UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

(1) MCKESSON CORPORATION; (2) CARDINAL HEALTH, INC.; (3) AMERISOURCEBERGEN DRUG CORPORATION; (4) CVS HEALTH CORPORATION; (5) WALGREENS BOOTS ALLIANCE, INC.; and (6) WAL-MART STORES, INC., Plaintiffs, vs. (1) TODD HEMBREE, ATTORNEY GENERAL OF THE CHEROKEE NATION, in his official capacity; (2) JUDGE CRYSTAL R. JACKSON, in her official capacity; and (3)-(7) DOE JUDICIAL OFFICERS 1-5; Defendants.	No. _____ **COMPLAINT**

Plaintiffs, by and through undersigned counsel, allege as follows:

INTRODUCTION

1) This Court should issue a declaratory judgment and enjoin Defendant Todd Hembree, Attorney General of the Cherokee Nation (the "Tribe"), and Defendants Judge Crystal R. Jackson and Doe Judicial Officers 1-5, all acting on behalf of the Tribe, from exercising jurisdiction they plainly lack. The Tribe has sued, in tribal court, six defendants (Plaintiffs here). Plaintiffs and/or certain of their subsidiaries or affiliates are all registered with the Drug Enforcement Administration ("DEA") to either distribute or dispense controlled substances. In its Petition, the Tribe claims these parties have failed to comply with regulations the DEA promulgated under the federal Controlled Substances Act, 21 U.S.C. §§ 801-904 ("CSA") in an area comprising all or part of fourteen counties in Oklahoma. It further alleges that, by doing so,

plaintiffs have contributed to the widespread abuse of opioids by the Tribe's members. This Court has jurisdiction over this declaratory judgment action because the Tribe's attempt to prosecute and adjudicate the *Cherokee Nation* Action presents a federal question under 28 U.S.C. § 1331.

2) The Tribe plainly lacks jurisdiction over the conduct alleged in the *Cherokee Nation* Action. None of Plaintiffs here are tribal members or tribal corporations. Moreover, none of Plaintiffs' conduct at issue occurred in Indian country. That should be the end of the jurisdictional inquiry. But even if a small fraction of the alleged conduct had occurred in Indian country, the Tribe cannot demonstrate that the conduct threatens either tribal governance or internal relations among Tribe members, as required for either of the exceptions to the rule barring tribal regulation of non-Indians to apply. Both exceptions are also inapplicable for other reasons discussed below.

3) The Tribe also lacks jurisdiction because the *Cherokee Nation* Action is an attempt to civilly enforce a federal statute, the CSA, under the guise of claims asserted under the Tribe's statutory and common law. By the express terms of the CSA, which delegate enforcement to the federal government exclusively in federal court and in administrative proceedings before the Attorney General (related to the DEA), Indian tribes have no right to enforce the statute or its regulations. The CSA does not create private rights of action. Not only is this the law, but it makes sense. The CSA's application and enforcement require the federal government, and particularly the DEA, to apply significant expertise in weighing express Congressional findings and making the judgment-laden determinations the CSA requires. As courts have held uniformly, Congress did not intend that such determinations would be made in

private actions of any sort. Nothing in the CSA suggests Congress intended to allow Indian tribes to enforce these requirements, let alone do so in a tribal court.

4) Exhaustion of tribal remedies is not and should not be required for three reasons. First, jurisdiction over the non-Indian Plaintiffs for their alleged conduct is so clearly lacking that exhaustion would serve no purpose but delay. Second, the Tribe's action violates the CSA's express jurisdictional mandates, namely, that it be enforced by the federal government, in federal court. Third, requiring exhaustion would be futile due to a law the Tribe recently enacted, which, among other things, bars all interlocutory appeals of jurisdictional rulings in tribal court. This prohibition prevents a jurisdictional challenge in tribal court that is timely, and therefore meaningful and consistent with due process. The Court should accordingly declare that the Tribe is without jurisdiction to prosecute or adjudicate the *Cherokee Nation* Action and should enter an injunction against same.

PARTIES

5) Plaintiffs here are the defendants in the *Cherokee Nation* Action. Plaintiffs note that certain of them are parent or holding corporations that have been improperly named by the Tribe in the *Cherokee Nation* Action, rather than the relevant subsidiaries, including Cardinal Health, Inc., CVS Health Corporation, and Walgreens Boots Alliance, Inc. "It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation ... is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998). "[A] holding or parent company has a separate corporate existence and is treated separately from the subsidiary in the absence of circumstances justifying disregard of the corporate entity." *Birmingham v. Experian Info. Solutions, Inc.*, 633 F.3d 1006, 1018 (10th Cir. 2011) (quoting *Benton v. Cameco Corp.*, 375 F.3d 1070, 1081 (10th Cir. 2004)). Plaintiffs

nevertheless bring this lawsuit as the named parties in the *Cherokee Nation* Action, but without making any admission that they have been properly named therein or that they are subject to the subject matter or personal jurisdiction of the District Court of the Cherokee Nation.

A. Distributor Plaintiffs

6) Plaintiff McKesson Corp. is a publicly traded Delaware corporation headquartered in California and a defendant in the *Cherokee Nation* Action.

7) Plaintiff Cardinal Health, Inc. is a publicly traded Ohio corporation headquartered in Ohio and a defendant in the *Cherokee Nation* Action.

8) Plaintiff AmerisourceBergen Drug Corporation is a Delaware corporation headquartered in Pennsylvania and a defendant in the *Cherokee Nation* Action (referred to in the Petition simply as "AmerisourceBergen").

9) Plaintiffs McKesson, Cardinal Health, and AmerisourceBergen (collectively, the "Distributor Plaintiffs") are wholesale distributors of pharmaceutical products, including prescription drugs, which include controlled substances. That is, the Distributor Plaintiffs purchase pharmaceutical products from suppliers, primarily drug manufacturers, and sell those pharmaceuticals to dispensers (usually pharmacies). The Distributor Plaintiffs do not make the opioid drugs at issue; nor do they do prescribe those drugs. Rather, by securely delivering the drugs with which pharmacies stock their shelves, the Distributor Plaintiffs bring efficiency to the highly-regulated federal supply chain. All distributions of controlled substances by the Distributor Plaintiffs in Oklahoma have been made to pharmacies and other customers who were duly registered with the DEA and properly licensed by the State of Oklahoma.

10) None of Distributor Plaintiffs' distribution facilities are on land that qualifies as "Indian country" within the meaning of 18 U.S.C. § 1151. The lands are all owned in fee by

non-Indians. In addition, none of the lands are (i) located within the exterior boundaries of any Indian reservation, *see* 18 U.S.C. 1151(a); (ii) trust lands (i.e., lands owned by the United States and held in trust for the benefit of a tribe or its members); (iii) a "dependent Indian community," set aside for the occupancy of Indians under continued federal superintendence, *see* 18 U.S.C. 1151(b); or (iv) "allotments" that remain in Indian ownership and subject to federal restrictions on alienation, *see* 18 U.S.C. 1551(c).

11) Distributor Plaintiffs are not aware of any contractual or other consensual relationship with the Tribe relating to the distribution of controlled substances.

B. Pharmacy Plaintiffs

12) Plaintiff CVS Health Corporation is a publicly traded Delaware corporation headquartered in Rhode Island and a defendant in the *Cherokee Nation* Action.

13) Plaintiff Walgreens Boots Alliance, Inc. is a publicly traded Delaware corporation headquartered in Illinois and a defendant in the *Cherokee Nation* Action.

14) Plaintiff Wal-Mart Stores, Inc. is a publicly traded Delaware corporation headquartered in Arkansas and a defendant in the *Cherokee Nation* Action.

15) In relevant part, Plaintiffs CVS Health Corporation, Walgreens Boots Alliance, Inc. and Wal-Mart Stores, Inc. (collectively, the "Pharmacy Plaintiffs") and/or certain of their subsidiaries or affiliates are all in the business of dispensing prescription medications.

16) None of the Pharmacy Plaintiffs are members or corporations of the Tribe or any other Indian tribe. In addition, as with the Distributor Plaintiffs, none of the Pharmacy Plaintiffs operates facilities on land that qualifies as "Indian country" within the meaning of 18 U.S.C. § 1151. The lands are all owned in fee by non-Indians. In addition, none of the lands are (i) located within the exterior boundaries of any Indian reservation, *see* 18 U.S.C. 1151(a); (ii) trust

lands (i.e., lands owned by the United States and held in trust for the benefit of a tribe or its members); (iii) a "dependent Indian community," set aside for the occupancy of Indians under continued federal superintendence, *see* 18 U.S.C. 1151(b); or (iv) "allotments" that remain in Indian ownership and subject to federal restrictions on alienation, *see* 18 U.S.C. 1551(c).

C. Defendants

17) Defendant Todd Hembree is the Attorney General for the Cherokee Nation, an Indian Tribe and the Plaintiff in the *Cherokee Nation* Action.

18) Judge Crystal R. Jackson is a judge of the Cherokee Nation District Court to whom the *Cherokee Nation* Action has been assigned.

19) Doe Judicial Officers 1-5 are judicial officers unknown at this time to whom the *Cherokee Nation* Action may be assigned.

20) All Defendants are named herein solely in their official capacity as representatives of the Tribe, and sued solely for prospective injunctive relief pursuant to the doctrine of *Ex parte Young*, 209 U.S. 123 (1908).

JURISDICTION AND VENUE

21) This Court has subject matter jurisdiction over this declaratory judgment action under 28 U.S.C. § 1331 because the existence of tribal jurisdiction over non-members is a federal question. *Nat. Farmer's Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 852 (1985).

22) An actual case or controversy exists between the Plaintiffs and Defendants due to the filing of the *Cherokee Nation* Action against Plaintiffs in the Cherokee Nation District Court.

23) Venue is proper under 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this District.

BACKGROUND

24) Tribal courts are not courts of general jurisdiction. *Nevada v. Hicks*, 533 U.S. 353 (2001). As domestic dependent quasi-sovereign nations, the jurisdiction of Indian tribes over non-Indians is strictly limited. A tribe's adjudicative jurisdiction over nonmembers cannot exceed its legislative jurisdiction, and may not even go that far. *Hicks*, 533 U.S. at 357-58; *see also id.* at 358 n.2 ("we have never held that a tribal court had jurisdiction over a nonmember defendant").

25) The "sovereignty that the Indian tribes" enjoy "is of a unique and limited character, … center[ed] on the land held by the tribe and on tribal members within the reservation." *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 327 (2008) (quotations omitted). Thus, "tribal jurisdiction is … cabined by geography: The jurisdiction of tribal courts does not extend beyond tribal boundaries." *Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 937-38 (9th Cir. 2009) (citing *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 658 n. 12 (2001)).

26) Despite these restrictions on tribal jurisdiction, in the *Cherokee Nation* Action, the Tribe purports to assert broad, general jurisdiction against the various non-member defendants—Plaintiffs in this action—that the Tribe alleges are responsible for various harms to the Tribe or tribal members allegedly caused by the illegal abuse of prescription opioids by members of the Tribe. (Pet. ¶¶ 1-9.)

27) In an effort to shield itself from challenges to tribal court jurisdiction, the Tribe, before filing the *Cherokee Nation* Action, enacted the Comprehensive Access to Justice Act (CAJA) in July 2016. That act, co-authored by Defendant Hembree, amended the Cherokee

Nation Code (CNC) to preclude all interlocutory appeals of challenges to the Tribe's jurisdiction. CAJA § 3 (adopting 12 CNC § 19). In addition, CAJA provides the following:

- creates the "Unfair & Deceptive Practices Act" under which Defendant Hembree now brings the *Cherokee Nation* Action, *id.* (adopting 12 CNC §§ 21 et seq.);
- provides that "No ... federal law, including any ... federal regulations, shall be binding upon the courts" unless the Tribal Council incorporates it into a tribal statute or the court adopts it as tribal common law, *id.* (adopting 12 CNC § 3);
- retroactively eliminates the statute of limitations for any case brought by the Tribe as plaintiff, *id.* (amending 12 CNC § 11);
- allows other Indian tribes to join in actions in tribal court without waiving their sovereign immunity, *id.* (adopting 12 CNC § 17);
- creates the authority of the Cherokee Nation Attorney General to bring civil actions as "*parens patriae*" on behalf of tribal members, *id.* (amending 12 CNC § 13);
- allows for "[a]ggregate data and evidence" rather than specific evidence, *id.* (§ 13(A));
- imposes threefold damages for the Tribe only, mandatory attorney's fees to the Tribe, and 20% interest "compounding continuously," *id.* (§ 13(B));
- allows for joint and several liability, *id.* (§ 15(B)); and
- eliminates the doctrine of learned intermediary, *id.* (§ 15(C)).

THE TRIBE LACKS JURISDICTION IN THE *CHEROKEE NATION* ACTION

A. The "Cherokee Nation Jurisdictional Area" Is Not Indian Country, and the Tribe Lacks Authority To Regulate Non-Member Conduct Outside Indian Country

28) In the *Cherokee Nation* Action, the Tribe alleges authority within a so-called "Cherokee Nation Jurisdictional Area" that purportedly encompasses the whole or part of 14 Oklahoma counties, as shown on a map attached as Exhibit A to the Petition. (Pet. ¶¶ 26-28.)

29) Tribal jurisdiction over nonmembers does not extend past land that constitutes "Indian country" as defined by 18 U.S.C. § 1151: (a) "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." *See also DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U. S. 425, 427, n. 2 (1975) (recognizing that Section 1151 generally applies to questions of civil jurisdiction).

30) The so-called "Cherokee Nation Jurisdictional Area" is not Indian country and thus does not describe a geographical area where the Tribe has authority to regulate nonmember conduct, even to the limited extent allowed by *Montana*. The Tribe does not allege that this area, comprising all or part of 14 Oklahoma counties, defines the exterior boundaries of a formal Indian reservation, and it therefore does not qualify as Indian country under Section 1151(a).

31) Likewise, none of the alleged conduct at issue here occurred upon Indian country as defined by Section 1151(b) because the land at issue is not part of a federal set-aside and

under continued federal superintendence. *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 530 (1998); *Hydro Res., Inc. v. U.S. E.P.A.*, 608 F.3d 1131, 1149 (10th Cir. 2010). The Tribe does not allege otherwise.

32) Nor is Section 1151(c) applicable, for the alleged conduct of Plaintiffs would have occurred on non-Indian fee land, not on land allotted to tribal members that has remained in Indian ownership and subject to federal restrictions on alienation. *See Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1030 (8th Cir. 1999) (lands allotted to tribal members under the Dawes Act and subsequently sold to non-Indians are not Indian country under Section 1151). Indeed, the Tribe does not allege that any of the alleged conduct at issue here occurred on allotments of any type.

33) The Tribe has not specifically averred that any of the activities it alleges in its Petition occurred within the boundaries of an Indian reservation or other area of Indian country. Rather, the Tribe cryptically alleges that the conduct "take[s] place on, *or* ha[s] direct impacts on, land that constitutes Indian country within the Cherokee Nation." (Pet. ¶ 24 (emphasis added).) The Tribe's vague allegation is intentional. It is well aware that none of the Plaintiffs' activity alleged would have actually occurred in Indian country.

34) The Distributor Plaintiffs' conduct that allegedly gives rise to the Tribe's purported causes of action consists of failing to stop or investigate "suspicious orders" of opioids, failing to properly train employees, and "fail[ing] to adequately control their supply lines to prevent diversion." (Pet. ¶¶ 5, 56, 112, 114.) But none of this alleged conduct would have occurred in the so-called "jurisdictional area," much less on land constituting Indian country. The Distributor Plaintiffs have no connection to Indian country or the Tribe's members. The Distributor Plaintiffs do not maintain distribution facilities within the "tribal jurisdictions"

identified in the Tribe's Petition, do not manufacture the products at issue, and do not sell directly to consumers.

35) The Pharmacy Plaintiffs' conduct that allegedly gives rise to the Tribe's purported cause of action consists of "filling" and "dispensing" prescriptions, "reviewing" prescriptions, "hiring" tribal employees to work as pharmacists and pharmacy technicians, and failing to adequately train or supervise employees (e.g., Pet. ¶¶ 44, 128, 131, 142, 143, 144, 148, 150). All of these alleged activities would have occurred, if at all, on the premises of the pharmacies, none of which are in Indian country.

36) Accordingly, the Tribe plainly lacks any jurisdiction over the nonmember Plaintiffs here for conduct that occurred, if at all, on privately owned fee lands located outside of Indian country. *See Plains Commerce Bank*, 554 U.S. at 327; *Philip Morris*, 569 F.3d at 937-38. While *Montana* provides exceptions to the general rule that a tribe lacks jurisdiction over nonmembers, those exceptions can apply *only to nonmember conduct in Indian country. See Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1091-92 (8th Cir. 1998); *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 786 (7th Cir. 2014); *Philip Morris*, 569 F.3d at 937-38; *see also Plains Commerce Bank*, 554 U.S. at 327. Here, there can be no doubt that all of the Plaintiffs' alleged conduct occurred entirely outside of Indian country, and the Court need not reach the applicability of the *Montana* exceptions.

B. The *Montana* Exceptions Do Not Apply and Have Not Been Satisfied

37) Even if any of Plaintiffs' alleged conduct occurred in Indian country—and it did not—tribal jurisdiction is plainly lacking under *Montana*.

38) Under *Montana*, even where non-Indian conduct occurs within Indian country (unlike in this case), tribal jurisdiction over such conduct is strictly limited. Efforts by a tribe "to

regulate nonmembers, especially on non-Indian fee land [within an Indian reservation] are presumptively invalid." *Plains Commerce Bank*, 554 U.S. at 330 (internal quotation marks omitted). The "sovereignty that the Indian tribes" enjoy, which provides authority to regulate such conduct, "is of a unique and limited character, ... center[ed] on the land held by the tribe and on tribal members within the reservation. *Id.* at 327 (quotations omitted). In particular, a tribe presumptively lacks jurisdiction over the activities of non-Indians even within Indian country, unless the tribe can satisfy one of the two very narrow exceptions under *Montana v. United States*, 450 U.S. 544, 565 (1981).

39) The burden rests on the Tribe to establish one of the exceptions to *Montana*'s general rule. *Atkinson Trading Co.*, 532 U.S. at 644. These exceptions are limited ones, and cannot be construed in a manner that would swallow the rule, or severely shrink it. *Plains Commerce Bank*, 554 U.S. at 330 (quoting *Atkinson Trading Co.*, 532 U.S. at 654-55, 57, and *Strate v. A-1 Contractors*, 520 U.S. 438, 458 (1997)).

40) The two limited *Montana* exceptions to the general prohibition of tribal jurisdiction are (1) a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements where necessary to protect tribal self-government and to control internal relations; and (2) a tribe may exercise civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe and the exercise of jurisdiction is needed to preserve the tribe's right to make their own laws and be governed by them. *Id.* at 329-30, 332; *MacArthur v. San Juan Cty.*, 497 F.3d 1057, 1075 (10th Cir. 2002). Again, these limited exceptions to the general rule that a tribe lacks

jurisdiction over nonmembers only apply when the alleged conduct occurred in Indian country, as defined by 18 U.S.C. § 1151, which is not the case at hand.

41) The alleged consensual activities of Plaintiffs—either for Distributor Plaintiffs or Pharmacy Plaintiffs—clearly do not satisfy the first *Montana* exception. There are no consensual activities—alleged or otherwise—between Distributor Plaintiffs and the Tribe or its members. As for Pharmacy Plaintiffs, the only alleged conduct is the filling of prescriptions for medication for members of the Tribe and hiring members of the Tribe to work in their pharmacies, which clearly do not satisfy the first limited and narrow *Montana* exception.

42) The Supreme Court has made clear that *Montana*'s consensual relationship exception only applies to conduct that intrudes on the internal relations of the Tribe or threatens tribal self-rule. *Plains Commerce Bank*, 554 U.S. at 334-35. No such conduct is alleged in the *Cherokee Nation* Action.

43) The term "consensual relationships" as used in *Montana* refers to "commercial dealing, contracts, leases, and other arrangements," 450 U.S. at 565, and does not apply to discrete sales of prescription drugs.

44) Moreover, even when there is a consensual relationship, there must be a nexus, a direct connection, between that relationship and the conduct the tribe seeks to regulate or adjudicate. *MacArthur*, 309 F.3d at 1223; *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1152 (10th Cir. 2011). No such connection exists here.

45) The Tribe's claims do not arise out of any consensual relationships with any of the Plaintiffs, but rather from alleged and acknowledged misconduct by third parties—fraud, theft, diversion, and other criminal activity in unlawfully obtaining and abusing prescription opioids allegedly distributed and/or dispensed by Plaintiffs.

46) The Tribe also cannot satisfy the second *Montana* exception because it has not alleged facts indicating that the challenged conduct imperils the subsistence or survival of the tribe or that the exercise of jurisdiction "is needed to preserve the [tribe's] right to make their own laws and be governed by them." *MacArthur*, 497 F.3d at 1075; *Plains*, 554 U.S. at 341 ("The conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community."). The activities alleged in the Petition also do not threaten the political integrity, economic security, or health or welfare of the Tribe so as to permit the assertion of jurisdiction over activities of non-Indians or non-Indian land. No court has applied the second *Montana* exception to an action alleging activities similar to those alleged in the *Cherokee Nation* action.

47) Accordingly, even if this cases involved alleged conduct in Indian country, which it does not, the *Montana* exceptions would not apply here and would not permit the Tribe's assertion of jurisdiction.

C. The 1866 Treaty Does Not Furnish Jurisdiction for the *Cherokee Nation* Action

48) In the *Cherokee Nation* Action, the Tribe purports to assert jurisdiction to regulate conduct by the non-member Distributor and Pharmacy Plaintiffs taking place on non-Indian fee land pursuant to its own Constitution, its laws, and the Cherokee Treaty of 1866. (Pet. ¶¶ 18-48.) However, the Cherokee Constitution and laws can confer jurisdiction only to the extent they are consistent with the Tribe's limited domestic dependent sovereignty under federal law, which does not extend to the conduct alleged in the *Cherokee Nation* Action for the reasons above.

49) The grant of jurisdiction in the Cherokee Treaty of 1866 was superseded by federal law in congressional enactments in the 1890s. *See* Act of May 2, 1890, ch. 182, §§ 1-30, 26 Stat. 81-93 (limiting tribal court jurisdiction to cases in which members of the tribe "are the sole parties"); *Alberty v. United States*, 162 U.S. 499, 502-03 (1896) (recognizing same); 1898

Curtis Act, § 28, ch. 517, 30 Stat. 495 (abolishing the Cherokee tribal courts referenced in the 1866 Treaty). The jurisdiction of the modern-day Cherokee Nation District Court is governed, not by the 1866 treaty, but by principles of federal Indian law, which severely restrict the jurisdiction of tribal courts over non-Indians, even when (unlike the conduct alleged in the *Cherokee Nation* Action) non-Indians engage in conduct on lands within Indian country. *See, e.g., Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). And whatever the geographic scope of tribal court jurisdiction over non-Indians may have been in 1866, the geographic scope of the modern-day Cherokee Nation District Court over non-Indians is limited, as noted above, to Indian country, and even there, the Tribe's jurisdiction over non-members is presumptively invalid under *Montana*, as noted above. For all of these reasons, the 1866 Treaty has no bearing on this case.

D. The Tribe Lacks Jurisdiction to Privately Enforce the CSA

1) The federal courts have exclusive jurisdiction over CSA violations

50) The Tribe purports to assert its claims pursuant to federal statutes, regulations, and compacts that recognize tribal jurisdiction over certain matters in an area that may be co-extensive with what the Tribe characterizes as its "jurisdictional area." Initially, none of these authorities purports to designate the area in question as Indian country under 18 U.S.C. § 1151. Moreover, these federal authorities merely permit the Tribe to implement certain government programs and functions for the benefit of tribal members within that area. They do not purport to grant the Tribe regulatory or adjudicatory jurisdiction over the conduct of non-Indians on non-Indian owned fee lands in that area, and certainly not over the alleged violations of the CSA the Tribe asserts in the *Cherokee Nation* Action.

51) Exercise of tribal jurisdiction over the Tribe's claims, all of which allege violations of the CSA, would conflict with a "superior federal interest." *UNC Res., Inc. v. Benally*, 518 F. Supp. 1046, 1052 (D. Ariz. 1981) (holding that "the assertion of tribal jurisdiction over the present dispute also conflicts with the superior federal interest in regulating the production of nuclear power"). The federal objective of "prevent[ing] diversion and abuse of [controlled substances] while ensuring an adequate and uninterrupted supply is available to meet the country's legitimate medical, scientific, and research needs," Drug Enforcement Administration, Practitioner's Manual 4, could well be frustrated if tribal courts were permitted to impose damages and penalties on the basis of a party's legal sale or distribution of a federally regulated controlled substance.

52) Moreover, Congress has committed enforcement of the relevant provisions of the CSA solely to the federal government, and has mandated that they be enforced only in federal district court. *See* 21 U.S.C. § 882(a). "[A]ccording to its plain terms, '[t]he [CSA] is a statute enforceable only by the Attorney General and, by delegation, the Department of Justice.'" *Smith v. Hickenlooper*, 164 F. Supp. 3d 1286, 1290 (D. Colo. 2016) (quoting *Schneller v. Crozer Chester Med. Ctr.*, 387 F. App'x 289, 293 (3d Cir. 2010)).

53) Congress enacted in the CSA a broad scheme of regulatory oversight for controlled substances, including prescription opioids. Part of this exclusive regulatory framework is the express grant to the federal government of the power of enforcement of federal drug policy regarding prescription opioids, to be undertaken only in federal court.

54) The manufacture, distribution, and dispensing of opioids is comprehensively regulated by Congress in the CSA.

55) The DEA is "the primary federal agency responsible for the enforcement of the Controlled Substances Act." In its enforcement capacity, the DEA acts "to prevent diversion and abuse of [controlled substances] while ensuring an adequate and uninterrupted supply is available to meet the country's legitimate medical, scientific, and research needs." DRUG ENFORCEMENT ADMINISTRATION, PRACTITIONER'S MANUAL 4.

56) The DEA adds and removes drugs from the defined schedules of controlled substances. *See* 21 U.S.C. § 811. The drugs at issue in the *Cherokee Nation* Action—hydrocodone (as of 2015), oxycodone, and oxymorphone—are federal Schedule II drugs. 21 C.F.R. §§ 1308.12(b)(l)(vi), (xiii), (xiv).

57) The DEA, acting pursuant to delegated authority, establishes manufacturer production quotas for schedule I and II controlled substances each year. 21 U.S.C. § 826. The DEA sets these quotas so as "to provide for the estimated medical, scientific, research, and industrial needs of the United States, for lawful export requirements, and for the establishment and maintenance of reserve stocks." 21 U.S.C. § 826(a).

58) The DEA registers and inspects distributors like the Distributor Plaintiffs pursuant to the CSA's mandate that "[e]very person who manufactures or distributes any controlled substance ... shall obtain annually a registration." 21 U.S.C. § 822(a)(1); *id*. § 822(f). Likewise, the DEA registers pharmacies such as the Pharmacy Plaintiffs pursuant to the CSA requirement to "register practitioners (including pharmacies, as distinguished from pharmacists) to dispense, or conduct research with, controlled substances." 21 U.S.C. § 823(f). In considering applications for registration from distributors and pharmacies, the CSA requires the DEA to consider, among other things, the applicant's past experience in the distribution of controlled substances as well as its maintenance of effective controls against diversion of particular

controlled substances. *See* 21 U.S.C. § 823(b), (f). This determination is discretionary and informed by the DEA's unique expertise in regulating the handling of controlled substances.

59) The CSA's scheme for regulating opioids and other controlled substances is a "closed system." That is, DEA-registered manufacturers may produce the drugs only according to assigned quotas and may sell them for distribution only to other DEA-registered distributors, which, in turn, may distribute them only to DEA-registered dispensers, such as pharmacies.

60) The DEA also enforces the CSA's detailed reporting requirements for registrants, such as the Distributor and Pharmacy Plaintiffs or their operating affiliates. 21 U.S.C. § 827. Those requirements include maintaining "a complete and accurate record of each [controlled] substance manufactured, received, sold, delivered, or otherwise disposed of by [the registrant]" and making periodic reports of "every sale, delivery or other disposal … with respect to narcotic controlled substances [which includes opioids]." *Id.* § 827(a)(3) & (d). The DEA has promulgated comprehensive regulations in furtherance of these provisions. *See* 21 C.F.R. §§ 1304, 1310.

61) The DEA maintains this data in the Automation of Reports and Consolidated Orders System ("ARCOS"). Through ARCOS, the agency is able to "monitor[] the flow of DEA controlled substances from their point of manufacture through commercial distribution channels to the point of sale or distribution at the dispensing/retail level—hospitals, retail pharmacies, practitioners, mid-level practitioners, and teaching institutions." U.S. Dep't of Justice, Drug Enforcement Administration: Diversion Control Division, *Background: What is ARCOS and What Does it Do?*

62) Of particular importance here, the DEA also requires registrants, including wholesale distributors, to "design and operate a system" to identify suspicious orders, and report

those suspicious orders to the DEA. *Id*. § 1301.74(b). The regulation defines suspicious orders as "orders of unusual size, orders deviating substantially from a normal pattern, and orders of unusual frequency." *Id*. It does not, however, identify what is an "unusual size," a "substantial" deviation from a "normal pattern," or an "unusual frequency." Further, the DEA has broad discretion in determining whether distributors comply with the suspicious order regulation, as it may in its discretion deem "substantial compliance" with the regulation to be sufficient. *Id*. at §1301.71(b).

63) Congress has allocated enforcement of the relevant provisions of the CSA solely to the federal government in federal district court. *See* 21 U.S.C. § 882(a). "[A]ccording to its plain terms, '[t]he [CSA] is a statute enforceable only by the Attorney General and, by delegation, the Department of Justice.'" *Smith v. Hickenlooper*, 164 F. Supp. 3d 1286, 1290 (D. Colo. 2016) (quoting *Schneller v. Crozer Chester Med. Ctr.*, 387 F. App'x 289, 293 (3d Cir. 2010)).

64) Indeed, the CSA's registration provisions direct the United States Attorney General to grant registration based on consideration of various statutorily enumerated factors. 21 U.S.C. § 823(b). The CSA also allows the Attorney General to revoke registrations on the grounds identified in the CSA; to do so, however, the Attorney General must follows the procedures specified in the CSA. *See id.* § 824. The Attorney General's determinations under the CSA are "final and conclusive," subject only to direct review by "any aggrieved person," and only in federal courts of appeals. *Id.* § 877.

65) Only federal district courts (and courts of general jurisdiction in U.S. territories and possessions) were granted authority by Congress to enjoin violations of the CSA. 21 U.S.C. § 882(a). Even the states have no power to enjoin the conduct complained of here. The

only exception the CSA provides to the exclusive enforcement of the CSA by the federal government is a limited right of action, not applicable here, for states to assert claims against certain online pharmacies, and that provision expressly states that "[n]o private right of action is created under this subsection." 21 U.S.C. § 882(c)(1), (5). State courts are granted no other rights to enforce the CSA, and Indian tribes are not granted any at all.

66) Recognizing this exclusive authority conferred on federal government regulators, "federal courts have uniformly held that the CSA does not create a private right of action." *Smith*, 164 F. Supp. 3d at 1290; *accord McCallister v. Purdue Pharma L.P.*, 164 F. Supp. 2d 783, 793 (S.D. W. Va. 2001) (finding no private cause of action under the CSA). Nothing in the text or structure of the CSA suggests Congress intended to confer legal rights—much less a private remedy—on other parties, much less on domestic dependent sovereigns such as the Tribe. *See* 21 U.S.C. § 882(c)(5) (no private right of action); *Smith*, 164 F. Supp. 3d at 1290; *McAllister*, 164 F. Supp. 2d at 793 n.16 (finding no such "legislative intent"); *Ringo v. Lombardi*, 2010 WL 3310240, at *2 (W.D. Mo. Aug. 19, 2010) ("The CSA does not specify a private remedy for those aggrieved by violations of the CSA.").

67) The CSA's plain terms indicate Congress did not overlook Indian tribes and tribal courts in determining how and where the CSA should be enforced, but intended not to give them any rights to enforce the CSA. The CSA, for various other purposes, addresses "Indian tribes," "tribal law enforcement agen[cies]," "tribal organizations," "tribal … regulatory agencies," "tribal … governmental authorities," and even "tribal proceedings." *See* 21 U.S.C. §§ 802(52)(B)(iv); 822a(a)(1); 822a(b); 831(g); 862; 872(c); 872a; 873, 878; and 882(c). Nowhere, however, does it suggest that tribes or tribal entities have any power whatsoever to enforce the CSA. Where Congress specifically referenced Indian tribes and authorities in the CSA for some

purposes, but included no provision suggesting that Indian tribes have authority to enforce any aspect of the CSA, let alone to do so in tribal court, it cannot be deemed to have intended to grant tribes or tribal courts any such authority.

2) The Tribe's Attempts to Privately Enforce the CSA are Improper

68) Although Congress has plainly committed enforcement of the CSA to actions brought by the federal government in federal court, the Tribe nevertheless attempts to use the *Cherokee Nation* Action to privately enforce the CSA against nonmembers in Cherokee Nation District Court, including through penalties and punitive damages. No lawful, retained sovereign interest of the Tribe supports this exercise of jurisdiction. The Tribe's attempt to exercise jurisdiction in the *Cherokee Nation* Action is contrary to congressional and Supreme Court limitations on tribal jurisdiction, and also to Congress's exclusive commitment of the enforcement of federal drug policy to the federal government and federal courts.

69) The *Cherokee Nation* Action alleges Distributor Plaintiffs are liable for various alleged injuries concerning prescription opioids allegedly caused by purported breaches of duties owed under the CSA. The Tribe extensively references duties of Distributor Plaintiffs under the CSA, including the efforts of the DEA to prevent improper distribution and use of opioids. (Pet. ¶¶ 83-99.) The Tribe further alleges, based on previous settlements by certain of the Distributor Plaintiffs with the U.S. Department of Justice, the DEA, and the Oklahoma Pharmacy Board, that Distributor Plaintiffs have violated the CSA. (*Id.* ¶¶ 100-110.) The Tribe concludes the Distributor Plaintiffs' "violation of [the CSA] shows that they failed to meet the relevant standard of conduct that society expects from them," and therefore alleges they are liable under Cherokee law. (*Id.* ¶¶ 81-82.)

70) The *Cherokee Nation* Action likewise alleges Pharmacy Plaintiffs are liable for alleged injuries concerning prescription opioids allegedly caused by the purported breaches of duties owed under the CSA. Once again, the Tribe alleges extensively that "the CSA imposes duties and requirements on the conduct" of Pharmacy Plaintiffs, which "requirements, along with their related regulations and agency interpretations," the Tribe asserts, "set a standard of care for pharmacy conduct." (Pet. ¶ 127; *see also id.* ¶¶ 128-39.) As with Distributor Plaintiffs, the Tribe alleges, based on previous settlements with the federal government by Pharmacy Plaintiffs and/or certain of their subsidiaries or affiliates, that Pharmacy Plaintiffs have violated the CSA in connection with the dispensing of opioids, and have thereby caused injury to the Tribe. (*Id.* ¶¶ 141-65.)

71) The Tribe alleges Plaintiffs have violated the CSA in the following ways:

A. Filling suspicious or invalid orders for prescription opioids at both the wholesale and retail level;

B. Failing to maintain effective controls against opioid diversion;

C. Failing to operate an effective system to disclose suspicious orders of controlled substances;

D. Failing to report suspicious orders of controlled substances;

E. Failing to reasonably maintain necessary records of opioid transactions;

F. Deliberately ignoring questionable and/or obviously invalid prescriptions and filling them anyway.

(Pet. ¶ 174.)

72) The Tribe seeks to enforce these purported violations of the CSA under the guise of five causes of action: (1) violation of the newly enacted Cherokee Nation Unfair and

Deceptive Trade Practices Act (CNUDTPA); (2) nuisance; (3) negligence; (4) unjust enrichment; and (5) civil conspiracy. Each cause of action, however, purports to predicate liability on alleged violations of the CSA by Distributor and Pharmacy Plaintiffs with regard to the distribution and dispensing of prescription opioids.

73) **CNUDTPA:** The Tribe alleges "[e]ach act by any [Plaintiff] that violated federal law under the CSA constitutes a violation of the [CNUDTPA]." (Pet. ¶ 174.)

74) **Nuisance:** The Tribe alleges Plaintiffs' alleged nuisance-causing activities "include failing to implement effective controls and procedures in their supply chains to guard against theft, diversion and misuse of controlled substances, and their failure to adequately design and operate a system to detect, halt and report suspicious orders of controlled substances," that is, failure to comply with the DEA's regulations. (*Id*. ¶ 181.)

75) **Negligence/Gross Negligence:** The Tribe alleges Plaintiffs' "challenged behavior … is against the law, i.e., facilitating the diversion of opioids to the illicit black market," and that the distributors' allegedly negligent conduct includes "unsafe distribution practices," "disregarding precautionary measures built into the CSA," and failing to report suspicious orders or refuse to fill them; again, a failure to comply with the DEA's regulations. (*Id*. ¶¶ 194-95, 198.)

76) **Unjust Enrichment:** The Tribe alleges a right to recover in unjust enrichment for "the costs of the harm caused by Defendants' negligent distribution and sales practices," which it alleges were "illegal." (*Id.* ¶¶ 210, 214.)

77) **Civil Conspiracy:** The Tribe alleges "Distributor [Plaintiffs] continuously supplied prescription opioids to the Pharmacy [Plaintiffs] despite having actual or constructive

knowledge that said pharmacies were habitually breaching their common law duties and violating the CSA." (*Id.* ¶ 218.)

78) The *Cherokee Nation* Action does not identify any alleged wrongful conduct by Plaintiffs other than alleged violations of the CSA, nor does it identify any legal basis of liability for any of these five causes of action other than alleged violations of the CSA.

79) The *Cherokee Nation* action is an improper attempt by the Tribe to enforce in Cherokee Nation District Court a federal statute for which Congress committed enforcement solely to the federal government, in federal court.

80) Exercise of tribal jurisdiction over the Tribe's claims, all of which allege violations of the CSA, would conflict with a "superior federal interest." *UNC Res., Inc. v. Benally*, 518 F. Supp. 1046, 1052 (D. Ariz. 1981). Nothing in federal law authorizes the Tribe to transform an alleged federal statutory violation into a consumer protection claim under its own law.

81) Defendant Hembree is patently without jurisdiction to bring a prohibited private cause of action on behalf of the Tribe to police alleged violations of the CSA in Cherokee Nation District Court, and Judicial Defendants lack jurisdiction to adjudicate those claims.

E. The Tribe Lacks Jurisdiction To Impose Civil Penalties or Punitive Damages in the *Cherokee Nation* Action

82) Defendants also lack jurisdiction to impose punishment in the form of civil penalties and punitive damages because "Indian tribes do not have inherent jurisdiction to try and to punish non-Indians," *Oliphant*, 435 U.S. at 212, and Congress has not authorized tribes to impose civil penalties or punitive damages on non-Indians.

83) The principle that Indian tribes lack inherent power to try and to punish non-Indians should extend to civil penalties and punitive damages as well as criminal sanctions

because civil penalties and punitive damages are predominantly punitive in nature. *See, e.g.*, *Cooper Indus. v. Leatherman Tool Grp., Inc*., 532 U.S. 424, 432 (2001) (explaining that punitive damages "have been described as 'quasi-criminal,' [and] operate as 'private fines' intended to punish the defendant and to deter future wrongdoing" (citation omitted)); *Tull v. United States*, 481 U.S. 412, 422 n.7 (1987) (explaining that "the remedy of civil penalties ... exacts punishment").

PLAINTIFFS ARE ENTITLED TO DECLARATORY AND INJUNCTIVE RELIEF

A. The Tribe Clearly Lacks Jurisdiction to Prosecute or Adjudicate the *Cherokee Nation* Action

84) As set forth above, Defendants lack jurisdiction to prosecute or adjudicate the *Cherokee Nation* Action for three reasons:

85) *First*, Defendants lack jurisdiction because the non-member conduct alleged here would not have occurred within Indian country. Therefore, because the Tribe lacks jurisdiction over non-Indians outside of Indian country, the Court need not even consider whether either of the two exceptions to *Montana*'s presumption against tribal court jurisdiction applies. (*See supra* at paragraphs 28-36.)

86) *Second*, even if the alleged conduct had occurred in Indian country, which it did not, the Tribe would be unable to overcome the presumption that it lacks jurisdiction over the non-member conduct under the *Montana* test. The *Cherokee Nation* Action is not predicated on (1) efforts to "regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" that are "necessary to protect tribal self-government and to control internal relations"; nor is it (2) a proper attempt to exercise authority over conduct on

fee lands that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Plains Commerce Bank*, 554 U.S. at 329-30, 332 (quotation omitted).

87) The Tribe cannot satisfy the "consensual relationship" exception because there are no consensual relationships related to the conduct it seeks to adjudicate, and because it cannot show it is protecting any interest that is necessary for its self-government. Moreover, the Tribe's claims arise out of alleged conduct by third parties that is by definition non-consensual—the use of fraud and theft to unlawfully obtain, sell, and/or abuse prescription opioids.

88) Nor can the Tribe satisfy the second exception, since there is no basis to suggest that the challenged conduct imperils the subsistence or survival of the tribe or that tribal court jurisdiction is "needed to preserve the [Tribe's] right to make its own laws and be governed by them." *MacArthur*, 497 F.3d at 1075; *Plains Commerce Bank*, 554 U.S. at 329-30, 332 (quotation omitted).

89) *Third*, the Cherokee Nation District Court lacks jurisdiction over the Tribe's attempt to privately enforce the CSA via the *Cherokee Nation* Action. As set forth above, Congress committed enforcement of the CSA to the federal government in federal court, precluding the Tribe's attempt to assert a private action to enforce the CSA in tribal court.

90) The Court should therefore declare that Defendants lack jurisdiction to prosecute or adjudicate the *Cherokee Nation* Action and enter an injunction against same.

B. Plaintiffs Are Not Required to Exhaust Jurisdictional Challenges in Cherokee Nation District Court Before Seeking Relief in Federal Court

91) Although a defendant in tribal court ordinarily must first exhaust its jurisdictional challenges in tribal court before seeking relief in federal court, the Supreme Court and the Tenth Circuit have recognized exceptions to the exhaustion requirement under which a defendant may

immediately file a declaratory judgment action. Three exceptions apply here: (1) it is "clear that the tribal court lacks jurisdiction so that the exhaustion requirement would serve no purpose other than delay"; (2) "the tribal court action is patently violative of express jurisdictional prohibitions"; and (3) "exhaustion would be futile because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction." *Burrell v. Armijo*, 456 F.3d 1159, 1168 (10th Cir. 2006) (citations and quotations omitted).

92) *First*, exhaustion is not required here because it is so clear the Cherokee Nation District Court lacks jurisdiction that the exhaustion requirement would serve no purpose other than delay. This is true for all the reasons set forth above, and particularly where, as here, a tribal court attempts to assert jurisdiction over the activities of non-Indians outside Indian country. *See, e.g.*, *Hornell Brewing Co.*, 133 F.3d at 1091 (exhaustion not required where conduct did not occur on reservation); *accord Jackson v. Payday Fin., LLC*, 764 F.3d 765, 786 (7th Cir. 2014); *Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 945 (9th Cir. 2009).

93) *Second*, Plaintiffs are not required to exhaust their jurisdictional challenges in tribal court because prosecution and adjudication of the *Cherokee Nation* Action in tribal court patently violates Congress's express jurisdictional prohibitions under the CSA.

94) *Third*, exhaustion is not required here because exhaustion would be futile due to the Tribe's enactment of CAJA which specifically bars any possibility of an interlocutory appeal of the Tribal Court's determination of its own jurisdiction. This recent legislation has the effect, and likely the purpose, of denying Plaintiffs here an adequate opportunity to challenge the tribal court's jurisdiction in tribal court without first spending millions of dollars in fees and thousands of hours to fully contest the case on the merits.

95) Accordingly, the Court should grant declaratory and injunctive relief prior to Plaintiffs' exhaustion of tribal remedies.

COUNT I
DECLARATORY JUDGMENT – 28 U.S.C. § 2201

96) Plaintiffs hereby reallege paragraphs 1 through 95, which are incorporated herein by reference.

97) Plaintiffs are entitled to declaratory judgment that the Cherokee Nation District Court lacks jurisdiction to adjudicate the *Cherokee Nation* Action against Plaintiffs.

98) Plaintiffs are not required to exhaust their jurisdictional challenges in Cherokee Nation District Court because the lack of tribal jurisdiction is so clear that the exhaustion requirement would serve no purpose other than delay; the *Cherokee Nation* Action is contrary to an express statutory prohibition; and exhaustion would be futile because of the lack of an adequate opportunity to challenge tribal court jurisdiction.

99) Defendants' prosecution and adjudication of *Cherokee Nation* action exceeds their lawful authority.

100) The *Cherokee Nation* Action unlawfully purports to adjudicate conduct beyond the scope of the Tribe's jurisdiction.

101) The *Cherokee Nation* Action lacks any valid basis to assert the limited and exceptional jurisdiction retained by Indian tribes over conduct by non-members on non-Indian fee land, even where (unlike in this case) such conduct occurs within the boundaries of an Indian reservation or other area of Indian country.

102) The *Cherokee Nation* Action is an improper attempt to privately enforce the CSA for which Congress exclusively delegated jurisdiction to the federal government in federal court, not to Indian tribes.

103) The United States has not delegated, by treaty or otherwise, jurisdiction to the Tribe to prosecute or adjudicate the *Cherokee Nation* Action.

104) The *Cherokee Nation* Action improperly seeks to impose punishment on non-Indians in the form of civil penalties and punitive damages, which the Tribe lacks inherent power to do.

105) Plaintiffs are therefore entitled to a declaratory judgment that: (a) Defendants Judge Crystal R. Jackson and Doe Judicial Officers 1-5 are without jurisdiction to adjudicate the *Cherokee Nation* Action against Plaintiffs; (b) Defendant Hembree lacks the authority to prosecute the *Cherokee Nation* Action against Plaintiffs in Cherokee Nation District Court; and (c) Plaintiffs are not required to exhaust their jurisdictional challenges in Cherokee Nation District Court prior to seeking relief in this Court.

COUNT II
INJUNCTION – FRCP 65

106) Plaintiffs hereby reallege paragraphs 1 through 105, which are incorporated herein by reference.

107) For the reasons stated above, Defendants are exceeding their jurisdiction by prosecuting or adjudicating the *Cherokee Nation* Action.

108) Plaintiffs are entitled to a preliminary injunction pursuant to FRCP 65 preserving the status quo and enjoining the Defendants, their agents, employees, successors, and assigns from further prosecution or adjudication of the *Cherokee Nation* Action in Cherokee Nation District Court during the pendency of this federal litigation.

109) Plaintiffs will suffer irreparable harm absent the preliminary injunction. For example, the Tribe can be expected to assert sovereign immunity, and Plaintiffs may have no ability to receive recompense for their losses or any payments to the Tribe once paid, much less

to recoup the extraordinary costs in time and money incurred by litigating this case in a court without jurisdiction. There is therefore a substantial risk that Plaintiffs will suffer losses that cannot be compensated by monetary damages.

110) As set forth above, there is a substantial likelihood that Plaintiffs will prevail on the merits and that this Court will determine that the *Cherokee Nation* and its courts lack the jurisdiction claimed in the *Cherokee Nation* Action.

111) The harms faced by Plaintiffs and described above far outweigh any that would be sustained by Defendants if the preliminary injunction were granted.

112) The requested injunction will not be adverse to the public interest. No public interest is served by the unlawful exercise of jurisdiction by a tribe or tribal court. Moreover, the public interest is served by the enforcement of federal law, the supreme law of the land, throughout the United States, including in the courts of its domestic dependent sovereigns, the tribes.

113) Plaintiffs are therefore entitled to a preliminary injunction pursuant to FRCP 65 enjoining the Defendants, their agents, employees, successors, and assigns from further prosecution or adjudication of the *Cherokee Nation* Action in *Cherokee Nation* District Court.

114) Plaintiffs are further entitled to a permanent injunction pursuant to FRCP 65 enjoining the Defendants, their agents, employees, successors, and assigns from further prosecution or adjudication of the *Cherokee Nation* Action in *Cherokee Nation* District Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs hereby demand judgment in this action granting the following relief against Defendants:

(1) a declaratory judgment that Defendant Hembree is without jurisdiction to prosecute and the Judicial Defendants are without jurisdiction to adjudicate the *Cherokee Nation* Action and that Plaintiffs are not required to exhaust their jurisdictional challenges in tribal court prior to seeking relief in this Court;

(2) a preliminary injunction enjoining further prosecution or adjudication of the *Cherokee Nation* Action in Cherokee Nation District Court;

(3) a permanent injunction enjoining same;

(4) attorneys' fees; and

(5) such other relief as the Court may deem just and proper.

Dated: June 7, 2017

Respectfully submitted,[1]

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