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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 04 2018

Mark C. McCartt, Clerk
U.S. DISTRICT COURT

1. KALYN FREE;)
)
 Plaintiff,)
)
 v.)
)
 1. KEVIN W. DELLINGER,)
 ATTORNEY GENERAL OF THE)
 MUSCOGEE CREEK NATION,)
 in his official capacity; and,)
)
 2. JUDGE GREGORY H. BIGLER,)
 in his official capacity,)
)
 Defendants.)

Civil Case No. _____

18 CV 131 CVE - JFJ

COMPLAINT

Plaintiff, Kalyn Free, brings this action against Defendants, upon personal knowledge and otherwise upon information and belief based upon the investigation of counsel, and alleges as follows:

NATURE OF THE ACTION

1. This is a civil action for injunctive relief against certain officers of the Muscogee Creek Nation, seeking to enjoin Defendant Kevin W. Dellinger, Attorney General of the Muscogee Creek Nation (herein the "MCN"), and Defendant Judge Gregory H. Bigler, acting on behalf of the MCN, from exercising jurisdiction over Plaintiff that they plainly lack. In MCN District Court, the MCN has sued Plaintiff as part of an action involving Indian gaming and alleged violations of MCN gaming law. See Exhibit 1, Tribal Court Amended Complaint (herein "Tribal Complaint").

Fees pd

2. Specifically, the MCN alleges in its Tribal Complaint that Plaintiff Free is a principal of “Bruner Investments” (another defendant named in the Tribal Complaint), which the MCN alleges “is the legal successor in interest to Free-Bruner Investments, LLC.” *Id.* at 2. Additionally, the Tribal Complaint alleges that Plaintiff Free “has individually enabled and/or participated in the development of Red Creek Casino.” *Id.* at 2. This allegation is nothing more than a conclusory allegation which is insufficient, by itself, to establish jurisdiction. *See Watts v. Donley*, 2015 U.S. Dist. LEXIS 63342 at *17 (D. Colo. May 14, 2015) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009)); *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1162 (10th Cir. 1999) (parties “may not rely on mere conclusory allegations of jurisdiction but must support the facts showing jurisdiction by competent proof”).

3. This Court has jurisdiction over this declaratory judgment action because the MCN’s attempt to prosecute and adjudicate its lawsuit against Plaintiff, in tribal court, presents a federal question under 28 U.S.C. § 1331.

4. The MCN plainly lacks jurisdiction over Plaintiff and her alleged conduct—what little there is alleged—in the Tribal Complaint. Plaintiff Free is not a member of the MCN. “Bruner Investments”¹ is not an entity legally recognized by the state of Oklahoma; although Bruner Investments, Inc.; Bruner Investments, LLC; and Free-Bruner Investments, LLC are. However, none are members of the MCN and none were involved

¹ The impetus for MCN naming “Bruner Investments” as a party defendant in the Tribal Complaint was, seemingly, a single reference within a very early blueprint that incorrectly identified “Bruner Investments” as developer of the putative gaming establishment.

in any capacity with the development of the Bruner Parcel. Moreover, the property at issue in the Tribal Complaint is restricted Indian property that Plaintiff Free has no interest in—and never can have interest in—nor dominion or control over. *See*, Ex. No. 3, Affidavit of Free.

5. Exhaustion of tribal remedies by Plaintiff is not, and should not be, required because jurisdiction over Plaintiff for her alleged conduct is so clearly lacking that exhaustion would serve no purpose but delay.

6. Furthermore, Plaintiff's attempt to exhaust tribal remedies was denied by the MCN Supreme Court and exhaustion is impossible. *See*, Ex. No. 2, MCN Order Denying Writs.

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction over the claims specified in this Complaint pursuant to 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).

8. Pursuant to 28 U.S.C. § 1391, venue is appropriate because the parties all reside in the District, property underlying the Tribal Complaint is located within the District, and a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this District.

PARTIES

9. Plaintiff Kalyn Free is not a member of the Muscogee Creek Nation. Plaintiff Free is domiciled in Tulsa County, Oklahoma. Additionally, Plaintiff Free does not conduct

business on any land held in trust for the benefit of the Muscogee Creek Nation or the Kialegee Tribal Town or members of each.

10. Defendant Kevin W. Dellinger is the Attorney General for the Muscogee Creek Nation, an Indian Tribe and the plaintiff who filed the Tribal Complaint. Defendant Dellinger is domiciled in Okmulgee County, Oklahoma.

11. Judge Gregory H. Bigler is a judge of the Muscogee Creek Nation District Court to whom the Tribal Complaint has been assigned. Defendant Bigler is domiciled in Creek County, Oklahoma.

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

BACKGROUND AND FACTS

A. Defendants Lack Jurisdiction Over Plaintiff.

13. In the Tribal Complaint, the MCN seeks to assert broad, general jurisdiction against Plaintiff who has no citizenship, business or personal relations with the MCN. In fact, it seems the MCN—for the purposes of jurisdiction—wishes to treat all Native Americans as MCN members when it is beneficial to them. *See* Exhibit 4, MCN Response to Free Motion to Dismiss Tribal Complaint at 5.

14. Indian nations are “distinct, independent political communities, qualified to exercise many of the powers and prerogatives of self-government.” *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008) (internal quotation omitted). “[T]he sovereignty that the Indian tribes [maintain] 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). 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)). In fact, the “exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.” *Montana v. United States*, 450 U.S. 544, 564 (1981).

15. Due to this restriction and limitation on tribal governance, “a tribe’s adjudicative jurisdiction [cannot] exceed its legislative jurisdiction,” and tribal courts are “not courts of general jurisdiction.” *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1151 (10th Cir. 2009) (internal quotation omitted).

16. The Supreme Court has held that, except in limited circumstances, “the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.” *Montana*, 450 U.S. at 565. In fact, “efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are presumptively invalid.” *Plains Commerce*, 554 U.S. at 330 (quotations omitted); *see also Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997). The *Montana* rule extends to tribal regulation over non-Indians even within Indian country. *See e.g. McKesson Corp., et al. v. Hembree, et al.*, 2018 U.S. Dist. LEXIS 3700 at *18 (Okla. N.D. Jan. 9, 2018).

17. However, the *Montana* rule is subject to two exceptions. First, 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.” *Montana*, 450 U.S. at 565 (internal citations omitted). The underlying principle of this exception lies in the fact that non-tribal members “have no say in the laws and regulations that govern tribal territory. Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. Even then, the regulation must stem from the tribe’s inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.” *Plains Commerce*, 554 U.S. at 337 (citing *Montana*, 450 U.S. at 564). However, the exception is “limited . . . and cannot be construed in a manner that would swallow the rule or severely shrink it.” *Id.* at 333 (internal quotation and citations omitted).

18. While the property that is the subject of the Tribal Complaint is arguably Indian country under the control of the MCN, there are no ties between the property and Plaintiff Free. Additionally, as noted above, Plaintiff has no personal or business contacts with the MCN such that it would subject Plaintiff to the MCN’s jurisdiction. If the Court were to accept the MCN’s claim of jurisdiction here, the MCN could theoretically have jurisdiction over any non-tribal member just because the action involves restricted Indian property—regardless of how tenuous the individual’s connections are to the subject property. Such an interpretation would “swallow the [*Montana*] rule or severely shrink it,” and as such must be rejected. *Plains Commerce*, 554 U.S. at 330.

19. The second exception to the *Montana* rule provides that a “tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its 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.” *Id.* at 343-344 (internal citations omitted). This exception is intended to allow the tribe to target conduct that directly threatens or impacts “the right of reservation Indians to make their own laws and be ruled by them.” *Strate*, 520 U.S. at 459 (1997). As a result, the exception is narrow and applies only to conduct that “imperil[s] the subsistence of the tribal community,” *Crowe & Dunlevy*, 640 F.3d at 1153 (quoting *Plains Commerce Bank*, 554 U.S. at 341), and cannot extend “beyond what is necessary to protect tribal self-government or to control internal relations,” *Strate*, 520 U.S. at 459. Additionally, the non-tribal member’s conduct must be “catastrophic for tribal self-government.” *Plains Commerce Bank*, 554 U.S. at 341 (internal quotation omitted).

B. Plaintiff Need Not Exhaust Tribal Remedies.

20. 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. These exemptions apply in this current action:

- (1) “where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith;”
- (2) “where the tribal court action is patently violative of express jurisdictional prohibitions;”

- (3) “where exhaustion would be futile because of the lack of an adequate opportunity to challenge the tribal court’s jurisdiction;”
- (4) “when it is plain that no federal grant provides for the tribal governance of nonmembers’ conduct on land covered by the main rule established in *Montana v. United States*;”
- (5) “when it is clear that the tribal court lacks jurisdiction so that the exhaustion requirement would serve no purpose other than delay”

Burrell v. Armijo, 456 F.3d 1159, 1168 (10th Cir. 2006) (citations, quotations, and alterations omitted).

21. First, the MCN has not alleged any basis by which it may exercise jurisdiction over Plaintiff Free but, instead, MCN actions appear to be aimed—solely—at harassing or intimidating Free. This is exemplified in the Tribal Complaint, attached as Ex. No. 1, which fails to allege any actions attributable to Free.

22. Second, exhaustion is not required here because, for the reasons set forth above, the Tribal Complaint “is patently violative of express jurisdictional prohibitions.”

23. Third, for the reasons stated herein, Plaintiff lacks an adequate opportunity to challenge the MCN’s jurisdiction. In fact, her efforts to challenge jurisdiction in tribal court were denied and she has no other recourse.

24. Fourth, there is no basis by which either of the limited exceptions to the *Montana* rule may be applied against Free, a non-tribal member of the MCN.

25. Finally, exhaustion is not required here because, for the reasons set forth above, it is clear that the Muscogee Creek Nation District Court lacks jurisdiction and thus the exhaustion requirement would serve no purpose other than delay.

26. On February 22, 2018, Plaintiff sought a writ from the Supreme Court of the MCN prohibiting Defendants from exercising jurisdiction over Plaintiff and mandating Defendants dismiss the action against Plaintiff. *See* Exhibit __, Plaintiff’s Application for Original Jurisdiction.

27. On March 1, 2018, the Supreme Court of the MCN denied Plaintiff’s requested writ. *See* Exhibit 2, Order Denying Petitioner’s Writ Application.

28. Accordingly, the Court should grant declaratory and injunctive relief prior to Plaintiff’s exhaustion of tribal remedies as the Tribal Complaint is indefinitely stayed and Plaintiff remains in legal limbo and wholly unable to obtain any redress—must less *timely* redress.

COUNT I

Declaratory Judgment – 28 U.S.C. § 2201

29. Plaintiff incorporates all preceding paragraphs by reference.

30. Plaintiff is entitled to declaratory judgment that the Muscogee Creek Nation District Court lacks jurisdiction to adjudicate the Tribal Complaint against Plaintiff.

31. Plaintiff is not required to exhaust her jurisdictional challenges in Muscogee Creek Nation District Court because the lack of jurisdiction is so clear that the exhaustion requirement would serve no purpose other than delay. Exhaustion would also be futile because of the Muscogee Creek Nation District Court’s stay of proceedings, including Plaintiff’s Motion to Dismiss therein, leave Plaintiff without an adequate opportunity to challenge tribal court jurisdiction.

32. Defendants' prosecution and adjudication of the Tribal Complaint exceeds their lawful authority.

33. The Tribal Complaint unlawfully purports to adjudicate conduct beyond the scope of the MCN's jurisdiction.

34. The Tribal Complaint lacks any valid basis to assert the limited and exceptional jurisdiction retained by Indian tribes over conduct by non-tribal members, even where such conduct occurs within Indian country.

35. The United States has not delegated, by treaty or otherwise, jurisdiction to the MCN to prosecute or adjudicate the Tribal Complaint.

36. Plaintiff is therefore entitled to a declaratory judgment that (a) Defendant Judge Bigler is without jurisdiction to adjudicate the Tribal Complaint against Plaintiff named herein; (b) Defendant Dellinger lacks the authority to prosecute the Tribal Complaint against Plaintiff named herein in the Muscogee Creek Nation District Court; (c) Plaintiff herein is not required to exhaust her jurisdictional challenges in Muscogee Creek Nation District Court prior to seeking relief in this Court.

COUNT II

Injunctive Relief – Fed. R. Civ. P. 65

37. Plaintiff incorporates all preceding paragraphs by reference.

38. For the reasons stated above, Defendants are exceeding their jurisdiction by prosecuting or adjudicating the Tribal Complaint against Plaintiff.

39. Plaintiff is entitled to a preliminary injunction pursuant to Fed. R. Civ. P. 65, preserving the status quo and enjoining Defendants and their agents, employees,

successors, and assigns from further prosecution or adjudication of the Tribal Complaint in Muscogee Creek Nation District Court during the pendency of this federal litigation.

40. Plaintiff will suffer irreparable harm absent the preliminary injunction. For example, without the injunction, Plaintiff will be forced to expend extraordinary costs in time and money litigating before a tribal court that lacks jurisdiction. The expense of litigation before a tribal court that clearly lacks jurisdiction constitutes irreparable harm. *See e.g. Crowe & Dunlevy*, 640 F.3d at 1157; *Kerr-McGee Corp. v. Farley*, 88 F.Supp.2d 1219, 1233 (D.N.M. 2000); *UNC Res. v. Benally*, 518 F.Supp. 1046, 1053 (D. Ariz. 1981). There is therefore a substantial and non-speculative risk that Plaintiff will suffer losses that cannot be compensated by monetary damages.

41. As set forth above, there is a substantial likelihood that Plaintiff will prevail on the merits and that this Court will determine that the MCN and its courts lack the jurisdiction claimed in the Tribal Complaint.

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

43. 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.

44. Plaintiff is therefore entitled to a preliminary injunction pursuant to Fed. R. Civ. P. 65 enjoining Defendants, their agents, employees, successors, and assigns from

further prosecution or adjudication of the Tribal Complaint in Muscogee Creek Nation District Court.

45. Plaintiff is further entitled to a permanent injunction pursuant to Fed. R. Civ. P. 65 enjoining Defendants, their agents, employees, successors, and assigns from further prosecution or adjudication of the Tribal Complaint in Muscogee Creek Nation District Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court grant Plaintiff judgment in this action, granting the following relief against Defendants:

- A. A declaratory judgment that Defendant Dellinger is without jurisdiction to prosecute and Defendant Bigler is without jurisdiction to adjudicate the Tribal Complaint and that Plaintiff is not required to exhaust her jurisdictional challenges in tribal court prior to seeking relief in this Court;
- B. A preliminary injunction enjoining further prosecution or adjudication of the Tribal Complaint in Muscogee Creek Nation District Court;
- C. A permanent injunction enjoining same;
- D. Award Plaintiff her costs and reasonable attorneys fees incurred in this action; and
- E. Such other relief as the Court may deem just and proper.

Respectfully submitted,

FRASIER, FRASIER & HICKMAN, LLP

By: 

George M. Miles, OBA #11433
James E. Frasier, OBA #3108
Steven R. Hickman, OBA #4172
1700 Southwest Blvd.
Tulsa, OK 74107
Phone: (918) 584-4724
Fax: (918) 583-5637
E-mail: frasier@tulsa.com

DISTRICT COURT
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MUSCOGEE (CREEK) NATION
DONNA HEAVER
COURT CLERK

**IN THE DISTRICT COURT OF THE
THE MUSCOGEE (CREEK) NATION
OKMULGEE, OKLAHOMA**

THE MUSCOGEE (CREEK) NATION)
Movant/Plaintiff,)

vs.) Case No.: CV-2017-129GB)

Bim Stephen Bruner;)
The Kialegee Tribal Town;)
Jeremiah Hobia [in his capacity as Town King)
of the Kialegee Tribal Town];)
Red Creek Holdings LLC; and)
Luis Figueredo [in his capacity of principal)
of Red Creek Holdings LLC])
Respondents/Defendants.)

And)

IN RE:)
A Certain Historic Reservation Tract of)
Muscogee (Creek) Nation Allotment Land)
Located in Broken Arrow, OK, also known as)
The Bruner Parcel)

**AMENDED COMPLAINT FOR TEMPORARY RESTRAINING ORDER
PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF
AND
DECLARATORY JUDGMENT**

COMES NOW the Muskogee (Creek) Nation (hereafter, "MCN"), by and through the Office of the Attorney General, pursuant the Court's Scheduling Order of October 17, 2017, allowing the parties ten (10) days [until October 27, 2017] to add additional parties. The MCN adopts and incorporates the allegations contained in its **Complaint for Temporary Restraining Order Preliminary and Permanent Injunctive Relief and Declaratory Judgment** (hereafter "Complaint"), filed on August 16, 2017, as if set out in full.

PLAINTIFF'S
EXHIBIT
1

ADDED PARTIES

Upon information and belief, the MCN adds the following parties, and their respective capacities, to-wit:

1. **Bruner Investments.** Bruner Investments has been identified through discovery as a "Developer" of the Red Creek Casino. Bruner Investments is the legal alter ego of Bim Steven Bruner and Kalyn Free. Bruner Investments is the legal successor in interest to Free-Bruner Investments, LLC. Free-Bruner Investments, LLC was formed by Bim Steven Bruner and Kalyn Free.

2. **Kalyn Free, individually, and in her capacity as principal or agent of Bruner Investments.** Kalyn Free is the spouse of Bim Stephen Bruner. Free and Bruner are principals in Bruner Investments. Kalyn Free has individually enabled and/or participated in the development of Red Creek Casino.

3. **Jeremiah Hobia,¹ individually.** Jeremiah Hobia issued the gaming license for development of Red Creek Casino upon the historical tribal lands of the MCN. Hobia has individually participated in the development and building oversight of Red Creek Casino.

4. **Lewis Figueredo, individually.** Lewis Figueredo is a principal of Red Creek Holdings and has held himself out as attorney for the same. He has identified himself as a Partner of Red Creek Holdings. Figueredo has participated in the development and oversight of Red Creek Casino.

5. **Shane Rolls, individually, and in his capacity as principal or agent of Red Creek Holdings².** Shane Rolls is a principal of Red Creek Holdings. He has identified himself as a Partner of Red Creek Holdings. He is listed as the registered service agent for Red Creek Holdings. Shane Rolls has participated in the development of Red Creek Casino.

¹ Hobia is not entitled to claim sovereign immunity when sued in his personal capacity, and because the MCN is seeking only injunctive relief. *Brian Lewis, et al., v. William Clarke*, 137 S.Ct. 1285 (2017), 197 L.Ed.2d 631; see also *Ex Parte Young*, 209 U.S. 123 (1908).

² Red Creek Holdings, LLC is a Florida limited liability company domesticated to do business in the State of Oklahoma. Red Creek Holdings, LLC sometimes identifies itself as Red Creek Holdings, Inc., which is not a recognized foreign or domestic entity in the State of Oklahoma.

6. John Fox, individually, and in his capacity as principal or agent of Red Creek Holdings, and/or Bruner Development. John A. Fox has held himself out as a "Contractor" of Red Creek Casino and has participated in its development.

7. D.J. Aleman a/k/a D.J. Alrman, individually, and in his capacity as principal or agent of Red Creek Holdings and/or Bruner Development. D.J. Aleman a/k/a D.J. Alrman has held himself out as a "Managing Member" of Red Creek Holdings and/or Bruner Development and has participated in the development of the Red Creek Casino property.

8. Jane Doe and/or John Doe, individually, and in her/his capacity as principal or agent of Red Creek Holdings and/or Bruner Development. The MCN continues to investigate this matter and has developed preliminary information indicating further parties may be involved and, therefore, would need to be added to this action. The MCN reserves the right to amend and add additional parties as discovery progresses.

JURISDICTION AND VENUE

The land upon which the Red Creek Casino was being developed by the original defendants and added parties is upon the restricted historical reservation land of the MCN and subject to federal restraints against alienation. Birm Steven Bruner took recorded possession of the land upon which the Red Creek Casino was being built on or about October 12, 2011. The original defendants and added parties' actions in furtherance of gaming activities at the Red Creek Casino - that are not licensed by the MCN - is in violation of MCN gaming law NCA 12-184, the Indian Gaming Regulatory Act, and the State of Oklahoma Gaming Compact.

Under the MCN Code Annotated, 21 §11-104(B) gaming which is unlicensed by the MCN is a nuisance; and, the remedy is abatement by injunction. The MCN seeks to enjoin and restrain the original defendants and added parties (Bruner Investments, Kalyn Free, Jeremiah Hobia, Luis

Figueredo, Shane Rolls, John Fox, D.J. Aleman a/k/a D.J. Alrman, and unknown Jane and/or John Doe) from any and all actions in furtherance of gaming upon the historical reservation lands of the MCN.³

The MCN is a sovereign Tribal Nation with its principal place of business in Okmulgee, Oklahoma. Bruner is a citizen of the Muscogee (Creek) Nation, record holder of the lands being developed as the Red Creek Casino, and principal of Bruner Investments. The added parties Bruner Investments, Free, Hobla, Figueredo, Rolls, Fox, and Aleman a/k/a Alrman, have all participated in the development of the Red Creek Casino. The events which give rise to the claims stated herein have occurred upon the historical reservation lands of the MCN. The original defendants and added parties' actions in furtherance of gaming operations occurred upon the historical reservation lands of the MCN - without a gaming license from the MCN. Jurisdiction and venue are therefore proper in the Courts of the MCN.

REQUEST FOR PERMANENT INJUNCTION

The original defendants and added parties have participated in the furtherance of gaming activities upon the historic tribal reservation lands of the MCN. Neither the original defendants nor the added parties have applied to the MCN for a gaming license for the Red Creek Casino, obtained a building inspection, or a health inspection through the MCN. As a result, the MCN has endured immediate and irreparable injury, loss, and damage due to the actions of the original defendants and the added parties. The actions of the original defendants and the added parties are a direct invasion upon the tribal sovereignty of the MCN. Immediate and irreparable injury, loss or damage will result to the MCN if the original defendants and added parties are allowed to continue to act in furtherance of establishing a gaming facility or other unlicensed commercial activities upon the historical reservation lands of the MCN.

³ Red Creek Casino is located between the Creek Turnpike and Tucson Street, West of Olive Street within the city limits of Broken Arrow, OK.

A permanent injunction is necessary to preclude the original defendants and added parties from continuing to attempt development of the Red Creek Casino, or another gaming enterprise, or other unlicensed commercial development upon the historical reservation lands of the MCN.

REQUEST FOR DECLARATORY RELIEF

The MCN also prays that this Honorable Court find and declare that the lands within the historical tribal reservation lands of the MCN may not be developed for gaming without the express consent of the MCN.

PRAYER

WHEREFORE, the Office of Attorney General respectfully requests a Permanent Restraining Order prohibiting the original defendants and added parties from acts in furtherance of gaming upon the historical reservation lands of the MCN, and protecting such lands from illegal activities. Finally, the MCN requests declaratory relief by this Honorable Court that will discourage future spurious attacks upon the historical reservation land of the MCN and to protect the sovereignty of the MCN.

Respectfully Submitted,



Kevin W. Dellinger, MCNBA #131
Lindsay Dowell, MCNBA #738
Department of Justice
Office of Attorney General
Muskogee (Creek) Nation
P.O. Box 580
Okmulgee, OK 74447
918.295.9720

CERTIFICATE OF SERVICE/MAILING

The undersigned hereby certifies that on the 26th day of October, 2017, a true and correct file stamped copy of the foregoing **AMENDED COMPLAINT FOR EMERGENCY TEMPORARY RESTRAINING ORDER, PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF AND DECLARATORY RELIEF** was placed into the U.S. Mails with postage fully pre-paid and sent Certified Mail, return receipt requested, to:

Bruner Investments
c/o Bim Steven Bruner
2248 E. 48th St.
Tulsa, OK 74103

Bruner Investments
108 Walking Horse Lane
Eatonton, GA 31024

Kalyn Free
2248 E. 48th St.
Tulsa, OK 74103

Jeremiah Hobla
P.O. Box 332
Wetumka, OK 74883

Jeremiah Hobla
108 N. Main St.,
Wetumka, OK 74883
Via Fax: 405.452.3413
Via Email: jeremiah.hobla@kialegetribe.net

Luis Figueredo
c/o Red Creek Holdings LLC
Attn: Shane Rolls, Registered Service Agent
9414 S. Gary Ave.
Tulsa, OK 74137

Luis Figueredo
General Counsel to
Red Creek Holdings, LLC a/k/a Red Creek Holdings, Inc.
8111 NW 29th Street
Miami, Florida 33122

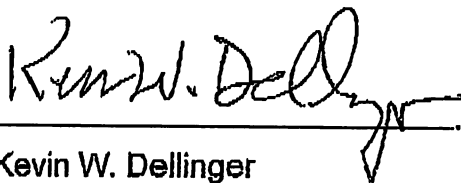
Shane Rolls
9414 S. Gary Ave.
Tulsa, OK 74137

John Fox
c/o Red Creek Holdings LLC
Attn: Shane Rolls, Registered Service Agent
9414 S. Gary Ave.
Tulsa, OK 74137

John Fox
c/o Foxcor, Inc.
c/o FOXWELL, LLC
108 Walking Horse Lane
Eatonton, GA 31024

D.J. Aleman a/k/a D.J. Alrman
c/o Red Creek Holdings LLC
Attn: Shane Rolls, Registered Service Agent
9414 S. Gary Ave.
Tulsa, OK 74137

Frasier, Frasier & Hickman, LLC
James E. Frasier
George Miles
1700 Southwest Blvd
Tulsa, OK
Fax: 918.583.5637
E-mail: Frasier@tulsa.com



Kevin W. Dellinger
Attorney General
The Muskogee (Creek) Nation
Department of Justice
P.O. Box 580
Okmulgee, OK 74447
T 918.295.9720
F 918.756.2445

IN THE MUSCOGEE (CREEK) NATION SUPREME COURT

IN RE APPLICATION OF:)
)
KALYN FREE,)
)
)
Petitioner,)
)
)
v.)
)
THE HONORABLE GREGORY H.)
BIGLER, District Court Judge,)
)
Respondent,)
)
AND)
)
MUSCOGEE (CREEK) NATION,)
)
Real Party in Interest.)

**SUPREME COURT
FILED**

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COURT CLERK
MUSCOGEE (CREEK) NATION
Case No.: **Unassigned**
(District Court Case No. DV-2017-129GB)

George Miles, James E. Frasier, Steven R. Hickman, Frasier, Frasier and Hickman, LLP;
Tulsa, Oklahoma; for Petitioner.

Honorable Gregory H. Bigler; Muscogee (Creek) Nation, District Court Judge, Okmulgee,
Oklahoma; Respondent.

Shelly Harrison, Muscogee (Creek) Nation, Office of the Attorney General, Okmulgee,
Oklahoma; Adam S. Weintraub, Terry S. O'Donnell, Savage, O'Donnell, Affeldt, Weintraub and
Johnson, P.L.L.C.; for Real Party in Interest.

ORDER DENYING PETITIONER'S APPLICATION

**MVSKOKVLKE FVTCECKV CUKO HVLWAT VKERRICKV HVYAKAT OKETV
YVNKE VHAKV HAKATEN ACAKKAYEN MOMEN ENTENFVTCETV, HVTVM
MVSKEKE ETVLWVKE ETEHVLVTKE VHAKV EMPVTAKV.¹**

Before: ADAMS, C.J.; THOMPSON, V.C.J.; LERBLANCE, HARJO-WARE, DEER, and
MCNAC, JJ; SUPERNAW, JJ, abstaining.

¹ "The Muscogee (Creek) Nation Supreme Court, after due deliberation, makes known the following decision based on traditional and modern Mvskoke law."



On February 22, 2018, this Court received the Petitioner's *Application to Assume Original Jurisdiction and Petition for Writs of Prohibition and Mandamus*, filed by and through her Attorneys George Miles, James E. Frasier, Steven R. Hickman and Trevor L. Reynolds of Tulsa, Oklahoma. Without discussing the particular underlying facts of the case, the Petitioner asks this Court to "assume original jurisdiction" over the District Court Case, *Muscogee (Creek) Nation v. Bruner, et al.*, Docket No. DV-2017-129GB, as that case relates to Petitioner.

Petitioner only cites to Oklahoma case law as authority for its position that an assumption of original jurisdiction by this Court would be proper. We direct Petitioner to this Nation's Supreme Court precedent relating to previous applications for assumption of original jurisdiction, as well as additional Oklahoma case law, uncited by Petitioner, consistent with this Court's previous orders related to assumption of original jurisdiction.

The Oklahoma Supreme Court has consistently held that assumption of original jurisdiction by that Court requires a showing that the issue(s) concern the public interest and that an element of urgency, or a need for an early decision, is present.² Additionally, the Oklahoma Supreme Court has held that the likelihood of additional costs and/or time to litigate the matter through a lower court does not justify a bypass directly to the Supreme Court.³ These holdings are consistent with *Muscogee (Creek) Nation*, Supreme Court precedent.⁴ Petitioner must exhaust all legal avenues before the *Muscogee (Creek) Nation* District Court prior to utilizing the Nation's appellate court system.


² See, *Fent v. Contingency Review Bd.*, 2007 OK 27, 163 P.3d 512, 521.

³ See, *Keating v. Johnson*, 1996 OK 61, 918 P.2d 51, 56 (citing *Jarman v. Mason*, 229 P. 459, 464).

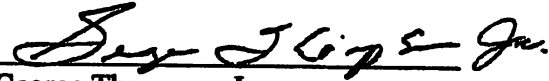
⁴ See, *A.D. Ellis v. MCN National Council*, SC 09-06, ___ Mvs. L.R. ___ (January 19, 2012), wherein the Court held the issues to be "extremely time-sensitive[;]" *Cox v. McIntosh*, SC 91-01, 4 Mvs. L.R. 70 (February 20, 1991), wherein this Court granted a writ of mandamus ordering Respondent to make records available for review prior to an impending Federal audit deadline; *McIntosh v. McGuire*, unassigned Supreme Court filing, wherein this Court denied Petitioner's application to assume original jurisdiction, requiring Petitioner to file an action in District Court, as required by statute.

IT IS HEREBY ORDERED that the above-captioned matter is **DENIED WITH PREJUDICE.**

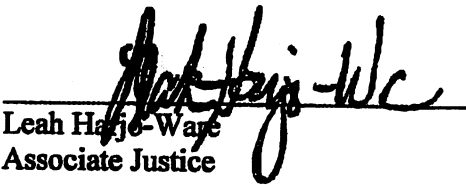
FILED: March 1, 2018.



Andrew Adams III
Chief Justice



George Thompson Jr.
Vice-Chief Justice



Leah Hafje-Ware
Associate Justice



Montie R. Deer
Associate Justice



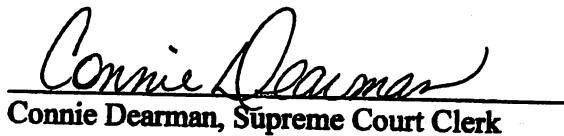
Amos McNac
Associate Justice



Richard C. LeBlance
Associate Justice

CERTIFICATE OF MAILING

I hereby certify that on March 1, 2018, I mailed a true and correct copy of the foregoing Order Denying Petitioner's Application with proper postage prepaid to each of the following: George Miles, James E. Frasier, Steven R. Hickman, 1700 Southwest Blvd., Tulsa, Oklahoma 74107; Trevor L. Reynolds, Tulsa Law Group, 1700 Southwest Blvd., Tulsa, Oklahoma 74107-1730; Shelly Harrison, Muscogee (Creek) Nation, P.O. Box 580, Okmulgee, Oklahoma 74447; Adam Scott Weintraub, Terry S. O'Donnell, 110 West 7th, Suite 1010, Tulsa, Oklahoma 74119. A true and correct copy was also hand-delivered to: Donna Beaver, Clerk of the Muscogee (Creek) Nation District Court.



Connie Dearman, Supreme Court Clerk

AFFIDAVIT

1. I, Kalyn Free am a resident of Tulsa County, Oklahoma and a citizen of the Choctaw Nation. I am not a citizen or eligible for citizenship in the Muscogee (Creek) Nation (MCN).
2. I married Bim Stephen Bruner, a citizen of the MCN, on September 5, 2009.
3. I have never entered into any contract, commercial dealing, lease, or any other consensual relationship with the MCN.
4. I have no right, title or interest in any of my husband's restricted trust property, including the property at issue in MCN District Court Case CV-2017-129GB and referred to as the "Bruner Parcel."
5. I have not "gamed" in any unlicensed facilities. I have not owned or operated any unlicensed (or licensed) gaming devices or gaming facilities.
6. I have not been a party to any agreement with the developers who entered into a contract for the lease/purchase of electronic gaming devices to the subject property. I have not been a party to any agreement with the Kialegee Tribal Town.
7. I have not been involved in any transaction relating to the procurement of the gaming devices that were found on the subject property. I had no knowledge that the electronic gaming devices had been ordered or were on the property until I learned of their presence after the arrest of my husband, Bim Stephen Bruner.
8. Furthermore, since the property is restricted trust property and I am not, nor ever can be, an enrolled citizen of the MCN, I cannot own, inherit or otherwise control the Bruner Parcel.
9. I was not involved with the development of the Bruner Parcel and the companies which I have an ownership interest in, Free Bruner Investments, LLC and Bruner Investments, LLC, were not involved in any way with the Bruner Parcel.

10. I have incurred unnecessary legal expenses to defend myself from false claims asserted by a Nation I am not a citizen of.

11. I have been a licensed attorney in the state of Oklahoma since 1987. I began my legal career by serving in the Honors Program with the United States Department of Justice from 1987 to 1998. I was promoted to Senior Counsel in the Indian Resources Section of the Environment and Natural Resources Division at DOJ. I litigated cases on behalf of the United States and Indian tribes until I left Washington, DC in 1998 to return to Oklahoma. In 1998, I was elected District Attorney of Pittsburg and Haskell counties and served until I resigned to run for U.S. Congress. The actions taken by the MCN have injured my reputation and interfered with my employment.

12. I declare under penalty of perjury that the foregoing is true and correct.

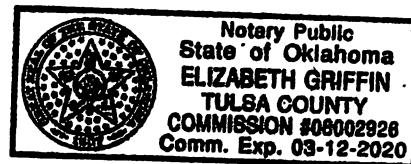
Kalyn Free
Kalyn Free

4.3.18
Date

Subscribed and sworn before me this 3rd day of April 2018.

Elizabeth Griffin
Notary Public

My commission expires 3-12-2020



IN THE DISTRICT COURT OF THE
THE MUSCOGEE (CREEK) NATION
OKMULGEE, OKLAHOMA

DISTRICT COURT
FILED

2017 DEC 8 AM 11 19

MUSCOGEE (CREEK) NATION
DONNA BEAYER
CLERK

Case No.: CV-2017-129GB

THE MUSCOGEE (CREEK) NATION
Movant/Plaintiff,

vs.

Bim Stephen Bruner;
The Kialegee Tribal Town;
Jeremiah Hobia [in his capacity as Town King
of the Kialegee Tribal Town];
Red Creek Holdings LLC; and
Luis Figueredo [in his capacity of principal
of Red Creek Holdings LLC]
Respondents/Defendants.

And

IN RE:

A Certain Historic Reservation Tract of
Muscogee (Creek) Nation Allotment Land
Located in Broken Arrow, OK, also known as
The Bruner Parcel

RECEIVED

DEC 14 2017

FRASIER, FRASIER & HICKMAN

**RESPONSE TO MOTION TO DISMISS
OF KALYN FREE AND FREE-BRUNER INVESTMENTS, LLC**

COMES NOW Plaintiff, The Muscogee (Creek) Nation ("Plaintiff" or "MCN") and responds to the Motion to Dismiss of Kalyn Free and Free-Bruner Investments, LLC.

The Motion and Brief as filed by said parties is a model of brevity, claiming that this Honorable Court lacks jurisdiction over these Defendants. However, Defendants' Motion is fatally flawed and must be denied.

STATEMENT OF FACTS

1. Pursuant to the scheduling order of October 17, 2017, Plaintiff was granted 10 days to add additional parties.
2. On or before October 27, Plaintiff filed its Amended Complaint, adopting and incorporating all allegations of the original Complaint, but

also making allegations against numerous additional parties, including Movants.

- 3. Service of the Amended Complaint was properly made upon Defendant Kalyn Free and Defendant Free-Bruner Investments, LLC.

ARGUMENT AND AUTHORITIES

It is a matter of hornbook law that a motion to dismiss is not intended to test the facts of the case, but instead tests the law governing the claims of the petition. See, e.g., Osage Nation v. Board of Commissioners of Osage County, 2017 OK 34, 394 P.3d 1224; Miller v. U.S., 642 F.Supp 2d 437 (M.D. PA, 2009). "The examining court must take as true all of the challenged pleading's allegations together with all reasonable inferences that can be drawn from them. Motions to dismiss are generally disfavored and granted only when there are no facts consistent with the allegations under any cognizable legal theory or there are insufficient facts under a cognizable legal theory." See, Osage Nation, at ¶ 22 and the legion of cases cited therein.

A motion to dismiss for subject matter jurisdiction under FRCP 12(b)(1) however, may follow a slightly different standard. Under such a motion, if the challenge relies on a facial attack of the pleadings, the court still considers the allegations of the complaint as true. However, if the challenge is apart from the pleadings, the court must ensure that it has the power to hear the case. See, Miller, at 440, 441.

In all candor, it is impossible for MCN to determine what Defendants' Motion encompasses, as there is no indication of its grounds nor evidence supporting its assertions. Out of an abundance of caution, the Nation assumes that this Motion is an attack on jurisdiction beyond the four corners of the Amended Complaint.

Proposition 1

DEFENDANTS' SOLE AUTHORITY IS NOT ONLY INAPPOSITE BUT ALSO HAS BEEN OVERRULED

Defendants Free and Free-Bruner Investments, LLC aver:

The Muscogee (Creek) Nation by virtue of their incorporation into the American Republic lost "the right of governing persons within their limits except themselves"

and cite as authority for this statement Oliphant v. Suquamish Tribe, 435 U.S. 191, S.Ct. 1011 (1978). Motion, at ¶ 4. Unfortunately for Defendants, this statement is as

inaccurate as it is blunt. First, Oliphant deals solely with the question of whether an Indian tribal court had *criminal jurisdiction* over a non-Indian. Obviously, Oliphant has no bearing in the case at bar--criminal jurisdiction is not being exercised in the case at bar, a case seeking mere equitable relief. More importantly, this entire body of law has changed since Oliphant was promulgated. First, Oliphant has been overruled by statute and second, the United States Supreme Court now recognizes that tribal courts do not act out of some delegated federal authority, as was presupposed by Oliphant, but instead act from *retained and inherent tribal sovereignty*. See, 25 U.S.C.A. § 1301(2); U.S. v. Lara, 541 U.S. 193, 124 S.Ct. 1628; 158 L.Ed.2d 420 (2004):

Section 1301(2) "recognizes and affirm(s) in each tribe the "inherent power" to prosecute nonmember Indians, and its legislative history confirms that such was Congress' intent. Thus, it seeks to adjust the tribes' status, relaxing restrictions, recognized in Duro¹ that the political branches had imposed on the tribes' exercise of inherent prosecutorial power.

[O]liphant, and Duro, then, are not determinative because Congress has enacted a new statute, relaxing restrictions on the bounds of the inherent tribal authority the United States recognizes Lara, at 193-194, 194.

The Court explained that the times and the law were changing, albeit incrementally:

[t]he change at issue here is a limited one. It concerns a power similar in some respects to the power to prosecute a tribe's own members--a power that this Court has called "inherent" (citation omitted). In large part it concerns a tribe's authority to control events that occur upon the tribe's own land. (citation omitted). "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and *their territory*. (emphasis in original)

Lara, at 204.

Further, discussing the changing times and diverging from Oliphant (and Duro):

But these holdings reflect the Court's view of the tribes' retained sovereign status as of the time the Court made them. They did not set forth constitutional limits that prohibit Congress from changing the relevant legal circumstances, i.e., from taking actions that modify or adjust the tribes' status.

Id., at 205.

¹ Duro v. Reina, 495 U.S. 676; 110 S.Ct. 2053, 109 L.Ed.2d 693, similarly statutorily overruled. See, Lara, at 193.

Finally, the Supreme Court of the Muscogee (Creek) Nation has held [in a forfeiture proceeding] that “the Nation has exclusive jurisdiction to regulate the conduct of all persons on tribal land, particularly those that voluntarily come on to tribal land for the purpose of patronizing tribal businesses.” Muscogee (Creek) Nation v. One Thousand Four Hundred Sixty Three and 14/100 (\$1,463.14); Methamphetamine; And A 2004 General Motors Hummer H2, VIN No. 5GRGN23U64H116688, SC-05-01; see Miner Electric, Inc., v. Muscogee (Creek) Nation, 505 F. 3d 1007 (10th Cir. 2007).

In sum, Oliphant, Movants' sole authority, utterly fails to support the Motion to Dismiss. The Motion is fatally flawed and must be overruled.

Proposition 2

THE DISTRICT COURT OF THE MUSCOGEE (CREEK) NATION HAS BOTH PERSONAL AND SUBJECT MATTER JURISDICTION OVER BOTH KALYN FREE AND FREE-BRUNER INVESTMENTS, LLC.

The U.S. Supreme Court has yet to examine a tribal court's civil jurisdiction in the post-Lara world. Accordingly, the current state of law is in a bit of flux—as discussed above, the Supreme Court has acknowledged that Congress' intent is to recognize inherent tribal authority instead of determining what power might have been delegated; and, certain cases limiting tribal court jurisdiction have been held for naught. Thus, it is possible that the law is more expansively in favor of the exercise of tribal jurisdiction than indicated by law on-the-books. However, even without noting the expanding recognition of inherent tribal authority after Lara, Defendants are properly before this Honorable Court.

The current state of law is that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to exceptions relating to (1) the activities of nonmembers who enter consensual relationships with the tribe or its members and (2) nonmember conduct that threatens or directly affects the tribe's political integrity, economic security, health, or welfare. Montana v. United States, 450 U.S., at 564-567, 101 S.Ct., at 1257-1259. Further, “[c]ivil jurisdiction over [the] activities [of non-Indians on reservations lands] presumptively lies in the tribal courts. Iowa Mutual Insurance Co. v. LaPlante, 480 U.S.

9, 107 S.Ct. 971, 94 L.Ed.2d 10; see also, Strate v. A-1 Contractors, 520 U.S. 438, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997).

Here, although unsupported by competent evidence, Defendants aver merely that 1) Defendant Kalyn Free is not a member of the Nation; 2) Free-Bruner Investments, LLC does no business with the Nation; and, 3) that there are no facts alleged in the Amended Complaint which give this Court jurisdiction over the Defendants.

According to the teachings of Montana, Iowa Mutual, and Strate, the first two of Defendants' averments are meaningless; the third is merely incorrect. See, Amended Complaint at 4:

The original defendants and the added parties have participated in the furtherance of gaming activities upon the historic tribal reservation lands of the MCN. Neither the original defendants nor the added parties have applied to the MCN for a gaming license for the Red Creek Casino... as a result, the MCN has endured immediate and irreparable injury, loss and damage... the actions of the original defendants and added parties are a direct invasion upon the tribal sovereignty of the MCN...

Id.

The allegations of the Amended Complaint also satisfy the Montana and Iowa Mutual tests. Even if Defendant Free was not a Native American of any description (but, she is) and even if the land in question was not part of the historic tribal reservation land of the MCN (but, it is), and even if Free-Bruner Investments, LLC does no business with the MCN (not part of the test), this Honorable Court holds jurisdiction over the parties and the subject matter. The allegations of the Amended Complaint, already found supported by this Court in its Emergency *Ex Parte* Temporary Restraining Order and Orders following, are that the activities of the Defendants are such that they "directly affect the tribe's political integrity, economic security, health, or welfare." See, Montana, supra. Accordingly, MCN's Amended Complaint sets forth sufficient prerequisite jurisdictional allegations vesting this court with jurisdiction over the matter, until proven otherwise.

The standard for consideration of motions to dismiss is set forth in the Supreme Court's decision in Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007), and the subsequent decision in Ashcroft v. Iqbal, 556 U.S. 662 (2009). In those cases, the U.S. Supreme

Court made clear that to survive a motion to dismiss, a complaint must contain enough allegations of fact which, if taken as true, "state a claim to relief that is plausible on its face." Twombly, 550 at 570. Plaintiff must "nudge their claims across the line from conceivable to plausible" to survive a motion to dismiss. Id. The standard for a motion to dismiss is not to be confused with the standards for a summary judgment. Here, defendants do not squarely challenge MCN's Amended Complaint, but rather assert irrelevant facts without proof, in an attempt to escape this court's jurisdiction. Whether MCN will be able to successfully survive a motion for summary judgment under these facts is a completely different question. However, the allegations as pleaded by MCN sufficiently state "a plausible claim to relief" and are more than robust enough to survive defendant's Motion to Dismiss.

Accordingly, Defendant's Motion to Dismiss must be denied.

Respectfully submitted,

br



Kevin W. Dellinger, MCNBA #131
Attorney General
The Muscogee (Creek) Nation
Department of Justice
P.O. Box 580
Okmulgee, OK 74447
918.295.9720

CERTIFICATE OF MAILING

I hereby certify that on the 8th day of December 2017, a true and correct copy of the above and foregoing was deposited in the United States mail with proper postage affixed thereto and addressed to:

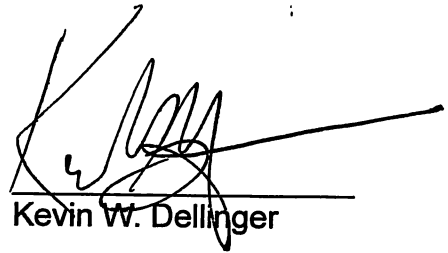
James E. Frasier, Esq.
George Miles, Esq.
Trevor Reynolds, Esq.
Frasier Frasier Hickman
1700 Southwest Blvd.
Tulsa, OK 74107

Free-Bruner Investments
2248 E. 48th St.
Tulsa, OK 74103

Kalyn Free
2248 E. 48th St.
Tulsa, OK 74103

Adam Scott Weintraub
Terry S. O'Donnell
Savage O'Donnell Affeldt Weintraub & Johnson
110 West 7th, Suite 1010
Tulsa, OK 74119

SW


Kevin W. Dellinger