IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MCKESSON CORPORATION; CARDINAL HEALTH, INC.; AMERISOURCEBERGEN DRUG CORPORATION; CVS HEALTH CORPORATION; WALGREENS BOOTS ALLIANCE, INC.; and WAL-MART STORES, INC., Plaintiffs, vs. TODD HEMBREE, ATTORNEY GENERAL OF THE CHEROKEE NATION, in his official capacity; JUDGE CRYSTAL R. JACKSON, in her official capacity; and DOE JUDICIAL OFFICERS 1-5, Defendants.	No. 4:17-cv-00323-TCK-FHM

SUPPLEMENTAL MEMORANDUM OF DEFENDANT ATTORNEY GENERAL TODD HEMBREE IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Defendant Attorney General Hembree submits this Supplemental Brief to explain a new and alternative basis for the Cherokee Nation's jurisdiction over the plaintiff opioid distributors' and retailers' activities alleged in the Amended Tribal Court Petition. This new argument is based on the law of this Circuit announced seven days ago in *Murphy v. Royal*, Nos. 07-7068, 15-7041, 2017 WL 3389877 (10th Cir. Aug. 8, 2017)—well after General Hembree submitted his response brief—which supports the "Indian country" status of the Cherokee Nation Jurisdictional Area under 18 U.S.C. § 1151(a). As explained below, under *Murphy* the Cherokee Reservation established by the 1835 Treaty of New Echota, Dec. 29, 1835, 7 Stat. 478, which was reaffirmed by, and whose final boundaries were set in, articles 16 and 31 of the 1866 Treaty of Washington, July 19, 1866, 14 Stat. 799, remains "Indian country" today under section 1151(a). This provides an additional basis for the Cherokee Nation to assert jurisdiction over the plaintiff opioid distributors under *Montana v. United States*, 450 U.S. 544 (1981), and is an additional issue that the distributors and retailers must exhaust in tribal court.[1]

I. PURSUANT TO *MURPHY* THE CHEROKEE NATION JURISDICTIONAL AREA IS "INDIAN COUNTRY" UNDER 18 U.S.C. § 1151(a) BECAUSE ITS RESERVATION STATUS WAS NEVER DIMINISHED UNDER THE *SOLEM* TEST.

In *Murphy* the Tenth Circuit granted a *habeas corpus* petition arising from a state court conviction of an Indian person for murder. The Circuit ruled that federal, rather than state,

[1] This new argument is in addition to the two alternative jurisdictional arguments advanced in General Hembree's Opposition Brief. There, General Hembree asserted, first, that the Nation has jurisdiction under Article 13 of the 1866 Treaty, which confirms the Nation's courts' exclusive jurisdiction over "all civil . . . cases arising within their country . . . where the cause of action shall arise in the Cherokee Nation," except to the extent that this jurisdiction was partially divested by Congress's establishment of courts in the former Indian Territory (and no such divestment occurred here). Second, General Hembree asserted that the Nation has congressionally-recognized jurisdiction over the Cherokee Nation Jurisdictional Area within the parameters set by the rule and two exceptions described in *United States v. Montana*, 450 U.S. 544 (1981).

jurisdiction applied to the crime because the murder occurred on an "Indian reservation" and thus in "Indian country" within the meaning of 18 U.S.C. § 1151(a).[2] The Court reasoned that the land in question was within the 1866 boundaries of the Muscogee (Creek) Reservation and that the Reservation had never been disestablished. *Murphy* at *18.

The Circuit court came to this conclusion by applying the three-part test set forth in *Solem v. Bartlett*, 465 U.S. 463 (1984). Under that test, federal courts must presume that Congress does not intend to diminish or disestablish a reservation absent "clear and plain" evidence to the contrary. *Murphy* at *17-18. Reservations are only deemed diminished when there exists: (1) a clear congressional intent reflected in the text of a statute, *id.* at *17 (citing *Solem*, 465 U.S. at 470-71); (2) a history associated with enactment of the statute that "unequivocally reveal[s] a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation," *id.* (citing *Solem*, 465 U.S. at 471) (alteration in original); or (3) "to a lesser extent," events occurring after passage of the statute that unambiguously show evidence of a congressional intent to diminish the reservation, *id.* at *18 (citing *Solem*, 465 U.S. at 471).

Applying this test, this Circuit in *Murphy* concluded that the Muscogee (Creek) Reservation was originally established by a land patent authorized in an 1833 treaty, that the Reservation was diminished but reaffirmed in an 1866 treaty; and that, applying the *Solem* test, the boundaries set in 1866 had subsequently never been diminished or disestablished by any one

[2] Although *Murphy* concerned criminal jurisdiction, and 18 U.S.C. § 1151 defines "Indian country" for purposes of federal criminal law, the definition of "Indian country" in section 1151 "also generally applies to questions of civil jurisdiction … ." *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998) (quoting *DeCoteau v. Dist. Cnty. Ct.*, 420 U.S. 425, 527 n.2 (1975)). Of course, Congress may also act through treaty or other statute to define the bounds of tribal civil jurisdiction in a particular case. *See Montana*, 450 U.S. at 564 (tribal power over non-members beyond the *Montana* rule "cannot survive without express congressional delegation").

of several statutes examined by the Court. *Id*. at *32-56. As discussed below, under the *Solem* test as applied by the Tenth Circuit, the Cherokee Nation Jurisdictional Area is Indian Country for the same reasons the Tenth Circuit concluded the land in question in *Murphy* is Indian Country.

We next consider these same elements for the Cherokee Nation Jurisdictional Area.

A. Just like the Muscogee (Creek) Nation's Reservation Addressed in *Murphy*, the Cherokee Nation's Reservation Was Established by a Treaty Land Patent that was Later Diminished but Reaffirmed in an 1866 Treaty.

The history of the Cherokee Nation Jurisdictional Area parallels the Muscogee (Creek) Nation history recounted in *Murphy*. Like the Creek, *Murphy* at *28, the Cherokee Nation was coerced into removing to a "vast tract of land in modern Oklahoma" promised to them in fee simple by treaty, specifically the 1835 Treaty of New Echota, arts. 2-3. In this Treaty the United States recognized the Nation's powers of self-government and promised the subject lands would never be put under the jurisdiction of a territory or state. Treaty of New Echota, art. 5; *see* 1846 Treaty of Washington, art. 1, Aug. 6, 1846, 9 Stat. 871 (confirming issuance of patent). Again like the Creek, *Murphy* at *28-29, the Cherokee Nation's landholdings were diminished in 1866, specifically by the 1866 Treaty, art. 16, authorizing the sale of some Cherokee lands, which was completed by the Act of March 3, 1893, ch. 209, § 10, 27 Stat. 612, 640. But also like the Creek, the Cherokee Nation's 1866 Treaty guaranteed the Cherokee Nation's title to, and authority over, the reduced lands. 1866 Treaty, art. 31. The boundaries of those remaining lands are the boundaries of what the Cherokee Nation today calls the 14-county "Cherokee Nation Jurisdictional Area."[3]

[3] The Cherokee Nation has long exercised governmental authority throughout the jurisdictional area, despite the fact no federal court had acknowledged the existence of a "reservation" for any of the Five Tribes until the *Murphy* decision. Article II of the 1999 Constitution of the Cherokee Nation specifically defines the boundaries of the Cherokee Nation territory to include those lands "described by the patents of 1838 and 1846 diminished only by the

Just as the *Murphy* court interpreted this history to have established a Muscogee (Creek) Reservation with boundaries defined by the Creek's 1866 treaty, *Murphy* at *32, it follows that the 14-county land area recognized by the Cherokee Nation's 1866 Treaty established a Cherokee Reservation. At a minimum, Attorney General Hembree's argument to this effect is both plausible and colorable in light of *Murphy*.

As we next show, under the 3-part *Solem* test as construed in *Murphy*, this Reservation was never disestablished or diminished.

B. Just like the Statutes Addressed in *Murphy* Under the First *Solem* Factor, None of the Statutes Relevant to the Cherokee Nation Demonstrates a Clear Congressional Intent to Disestablish the Cherokee Reservation.

Under the first and "most important" *Solem* factor, *Murphy* at *34, the Tenth Circuit considered whether the Muscogee (Creek) Reservation had been diminished by express statutory language, *id.* at *33-46. As part of this analysis, the Circuit court reviewed eight statutes passed from 1893 to 1906, dealing with the allotment of the Five Tribes' lands, the establishment of federal courts in the Indian Territory, and the authorization of the creation of the State of Oklahoma. *Id.* at *33.

Six of these statutes affected all Five Tribes, either because they dealt with territorial or state jurisdiction throughout the former Indian Territory, *see* Act of Mar. 3, 1893; Act of June 10, 1896, ch. 398, 29 Stat. 321; Act of June 7, 1897, ch. 3, 30 Stat. 62; Oklahoma Enabling Act of 1906, ch. 3335, 34 Stat. 267, or because they specifically applied to all Five Tribes, *see* Curtis Act of 1898, ch. 517, 30 Stat. 495; Five Tribes Act of 1906, ch. 1876, 34 Stat. 137. Two of the statutes reviewed in *Murphy* specifically applied to the Creek, *see* Creek Allotment Agreement of 1901,

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Treaty of July 19, 1866, and the Act of March 3, 1893." In 2001, the Motor Vehicle Licensing Act defined the term "reservation boundaries of Cherokee Nation" to include "the territorial boundaries of the Nation as they existed as of January 1, 1900." 68 C.N.C.A. 1304.

ch. 676, 31 Stat. 861; Supplemental Creek Allotment Agreement of 1902, ch. 1323, 32 Stat. 500, but have parallels to Cherokee-specific allotment legislation, *see Murphy* at *36-39.

The Circuit court determined that in none of these statutes had Congress included express language indicating intent to diminish the Muscogee (Creek) Reservation, *Murphy* at *42, which was especially probative given Congress's approval of treaties expressly dealing with the reservation's boundaries, *Murphy* at *43. To the contrary, Congress had explicitly recognized the existence of Muscogee (Creek) Reservation boundaries in at least one subsequent act. *Id.* (quoting Act of June 21, 1906, ch. 3504, 34 Stat. 325, 364). In all of these acts, Congress had never indicated an intention to alter reservation boundaries, only to change title within those boundaries and shift governmental authority in the Indian Territory from tribes to the Territory or State. *Id.* at *44-46.

With respect to the six statutes that apply with equal force to the Muscogee (Creek) Nation and the Cherokee Nation, the *Murphy* Court's conclusion that none effected a disestablishment is equally binding here.

As for Cherokee-specific legislation, the Cherokee Allotment Agreement of 1902, ch. 1375, 32 Stat. 716, dealt with the allotment of lands in restricted fee, §§ 11-23, 32 Stat. at 717-19; reserved some lands from allotment for named schools, colleges, and other purposes; allowed for any of those "school[s] or college[s] in the Cherokee Nation" to seek additional acreage to be reserved for them, *id.* § 24, 32 Stat. at 719-20; provided for the creation of a citizenship roll as the basis for allotment, *id.* §§ 25-31, 32 Stat. at 721-21; created a Cherokee school fund, *id.* §§ 32-36, 32 Stat. at 721-22; permitted the creation of public roads along section lines, *id.* § 37, 32 Stat. at 722; provided for the establishment of townsites, *id.* §§ 38-57, 32 Stat. at 722-25, "in the Cherokee Nation," *id.* §§ 48-49, 32 Stat. at 724; and provided for the issuance of titles to the allotments, *id.*

§§ 58-62, 32 Stat. at 725. The Agreement also provided that the Cherokee government would be abolished effective March 4, 1906, but this provision was suspended by the Five Tribes Act, *see* Doc. 86 at 13 n.9. In sum, and very much like the Creek Allotment Agreement and Supplemental Agreement addressed in *Murphy* at *36-39, the Cherokee-specific laws dealing with allotment did not disestablish the Cherokee Nation's reservation.

Moreover, just as Congress subsequently recognized the Muscogee (Creek) Reservation boundaries, *see id.* at *44, Congress subsequently recognized the Cherokee Nation's boundaries in legislation enacted throughout the late 19th and early 20th centuries. *See* Cherokee Allotment Agreement §§ 24, 48-49, 32 Stat. at 719-20, 724 (1901) (referring to schools, colleges, and townsites "in the Cherokee Nation"); Five Tribes Act §§ 12, 14, 16, 24 (referring to townsites and roads "in" the Nation); Oklahoma Enabling Act § 6 (establishing recording districts and congressional districts "in" and "comprise[d]" of the Cherokee Nation); Act of June 21, 1906, 34 Stat. at 342-43 (drawing recording districts in the Indian Territory with boundaries along the northern and western "boundary line[s] of the Cherokee Nation" and describing one of them as "lying within the boundaries of the Cherokee Nation").

In sum, the Tenth Circuit's decision in *Murphy* strongly supports the conclusion that the Cherokee Nation's Reservation was never disestablished by subsequent congressional action. At a minimum, this conclusion is both "plausible" and "colorable" for purposes of the tribal court exhaustion analysis.

C. Just like the History Reviewed in *Murphy* Under the Second *Solem* Factor, the History Associated with the Enactment of these Acts Does Not Unequivocally Reveal a Widely-Held, Contemporaneous Understanding that the Cherokee Reservation Would Shrink as a Result of the Proposed Legislation.

The *Murphy* court determined that under the second *Solem* factor—whether contemporary historical evidence unequivocally reveals congressional intent to diminish the reservation, *Murphy*

at *46 (quoting *Nebraska v. Parker*, 136 S. Ct. 1072, 1080-81 (2016))—the evidence regarding the Muscogee (Creek) Reservation was mixed and therefore did not support disestablishment, *id.* at *47. Floor debates and reports regarding the Five Tribes' land status were either insufficient to show a widely-held understanding of diminishment, *id.* at *47-48 (quoting *Parker*, 136 S. Ct. at 1080), or said nothing about Congress having an intent to disestablish the Five Tribes' reservations, *id.* at *48-49. They therefore could not meet the *Solem* standard in light of evidence entered by the petitioner and his tribe "show[ing] an understanding that the Reservation's borders continued," *id.* at *51.

Nothing in the record here supports the second *Solem* factor. Certainly the plaintiff opioid distributors and retailers haven't offered historical documents necessary to clearly show that "unambiguous evidence" unequivocally demonstrates a widely-held contemporaneous understanding that the Cherokee Reservation was diminished by congressional action. Of course, the development of such a record and the initial evaluation of the historical evidence are best done by the tribal court. *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985).

But even without the benefit of a full record here, *Murphy* strongly suggests that the plaintiffs will be unable to muster unequivocal evidence of a widely-held belief at the time of allotment that the Five Tribes' reservations were being disestablished. Evidence in *Murphy* showed that the Dawes Commission did not believe allotment would remove tribal governmental authority. *Murphy* at *49. Further, in 1900 the U.S. Attorney General opined that the Five Tribes had the power to exclude non-Indians and regulate activities within their boundaries, *id.* (citing 23 Op. Att'y Gen. 214, 215 (1900), 1900 WL 1001), and that even after the Curtis Act was passed the Secretary of the Interior still had the obligation to remove all persons "forbidden by treaty or

law" from the Five Tribes' reservations, *id.* at *50 (citing 23 Op. Att'y Gen. at 220). These materials alone, already reviewed by the Tenth Circuit in *Murphy*, show there was never an unequivocal contemporary understanding that the Cherokee Reservation was being diminished by the allotment process, and they certainly demonstrate there is at the very least a "plausible" and "colorable" argument that *Solem*'s second factor cannot be satisfied here.

D. Just like the Subsequent Events Reviewed in *Murphy* Under the Third *Solem* Factor, the Subsequent Events Pertinent Here Do Not Show Evidence of a Congressional Intent to Disestablish the Cherokee Reservation.

The Circuit in *Murphy* instructed that if neither of the first two *Solem* factors are met, "courts must accord 'traditional solicitude' to Indian tribes and conclude 'the old reservation boundaries' remain intact." *Murphy* at *56 (quoting *Solem*, 465 U.S. at 472). However, it nonetheless reviewed the third *Solem* factor and found no unambiguous evidence showing the Muscogee (Creek) Reservation was considered disestablished. *Id.* at *52-56. Although the State pointed to recent federal enactments using the term "former Indian reservations in Oklahoma," *id.* at *52, the court noted that these statutes did not indicate disestablishment because they "also include existing reservations within their definitions . . . and none of them reference the Muscogee (Creek) Reservation as being disestablished in particular," *id.* The same can be said of the Cherokee Nation, and the Circuit's contextual view of the term "former" is a complete answer to the plaintiffs' effort to draw a contrary inference from the same term, *see* Doc. 104 at 5-6.

Also on the other side of the scale, the Circuit court noted that the Oklahoma Indian Welfare Act refers to "*existing* Indian reservations" in Oklahoma. *Id.* (quoting Pub. L. No. 74-816, § 1, 49 Stat. 1967, 1967 (1936) (emphasis added)). And it also explained that the assertion of state jurisdiction in a reservation area could not work a disestablishment on its own, *id.* at *54-55 (quoting *United States v. John*, 437 U.S. 634 (1978)). The court further noted that the Muscogee

(Creek) Nation has "maintained a significant and continuous presence within the Reservation" by operating its government there, reorganizing it in 1979 under a new constitution, providing "extensive services within the Muscogee (Creek) Nation's borders," applying traffic laws and supporting traditional properties in the Nation, and entering into cross-deputization agreements for law enforcement services within the Nation's boundaries, *id.* at *55—observations all equally applicable to the Cherokee Nation, *see* Doc. 86 at 15-19.

Because the third *Solem* factor cannot overcome the first two *Solem* factors, it cannot alone establish that the Cherokee Reservation was disestablished. Moreover, the pertinent judicially noticeable evidence submitted in this case to date falls far short of satisfying this *Solem* factor. Here too, then, the Cherokee Nation has advanced at least a "plausible" and "colorable" argument that *Solem*'s third factor cannot be satisfied here.

II. TRIBAL COURT EXHAUSTION IS REQUIRED WHEN ASSESSING WHETHER A RESERVATION, ONCE CREATED BY TREATY, HAS SUBSEQUENTLY BEEN DISESTABLISHED.

The issue of whether the Cherokee Reservation still exists as Indian country under 18 U.S.C. 1151(a) must be exhausted in tribal court, unless it is "patently obvious" that the *Solem v. Bartlett* diminishment test has been met. *Vill. of Pender v. Parker*, No. 4:07CV3101, 2007 WL 2914871, at *1 (D. Neb. Oct. 4, 2007) (staying federal court proceedings for tribal court exhaustion of diminishment issue). *See also Smith v. Parker*, 996 F. Supp. 2d 815, 818 (D. Neb. 2014), *aff'd* 774 F.3d 1166 (8th Cir.), *aff'd sub nom. Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (considering diminishment issue after exhaustion); *Enlow v. Moore*, 134 F.3d 993, 995-96 (10th Cir. 1998) (finding tribal court remedies in dispute over boundaries of Indian country had been properly exhausted). Here, it is far from "patently obvious" that the *Solem* test can be met. To the contrary, all indications so far are that the Cherokee Nation's assertion that its reservation jurisdictional area

remains "Indian country" today is not only "colorable" and "plausible;" it is likely to succeed given the Circuit's teaching in *Murphy*.

To be sure, all parties must have an opportunity to develop the historical record necessary to fully assess the *Solem* test. But that is the quintessential role for the tribal court to undertake in the first instance. *Nat'l Farmers*, 471 U.S. at 856-57. It is the tribal court which must be given a "full opportunity to examine its own jurisdiction" by carefully examining "relevant statutes" bearing on tribal jurisdiction and the extent to which it has been "altered, divested or diminished … ." *Id.* at 856-57.

CONCLUSION

Murphy is new law that provides a substantial alternative basis for the Nation to assert jurisdiction over the plaintiff opioid distributors and retailers—that the Cherokee Nation Jurisdictional Area is unextinguished "Indian country" under 18 U.S.C. § 1151(a)—and therefore provides a powerful additional reason why the plaintiffs must be required to exhaust their available remedies in tribal court.

For the foregoing reasons and those set forth in General Hembree's opposition brief, Doc. 85, the plaintiffs' motion for a preliminary injunction should be denied.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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