

**IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF OKLAHOMA**

<b>THE CHEROKEE NATION,</b>	)	
	)	
<b>Plaintiff,</b>	)	<b>Case No. CIV-16-1354-C</b>
	)	
<b>v.</b>	)	<b>DEMAND FOR</b>
	)	<b>JURY TRIAL</b>
<b>THE DEPARTMENT OF THE</b>	)	
<b>INTERIOR, et al.</b>	)	
	)	
<b>Defendants.</b>	)	

**PLAINTIFF’S MOTION TO STRIKE EXHIBITS ATTACHED TO  
DEFENDANTS’ MOTION TO DISMISS, BRIEF IN SUPPORT THEREOF, AND  
REQUEST FOR EXPEDITED BRIEFING SCHEDULE**

Plaintiff Cherokee Nation (“**Plaintiff**” or the “**Nation**”), by and through its undersigned counsel, hereby files this Motion to Strike Exhibits Attached to Defendants’ Motion to Dismiss, Brief in Support Thereof, and Request for Expedited Briefing Schedule.

**I. INTRODUCTION**

On April 7, 2017, Defendants filed their Motion to Dismiss [DN51] (“**Motion to Dismiss**”), along with their Brief and Exhibits in Support of Their Motion to Dismiss [DN51-1] (“**Brief**”), [DN51-2] (“**Ex. 1**”), [DN51-3] (“**Ex. 2**”), [DN51-4] (“**Ex. 3**”), and [DN51-3] (“**Ex. 4**”). The four extraneous exhibits—consisting of *over 21,000 pages*—were attached to or submitted as supplements to the Motion to Dismiss, *see* Order dated 4-12-17 [DN53], and are primarily relied on in support of Defendants argument in Section V.B.3. of their Brief. None of the exhibits is referred to in the Nation’s Complaint [DN1], nor are any central to the Nation’s claims. *See, e.g., Goodwin v.*

*Feldman*, 2007 WL 4209032, at \*1 (W.D. Okla. Nov. 26, 2007) (a document submitted with a motion to dismiss can only be considered under Rule 12 if, *inter alia*, the document is referenced in the complaint and central to the plaintiff's claims). Thus, the Court cannot consider the exhibits or their content without converting the Motion to Dismiss into a motion for summary judgment. *Id.* And, even if the Court were inclined to exercise its discretion to convert the Motion to Dismiss, the exhibits are inadmissible under Fed. R. Civ. P. 56. Accordingly, the Court should strike the exhibits and all references to the exhibits from the record, and should refuse to consider them in deciding the Motion to Dismiss.

## II. LEGAL STANDARD

“A Rule 12(b)(1) motion may take the form of either a facial attack or a factual attack.” *Meadows v. Explorer Pipeline Co.*, 2014 WL 1365039, at \*6 (N.D. Okla. Apr. 7, 2014) (citing *Muscogee (Creek) Nation v. Okla. Tax Comm’n*, 611 F.3d 1222, 1227, n. 1 (10th Cir. 2010)). “‘A facial attack looks only to the factual allegations of the complaint in challenging the court’s jurisdiction,’ while a factual attack ‘goes beyond the factual allegations of the complaint and presents evidence in the form of affidavits or otherwise to challenge the court’s jurisdiction.’” *Id.* (quoting *Muscogee (Creek) Nation*, 611 F.3d at 1227, n. 1).

“Where the motion is a facial challenge, the court applies the same standards under Rule 12(b)(1) that are applicable to a Rule 12(b)(6) motion.” *Id.*; *see also Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995) (“In reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true.”). A

motion under Rule 12(b)(6) typically involves consideration of only the allegations in the complaint, and not extraneous materials. *Auraria Student Hous. at the Regency, LLC v. Campus Vill. Apartments, LLC*, 825 F. Supp. 2d 1072, 1075 (D. Colo. 2011) (citing *Straily v. UBS Fin. Servs., Inc.*, No. 07–cv–00884, 2008 WL 793615, at \*2 (D. Colo. Mar. 24, 2008)); *see also Goodwin*, 2007 WL 4209032, at \*1. “However, notwithstanding the usual rule that a court should consider no evidence beyond the pleadings on a Rule 12(b)(6) motion to dismiss, the district court may consider documents referred to in the complaint if the documents are central to the plaintiff’s claim and the parties do not dispute the documents’ authenticity.” *Goodwin*, 2007 WL 4209032, at \*1 (citing *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007)). “Even as to such documents, however, the Court has discretion whether or not to consider them on a Rule 12(b)(6) motion to dismiss.” *Auraria Student Hous.*, 825 F. Supp. 2d at 1076 (citing *Prager v. LaFaver*, 180 F.3d 1185, 1189 (10th Cir. 1999); *see also Goodwin*, 2007 WL 4209032, at \*1 (“The Court has discretion to consider materials attached by a defendant to a Rule 12(b)(6) motion[.]”).

A court may also consider extraneous materials by converting a motion to dismiss to summary judgment under Rule 56, in which case the parties must be given notice so that all pertinent evidence may be presented. Fed. R. Civ. P. 12(d); *Burnham v. Humphrey Hospitality Reit Trust, Inc.*, 403 F.3d 709, 713 (10th Cir. 2005). Converting a facial attack under Rule 12(b)(1)—like converting a Rule 12(b)(6) motion—is discretionary; a court is not required to accept the extrinsic evidence and convert the motion. *See Geras v. Int’l Business Machines Corp.*, 638 F.3d 1311, 1314 (10th Cir.

2011) (court did not abuse its discretion “when it considered evidence that was referenced in and central to the complaint while excluding materials outside the pleadings”). However, if the court does accept the extrinsic evidence, converting to summary judgment is required. *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997) (“The failure to convert a 12(b)(6) motion to one for summary judgment where a court does not exclude outside materials is reversible error unless the dismissal can be justified without considering the outside materials.”) (citing *Brown v. Zavaras*, 63 F.3d 967, 970 (10th Cir. 1995)).

In contrast to a facial attack, a factual attack under Fed. R. Civ. P. 12(b)(1) may involve consideration of materials outside the complaint:

When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint’s factual allegations. A court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1). In such instances, a court’s reference to evidence outside the pleadings does not convert the motion to a Rule 56 motion.

However, a court is required to convert a Rule 12(b)(1) motion to dismiss into a Rule 12(b)(6) motion or a Rule 56 summary judgment motion when resolution of the jurisdictional question is intertwined with the merits of the case. The jurisdictional question is intertwined with the merits of the case if subject matter jurisdiction is dependent on the same statute which provides the substantive claim in the case.

*Holt*, 46 F.3d at 1003 (citations omitted); *see also Wheeler v. Hurdman*, 825 F.2d 257, 259 (10th Cir. 1987) (“When subject matter jurisdiction is dependent upon the same statute which provides the substantive claim in the case, the jurisdictional claim and the merits are considered to be intertwined.”) (citations omitted).

### **III. ARGUMENT**

#### **A. The exhibits cannot be considered in a facial attack because they are not referenced in the Complaint or central to the Nations' claims**

Although Defendants' Motion to Dismiss does not specify whether it is a facial attack or a factual attack, it appears to be a facial attack. For example, in their Motion to Dismiss, Defendants set forth the standard of review for Fed. R. Civ. P. 12(b)(6), Brief at 7-8, which is the standard of review for a facial attack. *Meadows*, 2014 WL 1365039, at \*6. Accordingly, Defendants must show the exhibits are referenced in the Complaint and central to the Nation's claims. *Goodwin*, 2007 WL 4209032, at \*1. Defendants can show neither, and have made no attempt to do so.

The exhibits attached to the Motion to Dismiss consist of "periodic statements of Cherokee's trust accounts," Brief at 22; "audit letters," *id.* at 23 n. 6; "TRP results," *id.* at 24; and "proposed legislative options for resolving any trust account balance disputes arising from the TRP results," *id.* None of these exhibits are referenced in the Complaint.<sup>1</sup> Further, none of those exhibits are central to the Nation's claims. As such, the exhibits should be stricken.<sup>2</sup>

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<sup>1</sup> The Complaint does reference the Arthur Anderson reconciliation process, though it does not reference the "TRP results". See Complaint ¶¶ 123-25. To the extent the Court decides that is a "reference" to Exhibit 3, the "TRP results" are not central to the Nation's claims, especially considering that the "TRP results" were not an accounting of the Nation's trust funds and assets. *Id.*

<sup>2</sup> As with a factual attack, the Court could consider exhibits in evaluating a facial attack if the Court first converted the Defendants' motion to summary judgment. But in that case, the Court must provide the Nation with notice so that all pertinent evidence may be presented. Fed. R. Civ. P. 12(d); *Burnham*, 403 F.3d at 713.

**B. If Defendants are making a factual attack on the Court's jurisdiction, either the exhibits should be stricken or the Motion to Dismiss must be converted to summary judgment under Rule 56**

Though the Motion to Dismiss does not contain any indication that it is a factual attack, it is possible that the Defendants may argue that it is. If they do, the exhibits should still be stricken, or the Motion to Dismiss must be converted to a motion for summary judgment under Fed. R. Civ. P. 56.

Initially, Defendants have made no attempt to authenticate or establish the admissibility of any of the exhibits. Contrary to customary practice, Defendants did not attach the exhibits to an affidavit of a person with personal knowledge who could attest to their authenticity. The Court has no way of evaluating whether any of the United States' 21,000 pages of exhibits can properly be considered and should reject them. *Adams v. Bouchard*, 591 F. Supp. 2d 1191, 1203-04 (W.D. Okla. 2008).

If the Court does consider the exhibits in evaluating a factual attack, the Motion to Dismiss must be converted to summary judgment and the Nation must be given notice because the substantive and jurisdictional arguments are intertwined. The exhibits are relied on by Defendants in making their argument that "Cherokee is not an 'aggrieved' party under Section 702" on pages 21-24 of the Brief. More specifically, Defendants argue: "To the extent that Cherokee identifies sections 4011 and 4044 of the Trust Fund Management Reform Act, 25 U.S.C. §§ 4011 and 4044, as the bases for the discrete statutory created historical accounting duties by which Cherokee can legitimately invoke this Court's review under APA § 702, Cherokee's claims still fail because the essential factual predicate for subject matter jurisdiction does not exist." Brief at 21.

The two statutes referenced by Defendants—25 U.S.C. §§ 4011 and 4044—are relied on by the Nation for its substantive claims. *See, e.g.*, Complaint ¶¶ 135-36. Section 4011 grants an accounting right to Native American tribes. *See, e.g., Fletcher v. United States*, 730 F.3d 1206, 1210 (10th Cir. 2013) (United States did not dispute “that § 4011(a) grants an accounting right, at least to Native American tribes like the Osage Nation.”); *id.* at 1213 (“The government doesn’t dispute that § 4011(a), properly read, does require it to provide an accounting.”). And Section 4044 required the Department of the Interior to provide “as full and complete accounting as possible of the account holder’s funds to the earliest possible date.” 25 U.S.C. § 4044(2).

Defendants suggest to the Court that the exhibits at issue demonstrate that the United States has satisfied the duties under those statutes. This is a factual attack, and is necessarily intertwined with the merits of the Nation’s claims that Defendants have *not* met their obligations to account, including obligations under Sections 4011 and 4044. Thus, Defendants’ factual attack must be converted to summary judgment under Rule 56<sup>3</sup>. *Wheeler*, 825 F.2d at 259. And if the Motion to Dismiss is converted to summary judgment, the Court must provide the Nation with notice so that all pertinent evidence may be presented. Fed. R. Civ. P. 12(d); *Burnham*, 403 F.3d at 713.

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<sup>3</sup> *Wheeler* also provides that conversion to Rule 12(b)(6) is permissible. 825 F.2d at 259. However, the exhibits are not properly considered under Rule 12(b)(6) since they are not referenced in the Complaint or central to the Nation’s claims, so for the exhibits to be considered the Motion to Dismiss must be converted to summary judgment.

#### **IV. REQUEST FOR EXPEDITED BRIEFING SCHEDULE**

The Nation requests that the Court set a briefing schedule so that this Motion to Strike is fully briefed before Plaintiff's opposition to the Motion to Dismiss is due, as it will increase judicial efficiency in resolving Defendants' Motion to Dismiss. Accordingly, the Nation respectfully requests an expedited briefing schedule for this Motion to Strike, with the Defendants having 10 days to respond and the Nation having 2 days to file a reply, if necessary.<sup>4</sup>

The Nation has conferred with counsel for Defendants concerning this request, and has been advised that Defendants will consider whether to agree to an expedited briefing schedule once they are able to view the content of the motion to strike.

#### **V. CONCLUSION**

The Nation respectfully requests that the Court strike the exhibits attached to Defendants' Motion to Dismiss, along with all references in the Motion to Dismiss to those exhibits; that if the Court does consider the exhibits it converts the Motion to Dismiss to summary judgment and provide the Nation with notice; that the Court set an expedited briefing schedule on this Motion to Strike; and that the Court grant such other and further relief it deems appropriate.

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<sup>4</sup> The Nation is submitting a proposed order for its request for expedited briefing on the Motion to Strike.



Respectfully submitted on April 14, 2017,

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### **CERTIFICATE OF SERVICE**

I hereby certify that on the 14<sup>th</sup> day of April, 2017, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following:

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s/ Michael M. Frandina