UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

KALYN FREE;

Plaintiff,

v.

KEVIN W. DELLINGER, ATTORNEY GENERAL OF THE MUSCOGEE CREEK NATION, in his official capacity; and, JUDGE GREGORY H. BIGLER, in his official capacity,

Defendants.

Civil Case No. 18 CV 131 CVE - JFJ

PLAINTIFF'S MOTION FOR PRELIMINARY INJUCTION AND BRIEF IN SUPPORT

COMES NOW Plaintiff, by and through undersigned counsel, and respectfully moves this Court, pursuant to Fed. R. Civ. P. 65, for a Preliminary Injunction enjoining Defendants from taking any action against Plaintiff in *Muscogee (Creek) Nation v. Bruner, et al.*, Docket No. DV-2017-129GB (herein the "*Muscogee Creek Action*"), currently pending in the District Court of the Muscogee (Creek) Nation. In support thereof, Plaintiff states:

INTRODUCTION

The Muscogee Creek Nation (herein the "MCN"), through Defendant Dellinger, has filed suit against Plaintiff based upon the alleged actions of others—all non-parties to the current action though named parties in the *Muscogee Creek Action*—including Bim Stephen Bruner, the Kialegee Tribal Town, Red Creek Holdings, LLC, and others. The *Muscogee Creek Action* suit alleges unlawful gaming operations on restricted property in

Broken Arrow, Oklahoma. Notably, no specific allegations were leveled against Plaintiff Free except for the ever-nebulous contention that Free "enabled and/or participated in the development of Red Creek Casino." *See* Ex. No. 1, Amended Muscogee Creek Complaint. There are no allegations of *how* Plaintiff Free "enabled and/or participated" and there cannot be, because it never occurred.

The *Muscogee Creek Action* raises claims for relief for: (1) violation of MCN gaming law NCA 12-184, which compromises the entirety of Title 21 of the MCN Code (herein the "MCNCA"); (2) violation of the Indian Gaming Regulatory Act; (3) violation of the Gaming Compact between the MCN and the State of Oklahoma; and (4) nuisance for violation of MCN gaming law NCA 12-184. The only violative acts alleged by the MCN is that the *development* of the "Red Creek Casino" is not licensed by the MCN.[1]

The District Court of the Muscogee (Creek) Nation clearly lacks jurisdiction and, under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), this Court should enjoin the assigned District Court judge, and the MCN Attorney General, from proceeding with this action. Because Plaintiff is not a member of the MCN and none of the conduct—alleged or actual—of Plaintiff took place in Indian country, the District Court of the Muscogee (Creek) Nation lacks jurisdiction. Except where a tribe is regulating its own members, "[t]he jurisdiction of tribal courts does not extend beyond tribal boundaries." *Philip Morris*

---

[1] Even if there were jurisdiction over Plaintiff, it must be noted that there is nothing illegal about the development of a Public Gaming operation under MCN gaming law NCA 12-184, only the *operation* thereof. *See* MCNCA Title 21 § 3-101 ("Public Gaming operations *being conducted* within the jurisdiction of the Muscogee (Creek) Nation without the lawful written approval of the Commission are prohibited.") (emphasis added).

USA, Inc. v. King Mountain Tobacco Co., 569 F.3d 932, 937-38 (9th Cir. 2009). "[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana v. United States*, 450 U.S. 544, 565 (1981).

In *Montana*, the Supreme Court recognized two narrow exceptions to a tribe's limited authority over non-tribal members. *Id.* at 565. Under the first exception, 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 dealings, contracts, leases, or other arrangements." *Id.* at 565 (internal citations omitted). 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 566 (internal citations omitted). However, both exceptions are inapplicable here because none of Plaintiff's actions—if any—occurred in Indian country. Moreover, neither of the *Montana* exceptions would apply even if the alleged conduct *had* occurred in Indian country. None of the alleged conduct relates to the Tribe's interest in regulating self-government or internal relations; a critical threshold for either exception to apply. Nor does the alleged conduct pose a direct threat to tribal sovereignty. Clear United States Supreme Court precedent establishes that, in such circumstances, the Tribal Court has no jurisdiction. Under these circumstances, where federal law plainly deprives the tribal court of jurisdiction, exhaustion of tribal remedies would serve no purpose but delay.

Plaintiff brings this lawsuit against Defendants Kevin W. Dellinger, Attorney General for the MCN, and Judge Gregory H. Bigler, judge of the Muscogee Creek Nation District Court, to enjoin the prosecution and adjudication of the *Muscogee Creek Action* as it acts in excess of their lawful authority. An injunction is necessary to stop the lawsuit now, before an enormous amount of time and money is wasted on litigation in a forum where jurisdiction is demonstrably lacking. Further, Defendant Judge Gregory H. Bigler entered an idefinite stay of the *Muscogee Creek Action* before hearing Plaintiff's Motion to Dismiss, denying Plaintiff an opportunity to challenge the District Court of the Muscogee (Creek) Nation's jurisdiction over her. As a result, unless this Court intervenes, Plaintiff may face years of protracted and enormously burdensome litigation over her. In an effort to tip the case from high-center, Plaintiff applied to the MCN Supreme Court for a writ to end the improvident exercise of jurisdiction over Plaintiff. This application was denied and, therefore, remains in MCN courts, where Plaintiff can do nothing but wait indefinitely – all within a legal system where Plaintiff has no right of recourse, run by a tribal nation that she is not a citizen of and thus has no voice or representation. An injunction should therefore issue.

ARGUMENT AND AUTHORITIES

The "primary goal of a preliminary injunction is to preserve the pre-trial status quo" before a trial on the merits. *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009). To obtain a preliminary injunction, a movant must demonstrate that: (1) the movant is substantially likely to succeed on the merits; (2) the movant will suffer irreparable injury if the injunction is denied; (3) the movant's threatened injury outweighs the injury the

opposing party will suffer under the injunction; and (4) the injunction would not be adverse to the public interest. *New Mexico Dep't of Game & Fish v. United States Dep't of the Interior*, 854 F.3d 1236, 1246 (10th Cir. 2017) (citing *Fish v. Kobach*, 840 F.3d 710, 723 (10th Cir. 2016)). However, if a petitioner is able to strongly demonstrate factors 2, 3, and 4 listed above, respectively, then the test may be modified so that the likelihood of success on the merits need not be established but, instead, so long as petitioner is able to demonstrate that questions going to the merits are so serious and substantial so as to make the matter ripe for review, then the injunction may still be issued. *See Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir. 2002). The injunction requested here meets each of these elements.

I. PLAINTIFF IS SUBSTANTIALLY LIKELY TO SUCCEED ON THE MERITS BECAUSE THE MCN LACKS JURISDICTION.

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); *McKesson Corp. v. Hembree*, 2018 U.S. Dist. LEXIS 3700 at *9 (N.D. Okla. Jan. 9, 2018) (finding lack of tribal court jurisdiction where pharmaceutical distributors distributed products within the tribe's jurisdictional area). 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*, 554 U.S. at 327 (quotations omitted); *McKesson Corp.*, 2018 U.S. Dist. LEXIS 3700 at *9. Thus, "tribal jurisdiction is … cabined by geography: The jurisdiction of tribal courts does not extend beyond tribal

boundaries." *Philip Morris,* 569 F.3d at 937-38. In fact, the "[e]xercise 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). Due to this restriction on tribal governance, neither a "tribe's adjudicative jurisdiction," nor tribal courts are "of general jurisdiction." *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1151 (10th Cir. 2009) (internal quotation omitted).

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; *McKesson Corp.*, 2018 U.S. Dist. LEXIS 3700 at *10. 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. 436, 445 (1997). The *Montana* rule extends to tribal regulation over non-Indians even within Indian country. *See e.g. McKesson Corp*, 2018 U.S. Dist. LEXIS 3700 at *18. As discussed below, the *Montana* rule is subject to two exceptions, neither of which is applicable here. Even so, these two exceptions are "limited . . . and cannot be construed in a manner that would swallow the rule or severely shrink it." *Plains Commerce*, 554 U.S. at 3337 (citing *Montana*, 450 U.S. at 564) (internal quotation and citations omitted).

A. Plaintiff Has Not Entered Into a Relationship with the MCN Such That the MCN Would Obtain Jurisdiction Over Her.

Under the first exception, 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 dealings, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565 (internal citations omitted) ; *McKesson Corp.*, 2018 U.S. Dist. LEXIS 3700 at *19. The underlying principal of this exception lies in the fact that, because non-tribal members "have no say in the laws and regulations that govern tribal territory[,] . . . those 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); *McKesson Corp.*, 2018 U.S. Dist. LEXIS 3700 at *19. Plaintiff has not entered into any relationship with the MCN, much less a relationship which would trigger this exception. MCN has not even alleged otherwise.

The allegations against Plaintiff—to the extent there are any—within the *Muscogee Creek Action* are insufficient to trigger this exception. The amended complaint notes that Plaintiff Free is the spouse of Mr. Bruner—a fact Plaintiff readily admits. *See* Ex. No. 1, Amended Muscogee Creek Complaint, pg. 2. *See* Ex. No. 2, Free Affidavit. Plaintiff has not "gamed" in any unlicensed facilities and the MCN does not allege otherwise. Plaintiff does not own or operate any unlicensed (or licensed) gaming devices or gaming facilities and the MCN does not allege otherwise. *See* Ex. No. 2, Free Affidavit. Notably, the MCN

has not alleged that *any* unlicensed gaming has occurred. It is entirely unclear what "violation" has occurred and, to the extent there was a violation, it is unclear that Plaintiff had a role in it. Instead, the "allegations" against Plaintiff are limited to: 1) Plaintiff "enabled and/or participated" in some nebulous and undefined and undescribed violative act; and 2) Plaintiff is married to someone who somehow "act[ed] in furtherance of gaming activities" that are not licensed by the MCN. *Id.* at 3. As Plaintiff is not a member of the MCN, *any* attempt by the MCN to exert jurisdiction over her is presumptively invalid and MCN's austere "allegations" are insufficient to overcome this presumption. *See Plains Commerce*, 554 U.S. at 330.

B. The Alleged Conduct Does Not Threaten the Subsistence of the MCN.

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." *Montana*, 450 U.S. at 566 (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 v. A-1 Contrs.*, 520 U.S. 438, 459 (1997) (internal quotation omitted); *McKesson Corp.*, 2018 U.S. Dist. LEXIS 3700 at *24. 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).

It presses the bounds of reason for the MCN to contend that their attempted—and ongoing—exercise of jurisdiction over Plaintiff is "necessary to protect tribal self-government or to control internal relations." *Montana*, 450 U.S. at 564; *Strate*, 520 U.S. at 459. Indeed, this exception "envisions situations where the conduct of the nonmember poses a direct threat to tribal sovereignty." *Philip Morris*, 569 F.3d at 943. Generalized allegations of harm which exist for all members of society are, by themselves, insufficient to justify *Montana's* second exception. *See McKesson Corp., et al. v. Hembree, et al.*, 2018 U.S. Dist. LEXIS 3700 at *29 (Okla. N.D. Jan. 9, 2018). Instead, the complained-of conduct must truly be "catastrophic" to the tribe's very existence or stability. *See id.* (citing *Plains Commerce Bank*, 554 U.S. at 341). Even *if* Plaintiff participated in some—or even all—of the complained-of conduct, which she did not, MCN has provided no support for the notion that the conduct threatens the very existence and political stability of the Nation. That is what is required to satisfy *Montana's* second exception. This case has nothing to do with the internal relations and structures of the Muscogee Creek Nation and, as such, the Tribe has no jurisdiction over nonmembers' alleged actions which do not relate thereto.

C. Plaintiff Need Not Exhaust Tribal Remedies.

Although a defendant in tribal court ordinarily must exhaust his/her 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).

At this time, there are no allegations leveled against Plaintiff so as to apprise of the allegedly offending conduct. Instead, there is the generalized contention that Plaintiff "individually enabled and/or participated in the development of Red Creek Casino." Ex. No. 1, Amended Complaint. To the extent this simple statement is construed as an allegation against Plaintiff, it fails to meet the necessary pleading standard, "to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (citing *Conley v. Gibson*, 355 U.S. 41, 47) (internal citation and alteration omitted). While a complaint need not have detailed factual allegations, something more than mere labels, conclusions, and formulaic recitations are needed. *Id.* The Supreme Court, in adopting the *Twombly* standard, expressly noted the significance of Fed. Civ. Pro. Rule 8 to preclude "a plaintiff with a largely groundless claim

be[ing] allowed to take up the time of a number of other people." *Id.* at 557-558 (internal citations and alterations omitted). Rather than hauling Plaintiff into court for *her* alleged actions, it seems that MCN hauled Plaintiff—a non-tribal member—into tribal court for the *alleged* actions of her husband. *See* Ex. No. 1, Amended Complaint (noting that Plaintiff Free is the spouse of Bim Stephen Bruner). It is clear that the MCN seeks to harass Plaintiff and has proffered no particularized allegations against her. Accordingly, Plaintiff need not be forced to slog through tribal court proceedings intended only to harass and embarrass.

Additionally, even if the facts alleged in the *Muscogee Creek Action* are taken as true, MCN lacks the ability to maintain the action against Plaintiff because there is no criminal or civil violation alleged. Tribal courts are of limited jurisdiction, *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1151, such that Plaintiff cannot be hauled into tribal court for her actions—to the extent there were any—even if they are not MCN's preferred actions as they were not prohibited either civilly or criminally under tribal law.

Next, exhaustion is not required as Plaintiff lacks an adequate opportunity in a tribal forum to challenge the MCN's jurisdiction. Plaintiff was served with process regarding the Tribal Complaint on or about November 8, 2017. On November 15, 2017, before the Plaintiff to this action could even file a responsive pleading in Muscogee Nation District Court, the MCN sought a stay of the Tribal Complaint, which Defendant Bigler temporarily granted the following morning, pending hearing on the stay, which subsequently occurred and a stay was formally granted. As a result of this stay, Defendant Bigler has refused to consider Plaintiff's Motion to Dismiss the Tribal Complaint on jurisdictional grounds.

Simply put, Defendants' actions denied, and continue to deny, Plaintiff an opportunity to adequately challenge the MCN's jurisdiction. Subsequently, out of respect for the tribe's authority and sovereignty, and while remaining in a state of legal limbo, on February 22, 2018, Plaintiff applied to the MCN Supreme Court for writs of mandamus and prohibition so that Plaintiff would be dismissed from the *Muscogee Creek Action*. Ex. No.3 MCN Writ Application. However, on March 1, 2018, one week later and without a responsive pleading being filed in opposition to the Plaintiff's Writs or a hearing set, the MCN Supreme Court denied Plaintiff's requested writs. Ex. No. 4, MCN Order Denying Writs. Accordingly, the only potential tribal remedy available to Plaintiff is her remaining in legal limbo while the *Muscogee Creek Action* is indefinitely stayed. Even if Plaintiff were to receive an adverse ruling from the MCN District Court, this would at least meet the exhaustion requirement such that Plaintiff could, undeniably, bring the matter to this Court. At this time, however, Plaintiff *can do nothing more* to advance the matter *within* tribal court, which makes the exhaustion requirement inapplicable in this current action.

Finally, as discussed earlier in Section I, the MCN lacks jurisdiction over Plaintiff—a non-tribal member—as her alleged actions, even if true, do not violate the Tribe's law and do not implicate vital tribal functions so as to threaten the political and financial security of the Tribe. While the Tribe may feel emboldened in asserting authority over Plaintiff, the Tribe clearly lacks jurisdiction over Plaintiff and the Tribe's continued attempts at exercising jurisdiction over Plaintiff needlessly—and selfishly—consume resources and delay the inevitable. MCN lacks jurisdiction over Plaintiff for her alleged actions and this Court's involvement is needed to rectify the Tribe's ongoing reticence,

obstruction and harassment.

II. PLAINTIFF WILL SUFFER IRREPARABLE INJURY ABSENT AN INJUNCTION.

The showing of irreparable injury "is the single most important prerequisite for the issuance of a preliminary injunction." *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1261 (10th Cir. 2004). A movant "satisfies the irreparable harm requirement by demonstrating 'a significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damages.'" *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009) (quoting *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003)).

Here, absent an injunction, Movant "will be forced to expend unnecessary time, money, and effort litigating . . .[in] a court which likely does not have jurisdiction." *Crowe & Dunlevy*, 640 F.3d at 1157 (internal quotation marks omitted); *see also Wells Fargo Bank, N.A. v. Maynahonah*, 2011 U.S. Dist. LEXIS 99635 at **36-37 (W.D. Okla. Sept. 2, 2011) (finding irreparable harm). As the District Court for New Mexico has explained:

> Without an injunction, UNC would be forced to appear and defend in Tribal Court; were it not to appear, the Navajo plaintiffs there could obtain default judgments that the tribe might attempt to execute against UNC's interests on the reservation. The burden on UNC of defending numerous Tribal Court actions would be substantial. Any judgments obtained against UNC after trial might also be executed by the tribe. In such a closed system, it would be difficult if not impossible for UNC to find recourse to another forum that could protect it from the tribe's overreaching jurisdiction. The only way adequately to protect UNC from this potentially irremediable injury is to enjoin the defendants from proceeding further in Tribal Court.

UNC Resources, Inc. v. Benally, 514 F.Supp. 358, 363 and 1053 (D.N.M. 1981); *accord Kerr-McGee Corp. v. Farley*, 88 F.Supp. 2d 1219, 1233 (D.N.M. 2000) ("The Court finds that Kerr-McGee will suffer irreparable damage if Tribal Claimants are not enjoined from proceeding in Navajo Court, as demonstrated by the expense and time involved in litigating this case in tribal court."); *Chiwewe v. Burlington N. & Santa Fe Ry. Co.*, 2002 WL 31924768 at *2 (D.N.M. Apr. 15, 2002). "While economic loss is usually insufficient to constitute irreparable harm," it is relevant when sovereign immunity may prevent future remedy. *Crowe & Dunlevy*, 640 F.3d at 1157. "[T]he imposition of money damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury." *Id.* (alteration and internal quotation omitted). Because Plaintiff may be "without recourse" to recover any award from a "sovereign entity" like the Tribe, a preliminary injunction against Defendants is warranted. *Id.*

III. DEFENDANTS WILL NOT SUFFER ANY INJURY IF AN INJUCTION ISSUES.

The threatened injury to Plaintiff outweighs any potential inconvenience to the Defendants should preliminary relief be granted. As the Tenth Circuit held in *Crowe & Dunlevy*, where a tribal court lacks jurisdiction to regulate non-members, there is no offense to "the authority of . . . tribal courts" that could constitute harm. 640 F.3d at 1158. *Cf. Chiwewe*, 2002 WL 31924768, at *3 ("The Defendants have shown that they would suffer more harm from litigating in tribal court than the Plaintiffs would suffer from [] litigating in federal court only."); *Benally*, 518 F. Supp. at 1053 ("[I]t appears that the balance of hardships tips in favor of UNC since the defendants' injuries may be redressed in a federal

or state court of competent jurisdiction.").

Defendant Dellinger retains the ability to file the MCN's claims in federal or state court. *See County of Lewis v. Allen*, 163 F.3d 509, 516 (9th Cir. 1998) (en banc) (second *Montana* exception did not apply because tribal jurisdiction over claims was "not necessary to protect Indian tribes or their members who may pursue their causes of action in state or federal court."); *accord Strate*, 520 U.S. at 459 ("Opening the Tribal Court for her optional use is not necessary to protect tribal self-government; and requiring [non-Indian defendants] to defend against this commonplace state highway accident claim in an unfamiliar court is not crucial to 'the political integrity, the economic security, or the health or welfare of the [tribe].'" (citation and footnote omitted)). Accordingly, Defendants suffer no harm from the granting of a preliminary injunction in this action.

IV. INJUNCTIVE RELIEF IS IN THE PUBLIC INTEREST.

Finally, the public interest supports a preliminary injunction because, as courts have repeatedly recognized, the public interest is served by preventing tribal courts from proceeding where they lack jurisdiction. *Crowe & Dunlevy*, 640 F.3d at 1158 ("We simply are not persuaded the exertion of tribal authority over . . . a non-consenting, nonmember, is in the public's interest."); *Benally*, 514 F. Supp. at 363 ("Nor will the public interest be harmed by an injunction preventing the defendants from participating in an unlawful exercise of tribal power."). The Supreme Court has explained the dangers of extending tribal authority, noting that "nonmembers have no part in tribal government—they have no say in the laws and regulations that govern tribal territory." *Plains Commerce Bank*, 554 U.S. at 337. This is, consequently, a case to which tribal jurisdiction does not apply. A tribe's

"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 Bank*, 554 U.S. at 337 (emphasis added) (citing *Montana*, 450 U.S. at 564). The public interest is served by preventing the Tribe from over-extending its reach and adjudicating claims where it has no jurisdiction.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court grant Plaintiff a preliminary injunction enjoining further prosecution or adjudication of the Tribal Complaint in Muscogee Creek Nation District Court; a permanent injunction enjoining same; award Plaintiff her costs and reasonable attorneys fees incurred in this action; and such other relief as the Court may deem just and proper.

Respectfully submitted,

FRASIER, FRASIER & HICKMAN, LLP

By: _____

George 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

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 Muscogee (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 Holdings[2].** 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. Bim 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, Hobia, 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
Muscogee (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 Hobia
P.O. Box 332
Wetumka, OK 74883

Jeremiah Hobia
108 N. Main St.,
Wetumka, OK 74883
Via Fax: 405.452.3413
Via Email: jeremiah.hobia@kialegeetribe.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. Airman
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 Muscogee (Creek) Nation
Department of Justice
P.O. Box 580
Okmulgee, OK 74447
T 918.295.9720
F 918.756.2445

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.

PLAINTIFF'S EXHIBIT 2

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 3d day of April 2018.

Elizabeth Griffin

Notary Public

My commission expires 3-12-2020

Notary Public
State of Oklahoma
ELIZABETH GRIFFIN
TULSA COUNTY
COMMISSION #08002926
Comm. Exp. 03-12-2020

SUPREME COURT OF THE MUSCOGEE (CREEK) NATION

KALYN FREE

Petitioner,

v.

THE HONORABLE GREGORY H. BIGLER, District Judge,

Respondent,

And

MUSCOGEE (CREEK) NATION,

Real Party in Interest.

Case No. _____

SUPREME COURT
FILED
FEB 22 2018 JWA
COURT CLERK
MUSCOGEE (CREEK) NATION

APPLICATION TO ASSUME ORIGINAL JURISDICTION AND PETITION FOR WRITS OF PROHIBITION AND MANDAMUS

Petitioner Kalyn Free, by and through undersigned counsel, respectfully requests this Court assume original jurisdiction and grant her requested Petition for Writ of Prohibition and Mandamus prohibiting the Hon. Gregory H. Bigler, District Judge of the Muscogee (Creek) Nation, from exercising jurisdiction in this action over Petitioner Free, a non-citizen of the Muscogee (Creek) Nation, and requiring Judge Bigler to dismiss this action pursuant to Petitioner's pending Motion to Dismiss before the District Court in *Muscogee (Creek) Nation v. Bruner, et al.*, Docket No. DV-2017-129GB, currently pending before the District Court of the Muscogee (Creek) Nation. In support thereof, Petitioner states:

PLAINTIFF'S EXHIBIT 3

INTRODUCTION

In *Muscogee (Creek) Nation v. Bruner, et al.*, Docket No. DV-2017-129GB, the Muscogee (Creek) Nation (herein the "MCN") has filed suit regarding the alleged actions of Bim Stephen Bruner, the Kialegee Tribal Town, Red Creek Holdings, LLC, and others (herein the "*Muscogee (Creek) Action*"). The suit alleges unlawful gaming operations on restricted property in Broken Arrow, Oklahoma.

Regarding the named Petitioner here—one of the named defendants in the *Muscogee (Creek) Action*—the MCN made very minimal allegations. For instance, the MCN alleged that Petitioner Free "individually enabled and/or participated in the development of Red Creek Casino." There are no allegations of *how* Petitioner Free "enabled and/or participated" and there cannot be, because it never occurred. Additionally, the MCN made the contention that Petitioner Free is a shareholder in the Oklahoma business entity "Bruner Investments," presumably. However, it is possible Bruner Investments, Inc., but she has no interest therein. *See* Exhibit 1 (Aff. J. Adelman). The MCN alleged that "Bruner Investments has been identified through discovery as a 'Developer' of the Red Creek Casino." The impetus for this allegation was a single reference on a very early blueprint that incorrectly identified "Bruner Investments" as developer of the challenged facility.

The *Muscogee (Creek) Action* purports claims for relief under: (1) violation of MCN gaming law NCA 12-184, which comprises the entirety of Title 21 of the MCN Code (herein the "MCNCA"); (2) violation of the Indian Gaming Regulatory Act; (3) violation of the Gaming Compact between the MCN and the State of Oklahoma; and (4) nuisance

for violation of MCN gaming law NCA 12-184. The MCN's only allegation on these counts is that the development of the "Red Creek Casino" is not licensed by the MCN (rather than the Kialegee Tribe).

The District Court of the Muscogee (Creek) Nation clearly lacks jurisdiction over Petitioner Free and this Court should assume original jurisdiction and prohibit the Hon. Gregory H. Bigler, District Judge of the Muscogee (Creek) Nation, from exercising jurisdiction in this action over her, a non-citizen of the Muscogee (Creek) Nation, and require Judge Bigler to dismiss this action as to her pursuant to Petitioner's pending Motion to Dismiss before the District Court. Petitioner Free is not a member of the MCN, and there is no allegation that Free engaged in any conduct in Indian country. As a result, the District Court of the Muscogee (Creek) Nation lacks jurisdiction. Except where a tribe is regulating its own members, "[t]he 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). "[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana v. United States*, 450 U.S. 544, 565 (1981).

In *Montana*, the United States Supreme Court recognized two narrow exceptions to a tribe's limited authority over non-Indians. *Id.* at 565. Under the first exception, 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 dealings, contracts, leases, or other arrangements." *Id.* at 565 (internal citations omitted). 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 566 (internal citations omitted). However, both exceptions are inapplicable here, because there are – no alleged actions as to Petitioner and she has no interest in Bruner Investments, Inc. Moreover, neither of the *Montana* exceptions would apply even if the alleged conduct *had* occurred in Indian country. None of the alleged conduct relates to the Tribe's interest in regulating self-government or internal relations, a critical threshold showing required for either exception to apply. Nor does the alleged conduct pose a direct threat to tribal sovereignty. Clear United States Supreme Court precedent establishes that, in such circumstances, the Tribal Court has no jurisdiction.

Prohibition and Mandamus are necessary to stop the lawsuit against Petitioner Free now, before an enormous amount of time and money is wasted on litigation in a forum where jurisdiction is demonstrably lacking and to protect Free's professional and personal reputation from additional damage. Further, Respondent Judge Gregory H. Bigler stayed the *Muscogee Creek Action* before hearing Petitioner Free's Motion to Dismiss, denying Petitioner an opportunity to challenge the District Court of the Muscogee (Creek) Nation's jurisdiction over her, whether through the District Court or through appeal to this Court. As a result, unless this Court intervenes, Petitioner will face years of protracted and enormously burdensome litigation over her and additional damages.

ARGUMENT AND AUTHORITIES

This Court may "assume[ ] original jurisdiction in the exercise of our general superintending control over all inferior courts and all agencies, commissions and boards." *Maree v. Neuwirth*, 2016 OK 62, ¶ 6, 374 P.3d 750, 752. This superintending control includes the ability to correct an abuse of discretion (through writ of prohibition), or to compel action by the inferior court (through a writ of mandamus). *Id.* In proceedings requesting extraordinary writs, the petitioner possess the burden "to show facts necessary to support the requested writ." *Scott v. Peterson*, 2005 OK 84, ¶ 20, 126 P.3d 1232, 1237 (relying on *James v. Rogers*, 1987 OK 20, 734 P.2d 1298).

For a writ of prohibition to issue, the "petitioner must show: 1) a court, officer, or person has or is about to exercise judicial or quasi-judicial power; 2) the exercise of said power is unauthorized by law; and 3) the exercise of that power will result in injury for which there is no other adequate remedy." *Scott*, 2005 OK 84 at ¶ 20 (relying on *James*, 1987 OK 20 at ¶ 5). For a writ of mandamus to issue, the petitioner must show: "1) a clear legal right vested in the petitioner, 2) refusal to perform a legal duty which does not involve the exercise of discretion, and 3) adequacy of the writ and inadequacy of other relief." *Draper v. State*, 1980 OK 117, ¶ 13 (relying on *Witt v. Wentz*, 1930 OK 116, ¶ 0, 286 P. 796). Mandamus is improper where the petitioner seeks to compel action that is discretionary, unless there is a clear abuse of discretion. *See Draper*, 1980 OK 11 at ¶ 13. Mandamus and Prohibition are "ancient form[s] of common law judicial relief," and it is consequently no accident that the standards for judging its application are uniform across jurisdictions. *See Chuong Lam v. Hufford*, 2012 U.S. Dist. LEXIS 30463 at *18-22 (M.D.

Pa. Feb. 13, 2012) (hereinafter "*Chuong*"). The Oklahoma State standard for judging requests for such writs substantively parallels the federal standard:

> There are two prerequisites to issuing a writ of mandamus. [Petitioners] must show that (1) they have no other adequate means to attain their desired relief; and (2) their right to the writ is clear and indisputable. *See In re Patenaude*, 210 F.3d 135, 141 (3d Cir.2000); *Aerosource, Inc. v. Slater*, 142 F.3d 572, 582 (3d. 1988).

Chuong at *19 (*quoting Hinkel v. England*, 349 F.3d 162, 164 (3d Cir. 2003))

I. THE MCN CLEARLY AND INDISPUTABLY LACKS JURISDICTION.

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); *McKesson Corp. v. Hembree*, 2018 U.S. Dist. LEXIS 3700 at *9 (N.D. Okla. Jan. 9, 2018) (finding lack of tribal court jurisdiction where pharmaceutical distributors distributed products within the tribe's jurisdictional area). 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*, 554 U.S. at 327 (quotations omitted); *McKesson Corp.*, 2018 U.S. Dist. LEXIS 3700 at *9. 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). 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). Due to this restriction on tribal

governance, a "tribe's adjudicative 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).

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; *McKesson Corp.*, 2018 U.S. Dist. LEXIS 3700 at *10. 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. 436, 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). Here, since Petitioner Free is a non-citizen of the MCN, jurisdiction can only be found in one of the two exceptions to *Montana*, neither of which are applicable here.

A. Petitioner Free Has Not Entered Into A Relationship With The MCN Such That The MCN Would Obtain Jurisdiction Over Her.

Under the first exception, 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 dealings, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565 (internal citations omitted); *McKesson Corp.*, 2018 U.S. Dist. LEXIS 3700 at *19. The underlying principal of this exception lies in the fact that, because non-tribal members "have no say in the laws and regulations that govern tribal territory[,] . . . those 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); *McKesson Corp.*, 2018 U.S. Dist. LEXIS 3700 at *19. Moreover, the exceptions are "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).

Here, Petitioner Free has no relationship whatsoever with the MCN. Petitioner Free is a citizen of the Choctaw Nation. *See* Exhibit 2 (Aff. K. Free). Petitioner Free has never contracted with the MCN or entered into any consensual relationship with the MCN. Her only connection to the property at issue in the *Muscogee (Creek) Action* is her status as spouse to Bim Stephen Bruner. *Id.* at 1. However, since the property is restricted property, Petitioner Free cannot own, inherit, or otherwise control the property. *Id.* at 1.

B. <u>The Alleged Conduct Does Not Threaten The Subsistence Of The MCN.</u>

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 566 (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 v. A-1 Contrs.*, 520 U.S. 438, 459 (1997); *McKesson Corp.*, 2018 U.S. Dist. LEXIS 3700 at *24. 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.

Here, Petitioner Free's alleged conduct does not threaten the subsistence of the MCN. While the MCN may have an interest in restricted property under their control, particularly in controlling gaming on that property, Petitioner Free has no control over, or interest in, the subject property. As noted above, the subject property is restricted property, and Petitioner Free cannot inherit, own, or otherwise control the property. *Id.* at 1.

C. Petitioner Free Is Not Personally Liable For The Actions Of "Bruner Investments."

As noted above, the MCN has filed suit in the *Muscogee (Creek) Action* against Petitioner Free in relation to her alleged ownership interest in "Bruner Investments," another named party in the *Muscogee (Creek) Action*. "Bruner Investments," is an entity that does not exist by that name. There are three possible entities that MCN could mean by "Bruner Investments." Bruner Investments, Inc., Bruner Investments, LLC, and Free-Bruner Investments, LLC, are all Oklahoma business entities. Petitioner Free only holds an ownership interest in Bruner Investments, LLC, and Free-Bruner Investments, LLC. Neither of which have been involved with this restricted property in any way nor has any relationship whatsoever with MCN. *See* Exhibit 2 (Aff. K. Free) and Exhibit 1 (Aff. J. Adelman).

Assuming "Bruner Investments" is one of the limited liability companies, under Oklahoma Law, a corporation or limited liability company "is regarded as a legal entity, separate and distinct from the individuals comprising it." *Fanning v. Brown*, 85 P.3d 841, 846 (Okla. 2004). The Courts can only pierce that separation of entity and owner in limited circumstances. For instance, courts may disregard the business form and "hold stockholders personally liable for corporate obligation or corporate conduct under the legal doctrines of fraud, alter ego and when necessary to protect the rights of third persons and accomplish justice." *Id.* at 846. None of these situations are present here, nor has the MCN alleged that they are.

II. PETITIONER FREE HAS NO OTHER ADEQUATE REMEDY AND WILL SUFFER IRREPRABLE INJURY WITHOUT THE INTERVENTION OF THIS COURT.

A remedy is inadequate in instances "where no appeal lies, or where the remedy by appeal is inadequate." *See State ex rel. Comm'rs of the Land Office v. Dist. Court*, 95 P.2d 851, 853 (Okla. 1939). Here, the District Court has presented Petitioner with an instance from which she cannot appeal—at least not right now. Respondent Judge Gregory H. Bigler stayed the *Muscogee Creek Action* before hearing Petitioner Free's Motion to Dismiss, denying Petitioner an opportunity to challenge the District Court of the Muscogee (Creek) Nation's jurisdiction over them, whether through the District Court or through appeal to this Court. Additionally, the District Court has yet to actually enter an appealable final written order memorializing its stay of proceedings, which has limited Petitioner Free's ability to appeal the District Court's unlawful exercise of jurisdiction.

Additionally, at least in the instance of injunctive relief, courts have found that, where a Court clearly lacks jurisdiction over a party, the mere opportunity of a later appeal is insufficient to compensate a party for their expenditure of "unnecessary time, money, and effort litigating . . .[in] a court which likely does not have jurisdiction." *Crowe & Dunlevy*, 640 F.3d at 1157 (internal quotation marks omitted); *see also Wells Fargo Bank, N.A. v. Maynahonah*, 2011 U.S. Dist. LEXIS 99635 at **36-37 (W.D. Okla. Sept. 2, 2011) (finding irreparable harm). As the District Court for New Mexico has explained:

> Without an injunction, UNC would be forced to appear and defend in Tribal Court; were it not to appear, the Navajo plaintiffs there could obtain default judgments that the tribe might attempt to execute against UNC's interests on the reservation. The burden on UNC of defending numerous Tribal Court actions would be substantial. Any judgments obtained against UNC after trial might also be executed by the tribe. In such a closed system, it would be difficult if not impossible for UNC to find recourse to another forum that could protect it from the tribe's overreaching jurisdiction. The only way adequately to protect UNC from this potentially irremediable injury is to enjoin the defendants from proceeding further in Tribal Court.

UNC Resources, Inc. v. Benally, 514 F.Supp. 358, 363 and 1053 (D.N.M. 1981); *accord Kerr-McGee Corp. v. Farley*, 88 F.Supp. 2d 1219, 1233 (D.N.M. 2000) ("The Court finds that Kerr-McGee will suffer irreparable damage if Tribal Claimants are not enjoined from proceeding in Navajo Court, as demonstrated by the expense and time involved in litigating this case in tribal court."); *Chiwewe v. Burlington N. & Santa Fe Ry. Co.*, 2002 WL 31924768 at *2 (D.N.M. Aug. 15, 2002).

PRAYER FOR RELIEF

Petitioner Free requests this Court grant her Petition for Writ of Prohibition and Mandamus and prohibit the Hon. Gregory H. Bigler, District Judge of the Muscogee

(Creek) Nation from exercising jurisdiction over her and requiring Judge Bigler to dismiss this action pursuant to Petitioner's pending Motion to Dismiss before the District Court in *Muscogee (Creek) Nation v. Bruner, et al.*, Docket No. DV-2017-129GB, currently pending in the District Court of the Muscogee (Creek) Nation.

Respectfully submitted,

FRASIER, FRASIER & HICKMAN, LLP

By: _____

George Miles, OBA#11433
Muscogee (Creek) Nation Bar #692
James E. Frasier, OBA#3108
Muscogee (Creek) Nation Bar #505
Steven R. Hickman, OBA #4172
Muscogee (Creek) Nation Bar #895
1700 Southwest Blvd.
Tulsa, OK 74107
Phone: (918) 584-4724
Fax: (918) 583-5637
E-mail: frasier@tulsa.com

-and-

Trevor L. Reynolds, OBA #19363
Muscogee (Creek) Nation Bar #890
1700 Southwest Boulevard
TULSA LAW GROUP
Tulsa, OK 74107-1730
(918) 584-4724
(918) 583-5637 *fax*

CERTIFICATE OF MAILING

I hereby certify that on the 22 day of February, 2018, a true and correct copy of the above and foregoing was deposited in the United States mail with the proper postage affixed thereto and addressed to:

Shelly Harrison, Prosecutor
Muscogee (Creek) Nation
P.O. Box 580
Okmulgee, OK 74447

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

VIA HAND DELIVERY
The Honorable Gregory H. Bigler

George Miles

AFFIDAVIT

I, Kalyn Free, do hereby state that I am a citizen of the Choctaw Nation. I am neither a citizen or eligible for citizenship in the Muscogee (Creek) Nation (MCN).

I have been a licensed attorney in the state of Oklahoma since 1987.

I have never entered into any contract, commercial dealing, lease, or any other consensual relationship with the MCN.

I married Bim Stephen Bruner, a citizen of the MCN, on September 5, 2009.

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."

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.

I was not involved with the development of the Bruner Parcel. I have no interest in Bruner Investments, Inc. 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.

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

Kalyn Free

Kalyn Free

2.22.18

Date

Notary Public

Subscribed and sworn before me this 22nd day of February 2018.

My commission expires 3-12-2020

Notary Public
State of Oklahoma
ELIZABETH GRIFFIN
TULSA COUNTY
COMMISSION #08002926
Comm. Exp. 03-12-2020

AFFIDAVIT

I, James R. Adelman, of lawful age, do hereby state that I am duly enrolled to practice before the Internal Revenue Service, License Number 70785, licensed to prepare, file tax returns and represent taxpayers in all tax matters.

As an Enrolled Agent I have prepared and submitted to the Internal Revenue Service and the State of Oklahoma all required tax returns of the following since the inception of their businesses:

Bruner Investments, Inc.
Free-Bruner Investments, LLC
Bruner Investments, LLC

Bruner Investments, Inc. is an Oklahoma Corporation in good standing with the Secretary of State of Oklahoma. Kalyn Free has no interest in Bruner Investments, Inc.

Free-Bruner Investments, LLC is an Oklahoma Limited Liability Company in good standing with the Secretary of State of Oklahoma that operates an Event Center in Tahlequah, Oklahoma and is owned as follows:

Kalyn C. Free – 50%
Bim Stephen Bruner – 50%

Free-Bruner Investments, LLC is not, nor has not, been involved in any way with the the restricted property known in these proceedings as the "Bruner Parcel" and has no relationship with the Muscogee (Creek) Nation.

Bruner Investments, LLC is an Oklahoma Limited Liability Company in good standing with the Secretary of State of Oklahoma that has no assets or liability and has not engaged in any business activity. It is owned as follows:

Bim Stephen Bruner – 50%
Kalyn C. Free – 50%

Bruner Investments, LLC is not, nor has not, been involved in any way with the the restricted property known in these proceedings as the "Bruner Parcel" and has no relationship with the Muscogee (Creek) Nation.

James R. Adelman, EA

2/22/2018

Date

State of Oklahoma)
) ss
County of Tulsa)

On the 22nd day of February, 2018, personally appeared before me, a Notary Public, James R. Adelman, known to me to be the identical person that executed the above and foregoing document as his free and voluntary act and deed.

Notary Public

My Commission Expires:

TIM A. JOHNSTON
NOTARY PUBLIC - STATE OF OKLAHOMA
MY COMMISSION EXPIRES JANUARY 8, 2019
COMMISSION #15000139

IN THE MUSCOGEE (CREEK) NATION SUPREME COURT

IN RE APPLICATION OF:	SUPREME COURT FILED
KALYN FREE,	MAR 01 2018 JWA
Petitioner,	COURT CLERK MUSCOGEE (CREEK) NATION
v.	Case No.: **Unassigned**
THE HONORABLE GREGORY H. BIGLER, District Court Judge,	(District Court Case No. DV-2017-129GB)
Respondent,	
AND	
MUSCOGEE (CREEK) NATION,	
Real Party in Interest.	

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 MVSKOKE 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."

PLAINTIFF'S EXHIBIT 4

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 Harjo-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