly prospective.").

C. Even if *Ex parte Young* does not apply, tribal sovereign immunity does not extend to Judge Stidham's actions under *Burrell* and *Tenneco.*

Crowe's Complaint has also met the requirements of Tenth Circuit precedent for stating an exception to the sovereign immunity claimed by Appellant. When "'a complaint alleges that the named officer defendants have acted outside the amount of authority that the sovereign is capable of bestowing, an exception to the doctrine of sovereign immunity is invoked.'" *Burrell v. Armijo*, 456 F.3d 1159, 1174 (10th Cir. 2006) (quoting *Tenneco Oil Co. v. Sac & Fox Tribe of Indians*, 725 F.2d 572, 574 (10th Cir. 1984) (per curiam)). This is true even where, as here, the official claims to be enforcing the rule of law set by another -- "If the sovereign did not have the power to make a law, then the official by necessity acted outside the scope of his authority in enforcing it, making him liable to suit. Any other rule would mean that a claim of sovereign immunity would protect a sovereign in the exercise of power it does not possess." *Tenneco*, 725 F.2d at 574. "This exception to the protections of sovereign immunity is especially appropriate in Indian law cases." *Id*.

As explained in section I(B)(2) above, Crowe has alleged that Judge Stidham acted outside the jurisdiction of the Muscogee courts and, therefore, acted outside the jurisdiction the sovereign (the Muscogee Nation) was capable of bestowing. The cases cited by Defendant are inapposite -- they either involve suits brought against a tribe itself or suits brought to gain monies from a contractual dispute with a tribal entity. For example, in *Miner Electric, Inc. v. Muscogee*

(Creek) Nation, the plaintiffs filed suit against the Nation, itself. 505 F.3d 1007, 1008 (10th Cir. 2007). The plaintiffs did not sue any officials, and this Court expressly did "not reach the question whether any of the Nation's *officials* would be subject to suit in an action raising the same claims." *Id*. at 1012. In *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, the plaintiffs were suing over a contractual and anti-trust dispute with a tribal business entity and its officers. 546 F.3d 1288, 1291 (10th Cir. 2008). None of these cases abrogate the holdings of *Burrell* and *Tenneco*.[13]

D. Crowe's claims are not barred by judicial immunity.

1. Judicial immunity does not apply to claims brought against Appellant in his official capacity.

Appellant cannot assert judicial immunity against Crowe's claims under *Ex parte Young*. A claim under *Ex parte Young* is brought against an officer in his

[13] As he did in the briefing below, Appellant cites to several cases discussing the exhaustion of tribal remedies but does not assert that Crowe has failed to exhaust its remedies and has never disputed the facts showing exhaustion and futility as set forth in Crowe's application for preliminary injunction. And, Appellant again asserts that he feels himself bound by the order of the Muscogee Supreme Court (Aplt. Br. at 33-34), the highest appellate court of the Muscogee Nation. *See Enlow v. Moore*, 134 F.3d 993, 995-96 (10th Cir. 1998) (finding tribal exhaustion satisfied where the Muscogee Supreme Court had an opportunity to rule on issue of jurisdiction). In any event, any further exhaustion would serve no purpose other than delay and is unnecessary. *See, e.g., Nevada v. Hicks*, 533 U.S. 353, 369 (2001) ("Since it is clear . . . that tribal courts lack jurisdiction over state officials [in this case], adherence to the tribal exhaustion requirement in such cases 'would serve no purpose other than delay,' and is therefore unnecessary.").

official capacity. *See, e.g., Hill v. Kemp*, 478 F.3d 1236, 1255-56 (10th Cir. 2007). Judicial immunity, however, only applies when a judge is sued in his individual capacity.[14] *Ely v. Hill*, 35 Fed. App'x 761, 764 (10th Cir. 2002) (unpublished); *Skelton v. Camp*, 234 F.3d 292, 296 n.2 (5th Cir. 2000) (functional equivalent of federal judicial immunity applies only to officers sued in their individual capacity); *cf. Hulen v. Yates*, 322 F.3d 1229, 1236 n.2 (10th Cir. 2003) ("Qualified immunity, of course, only insulates defendants sued . . . in their *individual* capacities."); *Cady v. Arenac County*, --- F.3d ---, 2009 WL 2253264, at *6 (6th Cir. 2009) ("Absolute immunity is a personal defense that is unavailable in an official-capacity action."); *VanHorn v. Oelschlager*, 502 F.3d 775, 779 (8th Cir. 2007) ("absolute, quasi-judicial immunity is not available for defendants sued in their official capacities"); *Turner v. Houma Mun. Fire & Police Civil Serv. Bd.*, 229 F.3d 478, 483 (5th Cir. 2000) ("defenses such as absolute quasi-judicial immunity . . . are unavailable in official-capacity suits"). Judge Stidham cannot invoke judicial immunity to have Crowe's claims dismissed.

2. Judicial immunity does not apply to the claims against Appellant for declaratory and injunctive relief.

[14] Personal immunity defenses are not available to a person sued in their official capacity. *Kentucky v. Graham*, 473 U.S. 159, 166-67 (1985). Rather, "[t]he only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment." *Id*. at 167.

Judicial immunity would not apply here even if Crowe sued Appellant in his individual capacity. This Court has not yet extended the judicial immunity recognized in *Stump v. Sparkman*, 435 U.S. 349 (1978), to tribal judges,[15] and it does not provide immunity against suits seeking declaratory or injunctive relief, *Pulliam v. Allen*, 466 U.S. 522, 541-42 (1984). Appellant cannot argue that *Stump* exists outside the context of 42 U.S.C. § 1983 while at the same time arguing that *Pulliam* only exists within that context. Regardless, judicial immunity cannot be used to block claims for declaratory judgment.

Appellant argues that judicial immunity applies to Crowe's claim for injunctive relief, citing § 1983 law. This is not a § 1983 action. While many of the major cases discussing judicial immunity arise in the context of 42 U.S.C. § 1983, immunity is a common law principle that pre-existed that statute. Thus, in *Stump v. Sparkman*, the Supreme Court recognized judicial immunity as a long-

[15] It is not clear that the Tenth Circuit should extend judicial immunity to tribal court judges. Appellant cites to *Penn v. United States*, 335 F.3d 786 (8th Cir. 2003), as an example this Court should follow in extending judicial immunity. However, in *Penn*, the Eighth Circuit specifically noted that the tribal court order would be subject to review in federal district court under the habeas corpus provisions of 25 U.S.C. § 1303. *Id*. at 789. Habeas corpus is not (yet) available to Crowe, and Crowe will have no other chance to seek federal review. The Supreme Court has questioned the advisability of extending doctrines applicable to state tribunals into the tribal context for similar reasons. *See Nevada v. Hicks*, 533 U.S. 353, 368-69 (2001) (discussing the lack of a removal-right from tribal to federal courts and finding "the simpler way to avoid the removal problem is to conclude (as other indications suggest anyway) that tribal courts cannot entertain § 1983 suits").

established principle of law and that it applied to damages actions under 42 U.S.C. § 1983, because the legislative record gave no indication that Congress intended to abolish it. 435 U.S. 349, 355-56 (1978). When asked to determine whether judicial immunity protected against prospective injunctive relief, the Supreme Court again began by looking at the common law. "Our cases have proceeded on the assumption that common-law principles of legislative and judicial immunity were incorporated into our judicial system and that they should not be abrogated absent clear legislative intent to do so." *Pulliam v. Allen*, 466 U.S. 522, 529 (1984). The Court then conducted a detailed, multi-page analysis of the history of judicial immunity dating back to English common law and the King's prerogative writs. *Id*. at 529-36. The Court then found this history consistent with its own experience --

> None of the seminal opinions on judicial immunity, either in England or in this country, has involved immunity from injunctive relief. No Court of Appeals ever has concluded that immunity bars injunctive relief against a judge. At least seven Circuits have indicated affirmatively that there is no immunity bar to such relief . . . .

Id. at 536-37. The Court then found "even less support for a conclusion that Congress intended to limit the injunctive relief available under § 1983 in a way that would prevent federal injunctive relief against a state judge." *Id*. at 540. Thus,

the Court concluded that "judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity." *Id*. at 541-42.[16]

Subsequent amendments to 42 U.S.C. § 1983 have no effect on the application of pre-existing common law in other types of actions. As the Supreme Court noted in *Stump* and *Pulliam*, Congress has the power to alter pre-existing legal principles in its statutory enactments. However, when it took the opportunity to pass legislation 12 years after *Pulliam*, Congress did not act with the broad strokes Appellant wishes. Rather, Congress only amended 42 U.S.C. § 1983.[17] Federal Court Improvements Act of 1996, Pub. L. No. 104-317, § 309, 110 Stat. 3847, 3853 (1996). Regardless of the opinions of some Senators regarding *Pulliam*, the pre-existing principles of law have not been changed.

Finally, whether in a case is brought under § 1983 or in this case, there is no prohibition on seeking a declaratory judgment against a judicial officer. *See, e.g.*, *Pulliam*, 466 U.S. at 524 (determining the "scope of judicial immunity from a civil

[16] The Supreme Court went on also to find that a party seeking injunctive relief against a judicial officer could receive an award of attorney's fees under 42 U.S.C. § 1988. *Id*. at 544.

[17] Even then, Congress did not eliminate the possibility of injunctive relief. Under current civil rights law, injunctive relief will not be granted against a judicial officer in a § 1983 action for an act or omission taken in the officer's judicial capacity, unless "a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. § 1983.

suit that seeks injunctive and declaratory relief" (emphasis added)); 42 U.S.C. § 1983 (placing no limitations on declaratory relief).

E. The District Court properly refused to dismiss Crowe's claims under Fed. R. Civ. P. 19.

As noted in Crowe's Statement of Jurisdiction, this issue is not properly part of the appeal and should be dismissed. However, even if this were appealed, Appellant is wrong in asserting that the trial court erred in refusing to dismiss Crowe's complaint for failure to add the unnamed Muscogee Supreme Court justices. An inquiry as to whether a suit should be dismissed under Fed. R. Civ. P. 19 is a two-step process.

First, the court must determine whether the absent party is one who should be joined, and, if so, the "court must order that the person be made a party." Fed. R. Civ. P. 19(a)(1)-(2). A person should be joined if

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1). Where the current defendant's interests are "virtually identical" to the interest of the absent party, the concerns of prejudice animating Rule 19(a)(1)(B) are greatly reduced. *Sac & Fox Nation v. Norton*, 240 F.3d 1250, 1259 (10th Cir. 2001).

Second and only if that person cannot be joined, then "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). The factors to be considered in making this decision include,

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
>
> (2) the extent to which any prejudice could be lessened or avoided by:
>
> (A) protective provisions in the judgment;
>
> (B) shaping the relief; or
>
> (C) other measures;
>
> (3) whether a judgment rendered in the person's absence would be adequate; and
>
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for non-joinder.

Id.

As the moving party, Appellant bore the burden of persuasion in arguing for dismissal. *Am. Gen. Life & Acc. Ins. Co. v. Wood*, 429 F.3d 83, 92 (4th Cir. 2005); *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990).

In this appeal, Appellant apparently argues that the "indispensable parties" are unnamed justices who serve on the Muscogee Supreme Court. (Aplt. Br. at 2, 13-14.) While Appellant interpreted the January 16 Order as directing action against Crowe, this was not a necessary result. The January 16 Order was arguably directed to the litigants -- Thlopthlocco and the defendants. (APLT APP. 65.) Whether Thlopthlocco would have the ability to comply with this Order is another question entirely. It was Appellant who directed Crowe to return its earned fees to the Thlopthlocco treasury and file a proof of repayment with the Muscogee court (APLT. APP. 72), and then ordered that Crowe "appear and show cause why they should not be held in indirect contempt of court" (APLT. APP. 254). There has been no allegation (or evidence) of any action by any other Muscogee officer to enforce the January 16 Order against Crowe. *McNeilus Truck & Mfg., Inc. v. Ohio ex rel. Montgomery*, 226 F.3d 429, 438 (6th Cir. 2000) ("The *Ex parte Young* doctrine does not apply when the defendant official has neither enforced nor threatened to enforce the statute challenged as unconstitutional."). In any event, even where the offending officer acts under orders issued by his superiors, those superiors are not necessary parties if complete relief can be afforded by an order directed at the subordinate officer. *Williams v. Fanning*, 332 U.S 490, 494 (1947);[18] *see also*

[18] In *Williams*, it was argued that the Postmaster General was an indispensable party in an action against the local postmaster, because "if he were not, the local postmaster would be left under a command of his superior to do what the court has

Ceballos v. Shaughnessy, 352 U.S. 599, 603-04 (1957) ("Because the District Director is the official who would execute the deportation, he is a sufficient party" in a case seeking to have the order of deportation suspended). There is also no reason to believe that Muscogee officers will ignore the declaratory judgment of the federal court (if one is entered). *Johnson v. Kirkland*, 290 F.2d 440, 446 (5th Cir. 1961) ("the court having power over subordinates in such a situation is not required to assume that an authoritative ruling by a competent court will likely be ignored by the superior who is not a party"). Appellant has offered nothing but speculation in support of this vague argument.

In any event, there is no allegation or evidence, should the justices attempt to take action against Crowe, that they could not be added to this action. If the justices act outside the scope of their jurisdiction, they, too, will be amenable to suit under *Ex parte Young* and *Burrell*. Appellant has offered no other basis for asserting that these persons cannot be joined to this suit.

Finally, although not part of the issues raised on appeal, the body of Appellant's brief also mentions other, potential unnamed judges who may someday

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forbidden." 332 U.S at 494. The Supreme Court found this to be "immaterial" where "the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court. It seems plain in the present case that that will be the result even though the local postmaster alone is sued. It is he who refuses to pay money orders, who places the stamp 'fraudulent' on the mail, who returns the mail to the senders. If he desists in those acts, the matter is at an end. That is all the relief which petitioners seek." *Id*.

rule against Crowe, or the Muscogee Nation itself. As for the unnamed future judges, there is again no basis for asserting these parties are necessary, much less that they could not be joined. (Should Judge Stidham resign and be replaced, his successor would automatically be substituted as a party under Fed. R. Civ. P. 25(d).)

As for the Muscogee Nation, the Supreme Court has long held that, where the object is to restrain an individual officer from doing acts it is alleged that he has no authority to do and that derogate from the sovereign's authority, "There is no question that a bill in equity is a proper remedy and that it may be pursued against the defendant without joining either his superior officers or the United States." *Colorado v. Toll*, 268 U.S. 228, 230 (1925). Indeed, it is this lack of joinder that is part of the very nature of an *Ex parte Young* or *Burrell* action. If the sovereign was a necessary and indispensable party to every lawsuit alleging that an officer of that sovereign acted in violation of federal law or outside the authority that sovereign could bestow, there would never be an *Ex parte Young* action, nor could the rulings of *Burrell* or *Tenneco* have occurred.[19]

[19] In a footnote, Appellant throws out Thlopthlocco and the Anderson Defendants as persons with a "vital interest." Appellant adduces no evidence that any of these persons have ever asserted any claim against Crowe to return its earned fees. Indeed, Thlopthlocco has voluntarily paid Crowe's invoices for legal services rendered. MCBRIDE AFF. ¶ 22 (APLT. APP. 37). Moreover, even if these parties had an interest in Crowe's money, they would not have an interest in the jurisdiction of Judge Stidham. Finally, there is no reason why the Anderson

II. The District Court Did Not Abuse Its Discretion in Granting Crowe's Application for a Preliminary Injunction

A. Standard of Review

The Tenth Circuit reviews a district court's grant of a preliminary injunction for an abuse of discretion. *Davis v. Mineta*, 302 F.3d 1104, 1110-11 (10th Cir. 2002). Under this standard, the Tenth Circuit accepts the district court's factual findings, unless they are clearly erroneous, and reviews application of legal principles *de novo*. *Id*. at 1111. Under the clearly erroneous standard, the appellate court will affirm unless a review of the evidence leaves the appellate court with a definite and firm conviction that the lower court has committed a mistake. *Cunico v. Pueblo Sch. Dist. No. 60*, 917 F.2d 431, 436 (10th Cir. 1990).

B. The District Court could properly find irreparable harm based on the facts before it.

The district court did not abuse its discretion in finding that Crowe faced the immediate threat of irreparable harm if Appellant was not enjoined from attempting to enforce his order. While Crowe focused on its inability to recoup the money were it forced to return its earned fees to the Thlopthlocco treasury, this was not the only irreparable harm before the Court.

As the record shows, Crowe filed the application for preliminary injunction when faced with (1) a written directive from Judge Stidham that Crowe pay over

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Defendants, even if they were necessary parties, could not be joined to this litigation.

all of its earned fees to the Thlopthlocco treasury and furnish proof of repayment to him; and (2) an oral order that Crowe and Mr. McBride appear and show cause as to why they had not complied with the written order. MCBRIDE AFF. ¶¶ 20-21 & EX. A-7 (APLT. APP. 37, 72-73). After filing the application, Crowe received a written order directing it and Mr. McBride (or another attorney) to "appear and show cause why they should not be held in indirect contempt of court for failure to comply with" the earlier order. 3/19/09 ORDER (APLT. APP. 254). Thus, Crowe was threatened with multiple, irreparable harms, each of which was sufficient to support an injunction by itself.

First, Crowe was threatened with being held in contempt of court if it did not submit to the (nonexistent) jurisdiction of the Muscogee courts.[20] This sort of coercion -- inflicted by an entity that is immune from monetary damages -- goes well beyond a mere monetary loss. By definition, contempt means either incarceration or fines (or both). Black's Law Dictionary *contempt* (8th ed. 2004) ("The usual sanction [for civil contempt] is to confine the contemnor until he or she complies with the court order."). Incarceration is a harm that cannot be

[20] At the preliminary injunction hearing, counsel for Appellant represented that Judge Stidham had agreed to strike the show cause hearing and would not reset the hearing until the federal district court ruled on the motion to dismiss and application for preliminary injunction. 4/16/09 TR. at 32:15-33:7 (APLT. APP. 303-04.) The order to show cause, however, has not been permanently stricken and remains over Crowe and Mr. McBride's heads pending the outcome of this suit.

adequately addressed via monetary damages, and having one of its attorney placed in jail would harm Crowe's reputation. And, in any event, the Muscogee Nation is a federally recognized Indian tribe[21] and is immune from monetary damages for this or any fines. *See Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003) (irreparable harm where significant risk that plaintiff will experience harm that cannot be compensated after the fact by monetary damages); *see also, e.g., United States v. New York*, 708 F.2d 92, 93 (2d Cir. 1983) (per curiam) (irreparable business damages where defendant has sovereign immunity); *Feinerman v. Bernardi*, 558 F. Supp. 2d 36, 51 (D.D.C. 2008) (damages are irreparable *per se* where defendant has sovereign immunity). Similarly, a judge generally cannot be sued for money damages.[22] *Mireles v. Waco*, 502 U.S. 9, 9 (1991) (per curiam).

Second, Crowe was being ordered to subject itself to the continuing jurisdiction of a court that lacked such jurisdiction and to have that court adjudicate its right (after the fact) to its earned fees. As the district court correctly found, being subjected to trial in a court lacking jurisdiction is, in and of itself, irreparable harm. *See, e.g., Hicks v. Bush*, 397 F. Supp. 2d 36, 41-42 (D.D.C. 2005) (finding

[21] *Indian Entities Recognized & Eligible to Receive Services from the U.S. Bureau of Indian Affairs*, 73 Fed. Reg. 18,553, 18,555 (Apr. 4, 2008).

[22] As noted in section I(D)(2) above, this Court has not yet explicitly extended judicial immunity to tribal judges.

that subjecting party to proceedings before tribunal lacking jurisdiction would cause irreparable injury); *Chiwewe v. Burlington N. & Santa Fe Ry. Co.*, No. 02-0397, 2002 WL 31924768, at *2 (D.N.M. Aug. 15, 2002) (unpublished) (finding irreparable harm where defendants forced to expend unnecessary time, money, and effort litigating in court without jurisdiction and risk inconsistent binding judgments); *UNC Resources, Inc. v. Benally*, 518 F. Supp. 1046, 1053 (D. Ariz. 1981) (finding irreparable injury when forced to appear and defend in tribal court).

Third, as the district court found, Crowe faces the risk of inconsistent judgments. Crowe is currently subject to an order of the Muscogee courts that it return its fees to the Thlopthlocco treasury, and its client is under order not to pay its attorneys any fees incurred. Crowe, however, has asked the district court to declare that the Muscogee courts do not have jurisdiction to enter this order against Crowe. *Seneca-Cayuga Tribe v. Oklahoma*, 874 F.2d 709, 716 (10th Cir. 1989) (noting risk of inconsistent binding judgments); *Chiwewe*, 2002 WL 31924768, at *2 (same). Absent injunctive relief, an eventual order that Appellant lacks jurisdiction and that his coercive orders (including contempt proceedings) are void will not prevent irreparable harm if Crowe has already been coerced by threat of contempt into complying with the later invalidated orders.

Finally, even as to the legal fees themselves, there is no evidence that Crowe will be able to retrieve those funds. Thlopthlocco Tribal Town is a sovereign,

federally recognized Indian tribe[23] and, as such, is immune from suit absent a clear waiver of sovereign immunity. *Okla. Tax. Comm'n v. Citizen Band Potawatomi Indian Tribe,* 498 U.S. 505, 509 (1991). Crowe met its burden by making this evidentiary and legal showing below.

Appellant makes much of the agreement by Micheal Salem,[24] current counsel for Thlopthlocco, that the legal services agreement between Crowe and Thlopthlocco has in it "any provision in it that gives up any of their sovereign immunity," 4/16/09 TR. at 29:23-30:3 (APLT. APP. 300-01). This does not erase the immediate threat of irreparable harm to Crowe. Appellant's arguments ignore the conundrum before Crowe. Crowe is faced with the very immediate threat that it submit to a court without jurisdiction and transfer Crowe's money to the Thlopthlocco treasury or face contempt charges. If Crowe gives up possession of its money it has no way to get that money back, unless the court lacking jurisdiction says Crowe can have it back. Appellant now argues that Crowe can simply sue Thlopthlocco. But, to what end? The current government of the

[23] *Indian Entities Recognized & Eligible to Receive Services from the U.S. Bureau of Indian Affairs,* 73 Fed. Reg. 18,553, 18,556 (Apr. 4, 2008).

[24] While Appellant may wish that the record stated something different, Appellant cannot simply change the transcript to suit his wishes and to attribute the recorded statement to Michael McBride. Crowe, in fact, believes that Mr. McBride also spoke and that he stated that the agreement between Crowe and Thlopthlocco contains a "limited waiver." Unfortunately, Mr. McBride was sitting at counsel's table and not at the podium and his statement was not picked up by the court reporter.

Thlopthlocco (who does not even want the money back) is under order from the Muscogee courts not to pay these funds to Crowe. And, Appellant Judge Stidham anticipates determining whether the current government is the correct government. If Appellant determines that the current Thlopthlocco government did not have "the authority to vote to expend Thlopthlocco funds" (APLT. APP. 65) and replaces that government, the new government will simply invoke the tribe's sovereign immunity and refuse to recognize the agreement between Crowe and the tribe. As Appellant has repeatedly stated, Crowe can have its money back only if he determines that Crowe was entitled to these funds in the first place.[25] (Aplt. Br. at 41 ("If, as the *Anderson* defendants contend,[26] the Thlopthlocco did not have authority to contract with Law Firm, then the Law Firm is not entitled to be paid from tribal funds."); APLT. APP. 120 ("If . . . the Thlopthlocco Tribal Town does not have authority to rule, then the Law Firm is not entitled to be paid from tribal funds, no matter how much work it has done or how large its fees might be.").) And, in all of this, there is no entity that will recompense the costs incurred by

[25] This approach is particularly egregious where no party has filed any claim against Crowe in any jurisdiction and where Crowe is the only third-party vendor being singled out for the confiscation of its funds without hearing. The hundreds of other vendors and employees are not currently subject to orders to "return" the payments made to them over the past two years.

[26] There is no evidence that the "*Anderson* defendants' have made this contention.

Crowe in attempting to retrieve its funds. Absent injunctive relief, Crowe will have no remedy if it wins in federal court.

C. The District Court properly found that the other requirements for a preliminary injunction were met.

Appellant has not raised any defect in the district court's grant of preliminary injunction other than irreparable harm. (Aplt. Br. at 2, 14.) However, the body of his brief mentions the other requirements for an injunction, and, assuming *arguendo* such arguments were before this Court, they would fail.

1. The balancing of the harms favors Crowe.

Appellant has made no attempt to show any harm to himself (or the Muscogee Nation) in the maintenance of the status quo -- apart from the inability to exercise coercive jurisdiction the court found he probably lacks. The fees earned by Crowe would be transferred to the Thlopthlocco treasury, not to Muscogee hands. And, even more importantly, no party has asserted any claim against Crowe regarding the fees. If any party did have such a claim, they could file suit against Crowe in a court of competent jurisdiction that would afford Crowe and any other party the due process wholly lacking here. Appellant's harm, if any, is vastly outweighed by the immediate and irreparable harm to Crowe.

2. The injunction is not adverse to the public interest.

As the district court found, an unrestrained exertion of tribal court power over non-consenting non-members is not in the public's interest. *See Ford Motor*

Co. v. Todecheene, 221 F. Supp. 2d 1070, 1089 (D. Ariz. 2002), *stayed on other grounds*, 488 F.3d 1215 (9th Cir. 2007); *see also Winnebago Tribe v. Stovall*, 216 F. Supp. 2d 1226, 1234 (D. Kan. 2002) (finding public interest supports enjoining state enforcement action while state and tribal sovereignty issues are adjudicated).

3. Crowe has shown a substantial likelihood of success on the merits.

Crowe has shown a likelihood that Appellant and the Muscogee courts lack jurisdiction both over (1) Thlopthlocco's expenditure of tribal funds; and (2) nonmember, nonparty Crowe & Dunlevy. Either of these alone would be a sufficient basis to deny legislative, and therefore adjudicative, jurisdiction. *See Nevada v. Hicks*, 533 U.S. 353, 357-58 (2001) (holding that, as to nonmembers, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction and leaving open question of whether it even equals it).

a. That Appellant lacks jurisdiction over Thlopthlocco's expenditure of tribal funds.

Appellant has not appealed or otherwise contested the district court's finding that Crowe had shown a likelihood of success on the first issue (ORDER at 21-22), and the Court may affirm the district court on this basis alone.

In any event, the district court was right to find a likelihood that the Muscogee court had no jurisdiction over Thlopthlocco's expenditure of tribal funds or agreements with third parties. Appellant has never disputed that Thlopthlocco,

as a federally recognized Indian tribe, has sovereign immunity from suit in any court, and a waiver of this sovereign immunity "cannot be implied but must be unequivocally expressed." *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1293 (10th Cir. 2008) (internal quotation marks omitted). Appellant has not demonstrated such a waiver. First, there is no evidence that any entity other than Crowe's client, Thlopthlocco, had the authority to waive the tribe's sovereign immunity.[27] Second, the complaint filed by Thlopthlocco in the Muscogee courts cannot be construed as an express and unequivocal waiver of its immunity over its ability to pay its legal fees or perform under its contract with Crowe. When seeking the aid of the Muscogee courts to restrain the unlawful acts of a few individuals, the tribe passed a very specific and limited waiver of sovereign immunity and consent to jurisdiction. MCBRIDE AFF. ¶ 10 & EX. A-3

[27] The undisputed facts before the Court showed that the current Thlopthlocco government has been the only acting government for Thlopthlocco throughout this matter. MCBRIDE AFF. ¶¶ 8, 15-17 & EX. A-4 (APLT. APP. 34-35, 36-37, 58-63). *See also* Dep't of the Interior Bureau of Indian Affairs, Tribal Leaders Directory (Winter 2009) at Section 2, Page 44 of 123 (page 49 of the PDF), http://www.doi.gov/bia/docs/TLD-Final.pdf. As the *de facto*, if not *de jure*, government of Thlopthlocco, the current government's acts are valid and binding. *See, e.g.*, *Morford v. Territory*, 63 P. 958, 959 (Okla. Terr. 1901) ("The acts of a de facto officer are as valid and effective, when they concern the public or rights of third persons, as though they were officers de jure."); *City of Albuquerque v. Water Supply Co.*, 174 P. 217, 229 (N.M. 1918) (noting that until an adjudication is had ousting the officers, "all acts done and contracts made by the officers of such a de facto municipality are as valid and binding upon it and the property within its limits as though such officers were de jure officers of a de jure corporation"). Despite some baseless arguments, Appellant never offered any evidence showing the authority of any other entity to waive the tribe's immunity.

(APLT. APP. 35, 55-56). This waiver explicitly limited itself "only for injunctive and declaratory relief" and explicitly excluded "election disputes." (*Id*.) Appellant may not pull individual sentences out of the complaint and extrapolate that, just because Thlopthlocco sought one sort of relief, it must also have agreed to waive its immunity as to others. *See, e.g., Okla. Tax. Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) ("a tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions were pleaded in a counterclaim to an action filed by the tribe"). Similarly, seeking an award of attorney's fees does not confer jurisdiction on the court to order the movant to demand a refund of fees it has already paid to its own attorneys -- much less to order the movant's attorneys to refund such fees. There was no clear and unequivocal waiver by Thlopthlocco in the Muscogee courts regarding its contract with Crowe, and Appellant had no jurisdiction over that matter.

b. That Appellant lacks jurisdiction over nonmember, nonparty Crowe & Dunlevy.

Appellant also has no jurisdiction over Crowe, and none of the parties could have conferred that jurisdiction. Crowe has shown a likelihood of success on the merits. In this appeal, Judge Stidham continues to assert that Crowe's representation of a party in his court provides him with jurisdiction over Crowe's private agreements with its clients and control over its own funds. Tribal courts

are courts of limited jurisdiction, unlike state courts, which have "general jurisdiction," *Nevada v. Hicks*, 533 U.S. 353, 367 (2001),[28] and have no jurisdiction over activities between nonmembers (Crowe & Thlopthlocco) outside of Muscogee borders, *Plains v. Commerce Bank v. Long Family Land & Cattle Co.*, --- U.S. ---, 128 S. Ct. 2709, 2718 (2008) (noting that tribal jurisdiction "centers on the land held by the tribe and on tribal members within the reservation"). Even to the extent that any activities took place on Muscogee lands, Appellant's attempt to exercise jurisdiction would be "presumptively invalid" and he would have the burden of showing that a *Montana* exception applies.[29] *Plains*, 128 S. Ct. at 2718, 2720 ("tribes do not, as a general matter, possess authority over non-Indians who come within their borders"); *see also Nevada v. Hicks*, 533 U.S. at 359 (finding that Indian ownership of the land in question does not change this rule).[30]

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[28] As such, Appellant's citations to cases involving personal jurisdiction under state long-arm statutes are unavailing.

[29] Appellant incorrectly cites *Montana* as holding that "tribes generally *can have jurisdiction* over non-members." (Aplt. Br. at 28.) The opposite is true. The "*Montana* rule" is that "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana v. United States*, 450 U.S. 544, 565 (1981). Hence, the need for the *Montana* exceptions to apply before a tribe can assert jurisdiction. If this was not clear in 1981, it should be now. See *Plains* and *Hicks* cited above.

[30] Appellant also incorrectly implies that the Supreme Court in *Hicks* found that entry onto tribal land could be a "dispositive factor" resulting in a finding of tribal

In determining whether Appellant will meet his burden of showing one of the *Montana* exceptions, the court must keep in mind that these exceptions are "limited" and cannot be construed in a manner that would "swallow the rule" or "severely shrink it." *Plains*, 128 S. Ct. at 2720. The jurisdiction allowed under both exceptions is limited to that which is necessary to protect tribal self-government or control internal relations. *Hicks*, 533 U.S. at 359. What is necessary to protect these interests all falls back on the "right of the Indians to make their own laws and be governed by them." *Hicks*, at 360-61 (citing examples such as punishing tribal offenders, determining tribal membership, regulating domestic relations among members, and proscribing rules of inheritance for members). "*Self*-government and *internal* relations are not directly at issue here, since the issue is whether the Tribes' law will apply, not to their own members, but to a narrow category of outsiders." *Hicks*, at 371.

Neither *Montana* exception applies. Crowe does not have a "consensual relationship" with the Muscogee Nation that would support Appellant's jurisdiction. Appellant, however, attempts to find this relationship in the fact that some Crowe attorneys were members of the Muscogee bar and representing a client in its courts. Were this an issue of courtroom conduct, this might be

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jurisdiction. (Aplt. Br. at 28.) However, in context, the *Hicks* quote shows that the Supreme Court was referring to situations in which the absence of tribal ownership was virtually conclusive of the absence of tribal jurisdiction. 533 U.S. at 360.

relevant.[31] But, a relationship between a tribe and a nonmember in one area does not translate to jurisdiction by that tribe over another, even related, area. As the Supreme Court has "emphasized repeatedly in this context, when it comes to tribal regulatory authority, it is not 'in for a penny, in for a Pound'" --

> The Bank may reasonably have anticipated that its various commercial dealings with the [tribal members] could trigger tribal authority to regulate those transactions--a question we need not and do not decide. But there is no reason the Bank should have anticipated that its general business dealings with respondents would permit the Tribe to regulate the Bank's sale of land it owned in fee simple.

Plains, 128 S. Ct at 2724-25. Similarly, Crowe, by joining the Muscogee bar and practicing in its courts, would have no reason to anticipate that those courts would then seek to invalidate its client contracts without a claim, a party making a claim, notice, opportunity to be heard, or even seeing the contracts themselves. *See also Strate v. A-1 Contractors*, 520 U.S. 438, 443, 457 (1997) ("Although A-1 was engaged in subcontract work on the Fort Berthold Reservation, and therefore had a 'consensual relationship' with the Tribes, '[the plaintiff] was not a party to the subcontract, and the [T]ribes were strangers to the accident.'").

The second *Montana* exception is even less applicable. Crowe's conduct -- providing legal services to its client Thlopthlocco and receiving contractually obligated payments from its client -- cannot be said to "threaten[] or [have] some

[31] There is, for example, no allegation of "ethical violations" or "exorbitant fees." (Aplt. Br. at 33.)

direct effect on the political integrity, the economic security, or the health or welfare of the" Muscogee tribe. *Montana*, 450 U.S. at 566. Even with Appellant's show-cause order, this is not about the regulation of attorney conduct before the court. The Muscogee courts simply found that it would not be in the interest of "fairness" for one party to pay its attorney's fees while the other did not and, therefore, attempted to invalidate Crowe's contract. "The conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community" *Plains*, 128 S. Ct. at 2726 ("One commentator has noted that 'th[e] elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences.'"). The inability of the Muscogee Nation to regulate a contract between two nonmembers will not threaten its ability to govern itself. The second *Montana* exception will not be met at trial.

As the Supreme Court has noted, "we have never held that a tribal court had jurisdiction over a nonmember defendant," *Hicks*, 533 U.S. at 358 n.2, and this case will not be the one that breaks that mold.

CONCLUSION

Crowe respectfully requests that this Court dismiss the appeal as to Appellant's Issues 3 and 4 (asserting that Appellant had jurisdiction over Crowe and that the district court erred in denying the indispensable-party motion to

dismiss). Crowe also asks the Court not to consider the numerous arguments alluded to by Appellant but not included in his Statement of Issues. Finally, Crowe respectfully requests the Court affirm the district court's denial of Appellant's motion to dismiss on the grounds of sovereign and judicial immunities and the court's grant of a preliminary injunction to preserve the status quo.

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

Respectfully submitted,

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