

IN THE SUPREME COURT OF THE
MUSCOGEE (CREEK) NATION

THLOPTHLOCCO TRIBAL TOWN,)
a federally recognized Indian Tribe,)

Plaintiff,)

v.)

NATHAN E. ANDERSON, BRYAN)
McGERTT, TIMMY CHEEK,)
CANDICE (a/k/a KENDIS))
ROGERS, INDA McGERTT,)
FRANK HARJOCHEE, VIRGIL)
SANDERS, MARY McGERTT,)
GRACE BUNNER, THELMA JEAN)
NOON, WESLEY MONTEMEYER,)
PAULA BARNES-HERROD,)
MALINDA NOON, AND THOSE)
ACTING IN JOINT CONCERT)
AND PARTICIPATION WITH)
THEM,)

Defendant.

SUPREME COURT
FILED

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MUSCOGEE (CREEK) NATION

SC- 08 - 01

(Case Below:
Case No. CV-2007-39)

Application for Interlocutory Appeal from the District Court of the
Muscogee (Creek) Nation, Okmulgee District, Case No. CV-2007-39.

APPLICATION FOR INTERLOCUTORY APPEAL

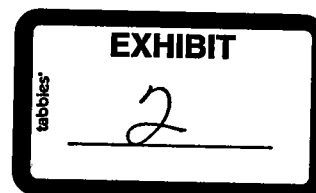


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Comes now the Thlopthlocco Tribal Town, a federally recognized Indian Tribe and traditional Creek Tribal Town, through its lawfully elected Business Committee, Moveant and Plaintiff below ("Thlopthlocco"), to seek an interlocutory appeal pursuant to MCN Rules of Appellate Procedure ("MCN RAP") 3(A). This appeal is necessary, because the District Court ordered Thlopthlocco to pay the continuing legal fees of the individuals who are attempting to disrupt the regular functioning of government business, despite the lack of a prevailing party, much less a waiver of Thlopthlocco sovereign immunity. Pursuant to MCN RAP 3(F), Thlopthlocco states as follows:

1. Copy of the written decision of the original hearing body. A copy of the Order entered by the District Court on October 29, 2008, and received by counsel for Thlopthlocco on October 30, 2008, is attached as Exhibit "A".¹ A copy of the September 11, 2008 Order, which related to the October 30 Order is attached as Exhibit "B".

2. Short statement explaining what relief is sought by Appellant.

Thlopthlocco is the lawfully elected and appointed government of the Thlopthlocco Tribal Town, which filed a Verified Complaint and Application for Emergency Injunction on June 11, 2007, asking the District Court to enjoin and declare invalid the results of an attempted *coup d'etat* and to enjoin the Defendants

¹ All exhibits attached hereto are in the Appendix separately filed with the Court.

from interfering with the duly elected officers of Thlopthlocco in the performance of their official duties. Even though the litigation is ongoing and Defendants have not prevailed on any substantive issues, Defendants filed a motion for attorneys fees and costs. Motion for Attorneys Fees, Exhibit C. Defendants sought fees and costs for both this litigation and a separate lawsuit, *Thlopthlocco Tribal Town v. Louis McGertt, et al.*, Muscogee (Creek) Nation District Court Case No. CV-2005-28 ("McGertt Litigation"). *Id.*

On September 11, 2008, the District Court granted in part Defendants' motion, ordering Thlopthlocco to pay Defendants governmental funds of Thlopthlocco Tribal Town ("September 11 Order").² The District Court found that this dispute was not one between different branches of the Thlopthlocco Government – where each branch would be required to fund its own fees -- but was a dispute over who is "the true governing body of Thlopthlocco Tribal Town." *See* Exhibit B at ¶ 4. In its Order, the District Court did not address and implicitly rejected Thlopthlocco's argument that there was no authority for an award of attorneys fees prior to the conclusion of the lawsuit, that any award would violate the Tribe's sovereign immunity, and that there was no basis for the assertion that any of Defendants' cross-claims. Based on its characterization of the dispute, the

² The District Court found that attorneys fees incurred in McGertt Litigation was outside of the jurisdiction of the court. *See* Exhibit B at ¶ 1.

District Court concluded that Defendants should have their attorneys fees paid from Tribe funds. Exhibit B at ¶ 6.

On September 30, 2008, Thlopthlocco filed its Motion to Reconsider, which the District Court denied on October 29, 2008. As set forth more fully below, this dispute cannot be characterized as who controls the Tribal government. Moreover, in awarding Defendants' attorneys fees, the District Court violated this Court's precedent and impinged upon the sovereign immunity of Thlopthlocco. If upheld, the September 11 Order will cause substantial and irreparable harm to the Thlopthlocco Government and people, as well as violate the its sovereign immunity and undermine the administration of justice.

In this interlocutory appeal, Thlopthlocco seeks the following relief and ask this Court to:

(1) stay all District Court action related to the attorneys fees issue, including any enforcement of any order to pay attorneys' fees, in this matter until a decision is made on this Application for Interlocutory Appeal and a final decision is completed; and

(2) enter an order reversing the District Court, vacating the September 11 Order, and denying Defendants' Motion for Attorneys fees.

3. Short statement explaining the legal grounds for seeking the appeal and justification for the relief requested.

As set forth more fully below, pursuant to MCN RAP 3(A), this Court should grant leave to hear the interlocutory appeal. The interlocutory appeal will: (1) clarify the proceedings in this litigation; (2) protect Thlopthlocco from substantial and irreparable injury; and (3) clarify an issue of general importance in the administration of justice. As noted by the District Court when it denied Thlopthlocco's Motion to Reconsider, the appeal to the Supreme Court "is available to them." Exhibit A at ¶ 3.

The September 11 Order should be reversed and vacated because the September 11 Order exceeded Thlopthlocco's limited grant of jurisdiction and waiver of sovereign immunity. Pursuant to this grant and waiver, the only claims before the District Court were those asserted in the Verified Complaint, which sought an injunction prohibiting the individual Defendants from interfering with the Business Committee's conduct of government business, enjoining those same individuals from holding themselves out as government representatives to others (including financial institutions), declaring void any actions purported taken by these individuals in Thlopthlocco's name, and declaring Thlopthlocco to be the lawful leaders of the Tribe. The control issues (that is, claims related to the January 27, 2007 election) were only raised in a "Cross-Claim" that Defendants attempted to bring on behalf of the Tribe. But, these claims could not be

considered, because they exceeded Thlopthlocco's limited grant of jurisdiction and waiver of sovereign immunity. Moreover, the District Court could not provide the remedy sought in the Cross-claims – even if all allegations in the Cross-Claim were true, Defendants would not control the Thlopthlocco government.

The September 11 Order should also be reversed and vacated, because it rests on two erroneous conclusions - (1) that the dispute is over who controls the Thlopthlocco government, and (2) that it was equitable to have Thlopthlocco pay the attorneys' fees of both sides.

Finally, the September 11 Order should be reversed and vacated, because its result is inequitable. The Order will reward wrongdoers for their illegal conduct. Even though Defendant Anderson admitted that he violated the Constitution in attempting to overthrow the Government, he and his fellow wrongdoers will be able to continue their actions at the government's expense. Meanwhile, this harm to Thlopthlocco is substantial and irreparable because it is an open ended commitment order by the District Court without any control in approval of the Business Committee. The September 11 Order eliminates the budgetary process that such an expenditure must normally go through, and will force the Business Committee to cut or possibly eliminate member programs to pay Defendants' attorneys' fee. All of this is done without any guidance to or input of the Business Committee to control the Tribe's financial resources. Moreover, even if it is

ultimately successful in reversing the attorney fee award on an appeal on the merits, the Government will face the daunting task of recovering the money paid from Defendants. Thus, after being forced to spend hard-won government funds to defeat an illegal coup attempt, Thlopthlocco will be stuck with the bills piled up by the individual wrongdoers. Even worse, the September 11 Order will set a precedent whereby future disgruntled members can circumvent the Constitutional r and try to seize control of the Tribe, knowing that the Government will be forced to pay their legal fess.

The September 11 Order will result in substantial and irreparable harm to Thlopthlocco. This Court should grant leave to hear the interlocutory appeal, and reverse and vacate the September 11 Order, denying Defendants' attorneys' fees. Alternatively, to the extent this Court believes the Government must pay Defendants' attorneys' fees, Thlopthlocco submits that this Court should at most require the Government to pay the funds into escrow. The monies can then be paid to Defendants only if they are successful and prevail in this litigation and make a proper showing of entitlement to the funds. This will reduce the harm to the tribe somewhat by assuring it the ability to recover the funds at the conclusion of the litigation should it be successful in demonstrating that Defendant's takeover attempt was unconstitutional.

LITIGATION BACKGROUND

The Thlopthlocco Tribal Town is a tribal town of the Muscogee (Creek) Nation and also a federally-recognized Indian tribe. Pursuant to the Constitution and By-Laws of the Thlopthlocco Tribal Town, the Town's citizens elect the Mekko (or, Town King), two Warriors, a Secretary, and a Treasurer. These five elected officers then appoint five advisors. Thlopthlocco Constitution, Art. V, §§ 1 and 2 (Exhibit D). The officers and advisors constitute the Business Committee, the governing body of the Thlopthlocco. *Id.* at § 4. This Business Committee has the power, among other things, to transact business and act on behalf of the tribal town on all matters. Thlopthlocco By-Laws, Exhibit D at § 2. Under the Constitution, the Mekko's powers are limited to presiding over Business Committee meetings, and the Mekko is required to follow the directions of the Business Committee. *Id.* There is no independent power or budgetary authority to pay the independent legal fees of the Mekko. *Id.*

On January 27, 2007, Thlopthlocco citizens elected Nathan Anderson as Mekko; Vernon Yarholar and Ryan Morrow as Warriors; Celesta Johnson as Secretary; and Ron Barnett as Treasurer (the "Officers"). Transcript of June 20, 2007 Hearing before the Muscogee (Creek) Nation District Court (Exhibit E) at 24:24-25:21; 27:18-20. These Officers then elected and appointed Barbara Canard Welborn, Janna Dickey, Tracey Hill, George Scott, and Brent Brown as Advisors

(the "Advisors"). (The Officers and Advisors are collectively referred to as the "Business Committee.") Minutes of January 27, 2007 Election (Exhibit F). The Business Committee of the Thlopthlocco was sworn in around February 10, 2007, and functioned without question or incident until June 5, 2007. Exhibit E at 25:22-26:18; 27:18-20.

Anderson admitted the member of the Business Committee "were constitutionally seated" and did not resign. *Id.* at 26:25-27:5; 28:2-4. Neither Anderson nor anyone else filed any grievance against any of the other members of the Business Committee. *Id.* at 27:6-11; 45:17-21.

After serving together for over four months, on June 5, 2007, Mekko Nathan Anderson, acting in concert with the other Defendants, asserted (in violation of the Thlopthlocco Constitution) that the January 27 election was void as to all officers – except himself – and that all the positions on the Business Committee – except his own – were vacant. *Id.* at 28:8-10; 34:23-35:18; 44:9-46:8. Pretending then to be the only remaining member of the Business Committee, he purported to appoint his relatives and friends to the positions that he had just unilaterally deemed to be vacant. *Id.* The resulting sham "business committee" appointed by defendant Anderson consisted of the following: Bryan McGertt and Timmy Cheek, as "Warriors"; Candice (a/k/a Kendis) Rogers, as "Secretary"; Malinda (Millie) Noon, as "Treasurer"; and Inda McGertt, Frank Harjochee, Mike Harjochee, Virgil

Sanders, and Marion Berryhill, as Advisors (collectively, the "Fake Business Committee"). Thereafter, Anderson attempted to appoint various persons to Thlopthlocco committees; to hire new "tribal" legal counsel; to spend at least \$25,000 in tribal funds; to discharge various Thlopthlocco employees; to intimidate and threaten employees; stop workers from renovating government buildings, including the casino; take computers, camera and government records; and contact banks in an effort to make himself the sole signatory on Thlopthlocco accounts.

Anderson took the preceding actions with full understanding of the Thlopthlocco Constitutional procedures for removing Business Committee members and fully aware that those procedures were exclusive. He was also aware of a previous lawsuit involving some of the same parties herein, wherein this Court ruled that such grievance procedures were the only method by which to remove a Thlopthlocco officer from government. Defendants knowingly failed to abide by the Constitutional procedures. *Id.* at 28:25-29:16; 44:14-46:6. Anderson admits that neither the Thlopthlocco Constitution nor his Oath of Office gave him authority to determine a vacancy in elected leadership or to unilaterally determine that an election was inappropriate four months after it was conducted. *Id.* at 30:7-25; 32:10-13; 33:4-34:19.

On June 11, 2007, Thlopthlocco filed their Complaint in the District Court seeking a TRO, injunction, and declaratory judgment requiring Defendants, and

those acting in joint concert with them, not to interfere with the lawfully-elected and appointed Business Committee; restraining the Fake Business Committee from representing to others that they hold any official capacity with the Thlopthlocco; and restraining and enjoining Anderson from taking any action to interfere with the functioning of the Thlopthlocco government. Because Thlopthlocco has not yet established its own court system or police department, it had no choice but to grant limited jurisdiction for only injunctive and declaratory relief. Thlopthlocco engaged in a limited and specific waiver of its sovereign immunity so that it could seek redress from Anderson's illegal actions and obtain injunctive relief from the Muscogee (Creek) Nation court.

This lawsuit was initiated by Thlopthlocco with a very specific and very limited waiver of Thlopthlocco's sovereign immunity. In Thlopthlocco Tribal Town Business Committee Resolution Nos. 7-20 and 7-21, Thlopthlocco (1) directed Thlopthlocco's attorney to seek injunctive relief enforcing the Thlopthlocco constitutional provisions that only the Business Committee may speak or act on behalf of the Town on all matters, and (2) authorized, consented to jurisdiction in this Court and ratified the filing of the present lawsuit for the limited purpose of obtaining the injunctive relief set forth in the Verified Complaint. *See* Exhibit G. Moreover, Resolution 7-21 further provides that Thlopthlocco "**does not consent to jurisdiction** in any other court or any other dispute except as

explicitly provided in a separate resolution" and "[t]his waiver of immunity **shall not include election disputes.**" *Id.* (Emphasis added).

The District Court granted the TRO on June 11, 2007, and set a Preliminary Injunction hearing for June 20, 2007 at 10:00 a.m. Instead of a hearing on the TRO, however, the District Court heard and granted Defendants' motion to dismiss. Subsequently, this Court accepted and granted Thlopthlocco's Writ of Mandamus, thereby reinstating the TRO and ordering the District Court to hear the case on the merits. *See* June 26, 2007 Order of the Supreme Court of the Muscogee (Creek) Nation (Exhibit H); October 27, 2007 Order and Opinion of the Supreme Court of the Muscogee (Creek) Nation..

After conducting discovery, pretrial conference was set for October 24, 2007. However, on October 11, 2008, "Specially Appearing Defendants" filed "Cross-Claims" against each member of the Business Committee. Exhibit I. The Cross Claims seek three forms of relief -- (1) a declaration that the adoption of certain members into the Thlopthlocco Tribal Town was void and, presumably, that such persons should not have voted in the general election; (2) a declaration that the refusal to allow certain persons to vote or run for office in the general election violated the rights of Thlopthlocco members; and (3) a declaration that the Thlopthlocco Tribal Town government consists of certain individuals and that the Cross-Claim Defendants be enjoined from interfering with that government.

On October 24, 2007, attorneys for Defendants did not appear at the scheduled Pretrial Conference. As a result of Defendants' failure to appear, the District Court struck all deadlines, including the trial date. Six weeks later, Defendants filed the Motion for Attorneys Fees. Counsel for Defendants alleged in the Motion that he had not been paid for over two years and threatened to withdraw as counsel for Defendants if the motion was not granted.

On January 18, 2008, the District Judge recused himself from this matter. On March 10, 2008, this court appointed Gregory R. Stidham as Special District Judge to hear this matter.

I. Under Controlling Authority of the Muscogee (Creek) Nation Supreme Court, Defendants are not Entitled to Attorneys Fees.

Contrary to the District Court's conclusion in the September 11 Order, the dispute between Thlopthlocco and Anderson is a dispute between the two branches of the Thlopthlocco government – the Mekko (executive branch) and the Business Committee (legislative branch). The Business Committee has the legislative power to act on behalf of the Town on all matters, including passing legislative directives and rules through resolutions, as well as authorizing all disbursements and approving any financial obligation of the Government. The Mekko's powers are executive in nature and are limited to presiding over Business Committee meetings and following the directions of the Business Committee. *See Exhibit D, Bylaws*, Art. II, §2. While the distinction between the executive and the legislative

branches of the Thlopthlocco government is not as delineated or distinctive as other governments, such as the Muscogee (Creek) Nation, there are nonetheless clearly delineated powers and duties between the Business Committee as a whole and the Mekko.

This conflict arose because the Mekko sought to exercise executive power by unilaterally removing the other nine members of the Business Committee. However, the exclusive power to remove members of the Business Committee is specifically delegated under the Constitution to (1) the Grievance Committee appointed by the Business Committee to investigate all grievances, and (2) the full Thlopthlocco electorate to vote on the removal of any member of the Business Committee. *See* Exhibit D, *Const.*, Art. VI; *Thlopthlocco Tribal Town v. Tomah, et al.*, ("Tomah II"), 8 Okla. Trib. 576 (Musc. (Cr.) D. Ct. 2004). However, because the grievance process by its nature takes time to accomplish its task and Defendants were quickly moving to illegally seize control of the government, the Business Committee had to take quick action to protect the Town by requesting a temporary restraining order and permanent injunctive relief. In doing so, the Business Committee was acting in its legislative capacity and under its Constitutional power to act on behalf of the town to stop Anderson from using his executive power to illegally overthrow the government.

As a result, this conflict is a one between the branches of Thlopthlocco's government. Thus, the decision in *Fife v. Health Systems Board*, 4 Okla. Trib. 319, 323 (1995) WL 1074108 (Muscogee (Creek) 1995), is applicable and should have guided the Court in analyzing Defendants' motion for attorneys fees. In *Health Systems Board*, the Principal Chief of the Nation challenged the constitutional authority of a committee of the National Council to appoint members to the Muscogee (Creek) Nation's National Health Systems Board. *Id.* The Court concluded that under such circumstances, the executive was not entitled to attorneys fees. *Id.*

As in *Health Systems Board*, the Business Committee brought this action against the Mekko, or the executive branch of Thlopthlocco's government, to prevent him and his co-Defendants from engaging in illegal and unconstitutional conduct. As a result, this is a dispute between the executive office of Mekko and the legislative branch, which is the Business Committee. As set forth in applicable precedent of *Health Systems Board*, under such circumstances, Anderson is not entitled to recover his attorneys fees.

The District Court relied upon *Muscogee Creek Nation Ex rel Fife v. Holdenville Indian Community*, 5 Okla. Trib. 551, 1992 WL 901820 (Muscogee (Cr.) D.Ct. 1992) as authority to award attorney's fees, costs, and expenses. That case is plainly distinguishable for four reasons. *First*, the court refers to a *prior*

agreement relating to attorney's fees. There is no such agreement by the Thlopthlocco Tribal Town to pay the former Town King and his co-conspirators' attorneys fees, costs and expenses. *Second*, in that case the court award was a part of an Order granting relief in what appears to be a final disposition of the merits of the case whereas in the case at bar, no relief on the merits, final or otherwise, has yet occurred. *Third*, there is no holding that attorney's fees can be awarded absent an agreement or statute or that an as-yet non-prevailing party can recover attorney's fees when there is a prevailing party statute. *Fourth*, there is obviously no holding that an attorney fee award could be made to a party who might later be adjudged in the case who attempted to overthrow the government by unconstitutional means. The Defendants' only argument was that because one of them—Anderson—was formerly the Town King he should have his fees paid for an unsuccessful takeover attempt done in clear violation of the CONSTITUTION. The other Defendants never had any plausible claim of official capacity much less some sort of claim to have the Government pay their lawyers.

In addition to being factually distinguishable, attorneys fees in *Holdenville Indian Community* were not awarded by the District Court until the conclusion of the lawsuit. *Id.* While the court offers little factual background on the reasoning of the decision, it is logical and reasonable to conclude that waiting until the case was resolved before awarding attorneys fees allowed the court to fully assess the

propriety of awarding such fees based on a fulsome assessment of the conduct of the parties that lead to the litigation and the equities created by such conduct.

In the present case, Thlopthlocco alleges and Anderson admits that he violated the Thlopthlocco Constitution in attempting to overthrow the government. Nothing in *Holdenville* supports awarding attorneys fees under such circumstances, much less on an interim basis. At the conclusion of the case, the court will be better able to assess the relative merits of the positions and determine whether there in fact was ever a real dispute over the control of the government at all.³

Other tribal jurisdictions including the Kaw Nation⁴ and the Cherokee Nation⁵ have also denied attorneys fees. Also state and federal courts similarly hold that a litigant cannot seek fees in this instance even when a statute provides

³ Indeed, it is noteworthy that Anderson and Defendant Timmy Check were found to be in contempt by the District Court in this case for their failure and refusal to abide by the TRO.

⁴ Even in disputes regarding ouster of tribal public officials where a party *has* prevailed, the courts recognize that attorney fees may not be awarded without authority. *In the Matter of the Removal of O'Bregon*, 7 Okla. Trib. 192, 2001 WL 34090173 (Kaw D. Ct. 2001) exemplifies this principle. In *O'Bregon*, the petitioner successfully sought removal of the respondent from her Executive Council position because respondent had unconstitutionally voted on a matter in which she had a conflict of interest. Petitioner sought attorney fees and costs, which the court summarily denied, noting that the court had asked for authority for such an award and no such authority had been provided. The court ordered that: "Each party shall bear their own expense."

⁵ In *Bunn v. Cherokee Nation Bingo Outpost, Inc.*, 5 Okla. Trib. 200, 1996 WL 1132754 (Cherokee 1996), a tribal corporate employee resigned (or was terminated) from employment. The Cherokee Nation filed a federal district court action challenging the legality of the severance pay, and Ms. Bunn was named a third party defendant and incurred attorney fees. The court held that Ms. Bunn "was not acting within the scope of her employment when she accepted the severance pay that the Cherokee Nation was attempting to recover in the federal lawsuit. She was not doing anything for the benefit of her employer."

for attorneys fees.⁶ As to Mr. Anderson, there is not even statutory authority providing for recovery of attorney fees, and the Government's allegations in this case are that he has acted unconstitutionally and fraudulently toward the Government, and indeed was removed by the citizenry of that Government pursuant to its constitutional procedures for his unlawful acts. He is hardly in a position to be reimbursed from the funds of the Government which he has sought

⁶ In non-tribal cases where an election dispute is litigated, entitlement to attorney fees depends on statute. If the statute does not provide expressly for recovery of attorney fees by the prevailing party, that party is *not* entitled to such fees. In *Dumas v. Gagner*, 971 P.2d 17, 31 (Wash. 1999), the Court denied attorney fees to a prevailing party in an election contest since the statute provided only for recovery of "costs."

Even when there is statutory authority to award attorney fees to a prevailing party, federal case law demonstrates that an interim award would be improper in circumstances like those here. See *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health*, 532 U.S. 598, 121 S.Ct. 1835 (2001). In *Buckhannon*, an assisted living center sued the West Virginia Health Department to invalidate certain state laws as violative of the Fair Housing Amendments Act and the Americans with Disabilities Act. The West Virginia Legislature repealed the challenged laws while the suit was pending, mooted the controversy. Plaintiff moved for attorney fees under the "prevailing party" provisions of the federal laws that had been relied upon, invoking a recognized but unsettled theory that the lawsuit was the "catalyst" for a favorable result. The Court prefaced its opinion by noting that attorney fees are unavailable absent "explicit statutory authority," then proceeded to analyze whether plaintiff was a prevailing party under the federal laws invoked.

In the course of this analysis the Court cited authority recognizing that an "interim" award of attorneys fees was sometimes permitted under a federal prevailing party statute, but that a predicate for such award is the obtainment of meaningful relief on the merits: The court held that a necessary predicate for attaining the status of a "prevailing party" is that the party obtain a judicial determination which alters "the legal relationship of the parties."

Accordingly, "procedural" or "technical" victories in the course of litigation do not furnish a basis for an award of attorney fees even under a prevailing party statute which authorizes an interim award of attorney fees.

Knowledge Connections, Inc. v. U.S., 76 Fed.Cl. 612, 616-617 (Fed.Cl. 2007) (holding that party's success on standing issue was the type of "technical victory" which could not support prevailing party status under the Equal Access to Justice Act).

to overthrow, and certainly can have no such right before the merits of the Town's claims are adjudicated.

II. The September 11 Order Ignored Thlopthlocco's Grant of Limited Jurisdiction to this Court and the Limited Waiver of Sovereign Immunity in this Action.

It is fundamental that historical tribal towns of the Muscogee (Creek) Nation maintain their independence and sovereign status. *See e.g.*, Muscogee (Creek) Nation Constitution, Art. II, § 5 ("This Constitution shall not in any way abolish the rights and privileges of persons of the Muscogee (Creek) Nation to organize tribal towns or recognize its Muscogee (Creek) traditions."). Indeed, Thlopthlocco is a separately and independently federal recognized Indian tribe. Thlopthlocco exercises inherent sovereignty pursuant to its Constitution and Bylaws. Exhibit D, *Const.* at Preamble.

It is also unquestionable that Indian tribes enjoy sovereign immunity and the doctrine of sovereign immunity bars suits against the tribe absent an express waiver of the immunity defense. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). While sovereign immunity can be waived by tribal consent or congressional action, *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980), *aff'd on other grounds*, 445 U.S. 130 (1981), it is also well-settled that a waiver of sovereign immunity by the tribe cannot be implied, but must be unequivocally expressed. *Santa Clara Pueblo*, 436 U.S. at 58; *see also McIntosh*

v. Beaver, 6 Okla. Trib. 436, 1998 WL 34067257 (Muscogee (Cr.) D.Ct.) (denied the claim because there was no specific waiver of sovereign immunity for the claim alleged); *In re Matter of the Appeal of Cain*, 7 Okla. Trib. 500, 2002 WL 32099963 (Cherokee) (denying the requested relief because there was no express waiver of sovereign immunity for the damages sought to be recovered).

Because Thlopthlocco, whose citizens are dual-enrolled Creek citizens, has not yet established its own court system or police department, it had no choice but to grant limited jurisdiction to the Muscogee (Creek) Nation Court and a specific waiver of its sovereign immunity so that it could keep the peace and seek redress of Anderson's illegal actions. As previously noted, this lawsuit was initiated by Thlopthlocco through a very specific and very limited and narrow waiver of Thlopthlocco's sovereign immunity and such waiver specifically excluded election disputes. *See* Verified Complaint at Exhibit __

Even though Thlopthlocco's waiver of sovereign immunity was specific and limited to only those claims asserted in the Verified Complaint and specifically excluded election disputes, Defendants alleged "cross-claims" that exceed the limited waiver of sovereign immunity. Through their "cross-claims", Defendants attempt to convert this case into one over the control of the government. Such an attempt exceeds the limited waiver of sovereign immunity and exceeds this Court's jurisdiction. As noted in *Thlopthlocco Tribal Town v. Tomah, et al.*, 8 Okla. Trib

451, 460 (Musc. (Cr.) D.Ct. 2004) ("Tomah I"), the Town's filing of a lawsuit does not "extend jurisdiction of the Muscogee (Creek) Nation for **any type of relief beyond** what is prayed for in [the Town's] complaint," nor does the exercise of jurisdiction "impact the governmental immunities enjoyed by Thlopthlocco Tribal Town." (Emphasis Added.) This conclusion was recently cited with approval by this Court in its Order and Opinion in *Thlopthlocco Tribal Town v. The Honorable Patrick Moore, Chief District Judge*, Case No. 2007-01, dated October 26, 2007 ("We believe the analysis and conclusion reached by Judge Stacy Leeds in Thlopthlocco was correct."). Exhibit H.

The only way this case is a dispute over who is "the true governing body of Thlopthlocco" is if Defendants can assert their "cross-claims." However, Business Committee Resolution Nos. 7-20 and 7-21 make clear that Thlopthlocco waived its sovereign immunity and confirmed jurisdiction in the Muscogee (Creek) Nation Court for only those claims set forth in the Verified Complaint. Moreover, Thlopthlocco "**does not consent to jurisdiction** in any other court or any other dispute except as explicitly provided in a separate resolution" and "[t]his waiver of immunity **shall not include election disputes**." Exhibit G (emphasis added).

Therefore, any attempt by Defendants to assert cross-claims or to otherwise raise election disputes in this case is a violation of Thlopthlocco's sovereign immunity. Thlopthlocco's specific grant of jurisdiction and limited waiver of

sovereign immunity governs what issues can be raised and litigated in this case and such waiver cannot be implied to cover additional claims. Because the waiver of sovereign immunity specifically excluded election disputes, this case cannot be about resolving "what persons constitute the true governing body of Thlopthlocco Tribal Town," but instead is limited to the issue of enjoining Anderson and Defendants' illegal and unconstitutional actions in attempting to overthrow the government. Defendants have no basis, even hypothetically, to contest the control of the government in this case because such an effort exceeds the grant of jurisdiction and the limited waiver of sovereign immunity. Thus, there is no basis at law or equity for rewarding Defendants' conduct by awarding them attorneys fees at this interim stage of the litigation.

III. This Dispute is Not About Control of the Thlopthlocco Government Because Defendants Cannot Obtain A Remedy From this Court that Puts Defendants in Control of the Thlopthlocco Government.

Although Defendants seek to frame this case as one for control of the government, in fact, it cannot obtain such relief from the Courts. Defendants have brought the Cross Claims as "Thlopthlocco Tribal Town as constituted under the leadership of Nathan Anderson, Timmy Cheek, Bryan McGertt, Kendis Rogers, Malinda Noon, Inda McGertt, Virgil Sanders, Marian Berryhill, Mike Harjochee, and Frank Harjochee." Exhibit I. However, even assuming all of Defendants

factual allegations are true, there is no set of circumstances under which the entity described above would exist.⁷

That is, even if there had been persons improperly adopted into the Tribal Town who voted in the Town's January 27, 2007 general election and even if other persons were improperly denied the right to vote or run for office in that election, there still would not exist a Thlopthlocco Tribal Town under Defendants' leadership.

If irregularities existed during the January 27, 2007 general election, there are at most two possible results apart from a finding that the current Business Committee properly holds office -- (1) the election would be void; or (2) the election would be voidable.

A. If the election was void, the previous Business Committee would constitute the Thlopthlocco government, not Defendants.

As a preliminary matter, there is no valid argument that the January 27 general election was void as a matter of law. "As a general rule, when a party with standing challenges compliance with the statutory requirements for calling the election, rather than merely challenging conduct of the election, that party has the right . . . to maintain an action to have the election declared void." *Robinson v. Ehrler*, 691 S.W.2d 200, 204 (Ky. 1985). But, where this dispute relates to the

⁷ On November 15, 2007, "Cross-Claim" Defendants and Thlopthlocco filed a motion to dismiss the cross-claims. Although Defendants never responded to the motion to dismiss, the motion has not been ruled on and is still pending at the District Court.

conduct of the election or a latent defect, the election is only voidable, *id.*, and a timely challenge is required, *cf. Chandler v. City of Winchester*, 973 S.W.2d 78, 82 (Ky. Ct. App. 1998).

However, even if the January 27 general election was void, there still would be no such thing as "Thlopthlocco Tribal Town as constituted under the leadership of Nathan Anderson" and the other Defendants. A void election is the same as no election. *Stonecalf v. Election Bd.*, 8 Okla. Trib. 269 (Chey.-Arap. D. Ct. 2003) ("If the election is found to be null and void, it is as if the election did not take place"); *Robinson*, 691 S.W.2d at 206 n.4; *see also Black's Law Dictionary* (8th ed. 2004) (noting that "void" means "[o]f no legal effect" and applies to provisions that "are of no effect whatsoever"). So, in order to determine the effect if the January 27 general election had been void, the Court need look only at what would have happened had there been no election at all. Pursuant to the Thlopthlocco Constitution, the "officers of the Thlopthlocco Tribal Town . . . shall be elected by the town membership and their term of office shall be for a period of four years, or until their successors are elected and installed." Thlopthlocco Const. Art. V, Sec. 1. So, if there had been no election, the pre-election government would have continued until a new government was elected. *See Mosqueda v. Cheyenne-Arapaho Tribal Election Bd.*, 5 Okla. Trib. 96 (Chey.-Arap. 1996) ("The Tribes' Constitution provides . . . that [t]he term of office for each committeeman .

. . . shall be for a period of four (4) years, *or until his successor is duly elected and installed in office*. In cases such as this one, where no one's election to the new term of office . . . has yet been properly validated, and no successor has yet been properly installed in office, the language . . . italicized above clearly requires temporary continuance in office by the individual who occupied the contested Business Committee seat during the preceding term of office." (emphasis and alterations in the original)).

B. If the election was voidable, the current Business Committee would constitute the Thlopthlocco government, absent a timely challenge and removal under the grievance process set forth in the Thlopthlocco Constitution.

Even if the election had been voidable, the current Business Committee would serve as *de facto* officers absent their removal pursuant to the Thlopthlocco Constitution. In cases like this one where the current Business Committee members were sworn in (by Defendant Anderson himself) following the now-disputed election, they are *de facto* officers of the Thlopthlocco Tribal Town. *See Black's Law Dictionary* (8th ed. 2004) (defining "officer de facto" as "[a]n officer who exercises the duties of an office under color of an appointment or election, but who has failed to qualify for office for any one of various reasons"); *see also In re Removal of McCauley*, 8 Okla. Trib. 31 (Kaw 2003) (finding that even if the appointed judge had not been confirmed, he would have been a *de facto* judge); *Morford v. Territory*, 63 P. 958, 959-60 (Okla. Terr. 1901) (noting that a person is

a de facto officer when he assumes an official position and is reputed and understood to have that position); *De Jure Office as a Condition of a De Facto Officer*, 99 A.L.R. 294 (1935) (a *de facto* officers' actions are valid as long as there is a de jure office to occupy). As *de facto* officers, they could not be removed without complying with Thlopthlocco's constitutional procedures. *Office of Hawaiian Affairs v. Cayetano*, 6 P.3d 799, 806 (Haw. 2000) (no "automatic vacancy" occurs when an officer becomes a de facto officer because of infirmities in an election; rather, "there is legal authority that further removal action is required before the office is deemed vacant"). Defendants have not alleged, and cannot assert, that the Thlopthlocco Constitution's procedures have been followed to remove the members of the current Business Committee, and the current Business Committee is still the government of the Thlopthlocco Tribal Town.

Moreover, even if the January 27 election was voidable, this Court would not be the proper venue for that dispute. Unlike claims that an election was void, which have been found to fall within a court's traditional equitable powers, a claim that an election is voidable must be brought under a specific statutory authorization, or not at all. *See Robinson*, 691 S.W.2d at 205. While the Constitution and By-Laws of the Thlopthlocco Tribal Town do not provide a judicial forum for election disputes, they do provide a procedure for removing individuals from their offices in the government. Thlopthlocco Const. Art. VI.

Had any person disputed the results of the January 27 general election, they could have taken advantage of this procedure in a timely fashion. Indeed, Mr. Anderson seemed to think that removal from office was the appropriate response -- however, he failed to follow the Thlopthlocco Constitution and attempted to remove elected officers without allowing the majority vote of the town membership required by Article VI (much less having a quorum or action by the Grievance Committee). Having failed to comply with the legal way to remove persons from the Thlopthlocco government, Defendants cannot seek a different result in the District Court. *See Beaver v. Muscogee (Creek) Nation Council*, 1 Okla. Trib. 57 (Musc. (Cr.) S. Ct. 1986) ("Candidate Fife did not comply with [the statute] which provided a legal way to challenge the results of a disputed election. His failure to do so legally required the Muscogee (Creek) Nation Election Board to certify candidate Beaver to the office of Second Chief."); *see also Stonecalf v. Election Bd.*, 8 Okla. Trib. 269 (Chey.-Arap. Dist. Ct. 2003) ("Two wrongs do not make a right. To get to the bottom you must go back to the last thing that was done properly.").

Whatever the result had the election been improperly conducted, there is simply no scenario under which Defendants would constitute the entity they purport to be. Even if successful on their "cross-claims", Defendants cannot be installed on the Business Committee. Thus, this case cannot be characterized as

one "concerning what persons constitute the true governing body of Thlopthlocco". Such a determination or outcome is simply not legally feasible and cannot be made by this Court, even if it had jurisdiction over the issue.

IV. September 11 Order Eviscerates the Constitutional Grievance Process and Could Promote Future Conflict.

If not reversed and vacated, the September 11 Order will set a new and dangerous precedent that will undermine and circumvent Thlopthlocco's Constitutional grievance procedures. As is plain from the Constitution and as recognized by the Muscogee (Creek) Nation Courts, there is only one way to remove a member of the Business Committee – the grievance process under Article VI of the Constitution. *See* Exhibit D, *Const.*, Art. VI, *Thlopthlocco Tribal Town v. Tomah, et al.*, ("Tomah II"), 8 Okla. Trib. 576 (Musc. (Cr.) D. Ct. 2004) ("The Thlopthlocco Tribal Town Constitution provides only one mechanism for the removal of tribal leaders."). Pursuant to the grievance process, a grievance must be filed, the Grievance Committee must investigate the complaint and, if it finds a basis for the complaint, present the grievance to the Town membership. Eligible voters of the entire Town then have the opportunity to vote on the removal of the Business Committee member. *Id.*

If the September 11 Order stands, however, Thlopthlocco members will have a new and more attractive option to settling disputes. Rather than file a grievance and wait for the Constitutional process to run its course, disgruntled

members may simply attempt to overthrow the government and, if the lawful government resist such illegal conduct, force the government to pay the wrongdoers' legal fees. Sadly, the Town has a history of such disagreements and some of the Defendants in this action have previously tried to overthrow the government. If the September 11 Order is not reconsidered and vacated, the message to Defendants and future disgruntled members will be clear – there is no financial risk for unconstitutional attempts to overthrow the government. Not only will this encourage future actions like that taken by Defendants, but could very well lead to the demise of Thlopthlocco as a functioning and viable federally recognized Indian tribe.

V. September 11 Order Usurps the Legislative Power, Prerogatives and Sovereign Immunity of Thlopthlocco.

The September 11 Order also improperly creates an on-going financial commitment for the Thlopthlocco government without a final judgment or other appealable order. The result is a usurpation of the legislative powers and sovereign immunity of Thlopthlocco by ordering it to pay out money without approval of the Business Committee, and with no authority by the Business Committee to condition, approve or otherwise oversee the expenditure of tribal monies. As such, the September 11 Order violates Thlopthlocco's sovereign immunity and its status as an independent federally recognized Indian tribe with a right of self-governance.

It is axiomatic that federally recognized Indian tribes have plenary and exclusive power over their members and their territory subject only to limitations imposed by federal law. *See e.g., Cohen's Handbook of Federal Indian Law*, § 4.01[1][b] (2005 ed.). Indeed, it has long been held that the power to tax and determine how to expend tribe resources is "an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." *Merrion*, 455 U.S. at 137.

Pursuant to the Thlopthlocco Constitution, only the Business Committee has the power to transact business on behalf of the Town. This includes the power to approve and oversee the expenditure of Thlopthlocco funds. The limited waiver of sovereign immunity and limited grant of jurisdiction to the Muscogee (Creek) Nation Court, however, did not include any action for the reward of money damages or attorneys fees, only for injunctive and declaratory relief. The September 11 Order exceeds this limited waiver and jurisdictional grant and takes the power to expend and oversee the expenditure of Town funds away from the Business Committee and puts it in the hands of District Court. The District Court has effectively taken control of the finances of Thlopthlocco without approval, oversight or control of the Business Committee by essentially awarding Defendants monetary damages from which Thlopthlocco has no redress and no right of appeal until the conclusion of the case. The September 11 Order would

award Defendants such equitable relief even though Anderson admitted Defendants' actions were illegal and violated the Thlopthlocco Constitution. Even if Thlopthlocco ultimately prevails on appeal on the attorneys fee issue, it would then face the daunting and highly improbably task of recovering from the Defendants the monies it was forced to pay out. There is no legal support for such a usurpation of Thlopthlocco's sovereign immunity by this Court.

CONCLUSION

For the reasons set forth above, Thlopthlocco respectfully submits that the September 11 Order is contrary to applicable Muscogee (Creek) Nation Supreme Court precedent, exceeds the limited waiver of sovereign immunity, and exceeds the limited jurisdiction granted to this Court by Thlopthlocco. Moreover, if not vacated, the September 11 Order will eviscerate the Constitutional grievance process, promote more lawless action and usurp the legislative power and prerogatives of a sovereign federally recognized Indian tribe. Finally, the District Court's characterization of the dispute as who controls the Government is factually and legally incorrect. Defendants cannot gain control of the Government through this litigation.

The September 11 Order is not and cannot be supported by law. This Court should reverse and vacate the September 11 Order and deny Defendants' motion for attorneys' fees.

4. Short statement outlining the hearing bodies and/or agencies where the Appellant has sought a remedy. The District Court awarded Defendants' attorneys' fees in the September 11 Order. On October 29, 2008, the District Court denied Thlopthlocco's Motion to Reconsider the September 11 Order.

5. Names, address, and phone numbers of all parties, including respondents.

Appellant Thlopthlocco Tribal Town Government Offices Clearview Exit 227, Interstate-44 Okemah, OK 74859	Respondent Nathan E. Anderson c/o Thlopthlocco Tribal Town Government Offices Clearview Exit 227, Interstate-44 Okemah, OK 74859
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Respondent Bryan McGertt 1803 E. 10th Okmulgee, OK 74447	Respondent Timmy Cheek 1105 N. 3 rd Okemah, OK 74859
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Respondent Candice (a/ka Kendis Rogers) c/o Thlopthlocco Tribal Town Government Offices Clearview Exit 227, Interstate-44 Okemah, OK 74859	Respondent Inda McGertt 100 Taylor Dr., Apt. 107 Okmulgee, OK 74447
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Respondent Frank Harjochee 3136 SW 100th Pl. Oklahoma City, OK 73159	Respondent Virgil Sanders 14455 N. 210 Rd. Okmulgee, OK 74447
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Respondent Mary McGertt 222 E. 149 th Glenpool, OK 74003	Respondent Grace Bunner 1117 E. 10th Shawnee, OK 74801
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Respondent Thelma Jean Noon	Respondent Wesley Montemeyer
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510 S. Main
Wetumka, OK 74883

2937 NW 31st St.
Oklahoma City, OK 73112

Respondent Paula Barnes-
Herrod
805 E. Rosa
Shawnee, OK 74801

Respondent Malinda Noon
318 S. Wetumka
Wetumka, OK 74883

6. Name, address, and phone number of all parties' advocates.

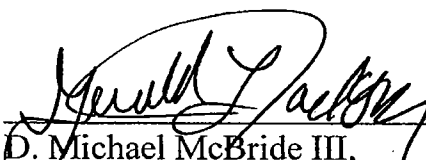
For Appellant:

D. Michael McBride, III
Gerald L. Jackson
Michael R. Pacewicz
Crowe & Dunlevy
500 Kennedy Building
321 S. Boston Ave.
Tulsa, OK 74103-3313
(918) 592-9800

For Respondents:

John Velie
Velie & Velie, P.C.
210 E. Main St., Ste. 222
Norman, OK 73069
(405) 364-2525

Respectfully submitted,



D. Michael McBride III,
Muscogee (Creek) Nation Bar # 116;
Gerald L. Jackson,
Muscogee (Creek) Nation Bar # 506;
Michael R. Pacewicz,
Muscogee (Creek) Nation Bar # 507;

- Of the Firm -

CROWE & DUNLEVY
A Professional Corporation
500 Kennedy Building
321 South Boston Avenue
Tulsa, OK 74103-3313
(918) 592-9800
(918) 592-9801 (Facsimile)

GENERAL COUNSEL FOR
THLOPTHLOCCO TRIBAL TOWN
GOVERNMENT – PLAINTIFF