

FILED

2017 OCT -6 PM 4: 25

THE DISTRICT COURT
OF THE CHEROKEE NATION

THE CHEROKEE NATION,)
)
 Plaintiff,)
)
 v.)
)
 MCKESSON CORPORATION;)
 CARDINAL HEALTH INC.; CARDINAL)
 HEALTH 110, LLC;)
 AMERISOURCEBERGEN DRUG)
 CORPORATION; CVS HEALTH)
 CORPORATION; CVS PHARMACY,)
 INC.; WALGREENS BOOTS ALLIANCE,)
 INC.; WALGREEN CO.; WAL-MART)
 STORES, INC..)
)
 Defendants.)

THE DISTRICT COURT
OF THE CHEROKEE NATION
WENDY WOODYEA
CLERK


Case No. CV-2017-203

**DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION
TO WAIVE FILING OF APPEAL OR SUPERSEDEAS BOND**

The Cherokee Nation asks this Court to issue a non-final, advisory ruling on the appeal bond. Defendants¹ respectfully object to the Nation's use of this Court's time and process in this fashion. Attached as Exhibit "A" is the federal court filing made by the undersigned on October 6, 2017. The Court should deny the Nation's motion and continue the stay to allow the federal court to rule.

¹ Defendants have reserved and continue to reserve their rights to assert that the Cherokee Nation and this Court lacks the authority and jurisdiction to regulate their conduct, or to prosecute or hear the above-captioned litigation. The Nation and Court lack jurisdiction under federal law and both subject-matter and personal jurisdiction under tribal law. Defendants do not consent to the jurisdiction of the Nation or this Court.

Respectfully submitted,



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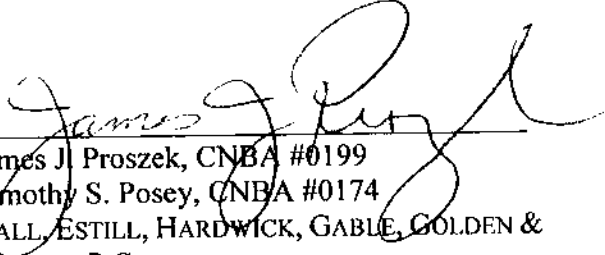
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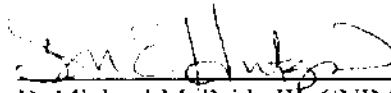
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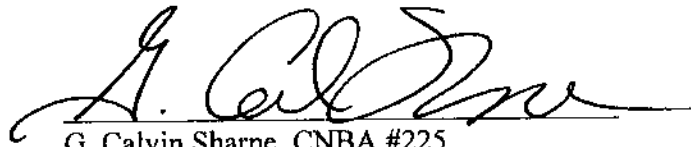
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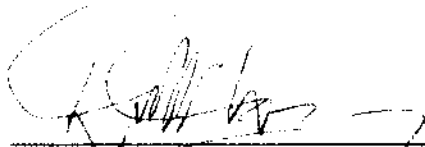
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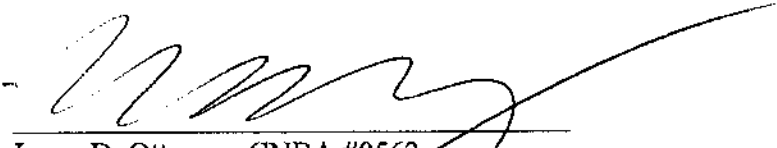
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* *pro hac vice motions pending*

** *application to Cherokee Bar pending*

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I hereby certify that, on this 6th day of October, 2017, I deposited a true and exact copy of the foregoing in the United States Mail, postage pre-paid addressed to the following:

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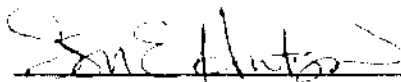
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**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

MCKESSON CORPORATION, et al.)
)
 Plaintiffs,)
)
 v.)
)
 TODD HEMBREE, ATTORNEY)
 GENERAL OF THE CHEROKEE)
 NATION, in his official capacity, et al.,)
)
 Defendants.)

Case No. 17-CV-00323-TCK-FHM

**PLAINTIFFS' RESPONSE TO
MEMORANDUM OF DEFENDANT TODD HEMBREE**

Plaintiffs respectfully submit the following response to the Memorandum of Defendant Attorney General Todd Hembree in Response to the Court's Order of September 12, 2017 (Dkt. #124). In that Order, the Court asked Defendant Todd Hembree ("AG Hembree") to brief three specific issues raised by the application of the Cherokee Nation's newly enacted Comprehensive Access to Justice Act of 2016 ("CAJA"):¹ (1) the requirement to post a bond in tribal court; (2) the release of that bond before federal review of jurisdiction; and (3) sovereign immunity as a bar to recovery of that bond once released. (Order, Dkt. #118, at 2.) AG Hembree's response purports to address only the first of these questions and ignores the other two. Specifically, AG Hembree states that he "does not intend to seek the posting of a supersedeas or appeal bond" and notes that he has unilaterally moved for an order from the tribal court to waive the requirement of a bond. (Mem. at 3.) AG Hembree's response fails to rebut, much less to cure, the irreparable harm Plaintiffs have shown they will experience unless a preliminary injunction is issued.²

¹ A complete copy of the CAJA can be found at Exhibit 1B to Plaintiffs' Motion for Preliminary Injunction (Dkt. #13-3).

² While this brief addresses the bond, additional irreparable harm is outlined in Plaintiffs' prior briefing. (See Dkt. #13 & #104.)



First, not only has AG Hembree's motion to waive the bond requirements not been granted by the tribal court, his request is inconsistent with the plain language of CAJA. AG Hembree's response omits that those requirements are stated with mandatory language binding on all judgment debtors (other than the Tribe)³ as a necessary condition of obtaining a stay of judgment:

- “The stay takes effect *when the court approves the bond.*” 12 C.N.C.A. § 20(A) (Dkt. #13-3 at 11) (emphasis added).
- “*Unless an undertaking is given*, the perfecting of an appeal *shall not stay enforcement* of the judgment . . . if the judgment . . . is for any of the following: a. Money or the payment of money, whether consisting of a special fund or not” *Id.* § 20(C)(1) (Dkt. #13-3 at 11-12) (emphasis added).
- “The undertaking *shall be on condition* that if the judgment . . . is affirmed . . . , the party ordered to pay *shall pay the amount*” *Id.* § 20(C)(2) (emphasis added).
- “The undertaking *shall be* for double the amount of the judgment,” which will include costs and attorney fees. *Id.* § 20(C)(3), (5)-(6) (emphasis added).
- “A decision of the Supreme Court of the Cherokee Nation shall lift the stay and the bond *shall be released* to the prevailing party immediately.” *Id.* § 20(D) (emphasis added).

Without quoting any of this language, AG Hembree concedes only that CAJA “suggests” that the new law requires the filing of a bond to obtain a stay of execution. (Mem. at 4.) However, AG Hembree posits that because the law gives the tribal district court the power to order a bond,⁴ it must also have the power to award a stay without a bond or to waive it. This view is inconsistent with the clear language of CAJA cited above providing that, without a bond, the appeal “shall

³ “The Court must not require a bond . . . when granting a stay on an appeal by the Cherokee Nation” 12 C.N.C.A. § 20(B)(1) (Dkt. #13-3 at 11).

⁴ “Upon the filing of the Petition in Error of a civil money judgment, the District Court may order the filing of a bond” 12 C.N.C.A. § 20 (Dkt. #13-3 at 11).

not stay enforcement” of a judgment. The only exception authorized by CAJA requires an order of the Tribe’s Supreme Court, apparently on a demonstration of an inability to post the bond. 12 C.N.C.A. § 20 (Dkt. #13-3 at 11). AG Hembree has not asked the Tribe’s Supreme Court to waive this requirement, and any such application would be premature prior to the entry of a judgment showing that the requirements of Cherokee law for waiver are met.

Second, even if the tribal district court grants AG Hembree’s motion, the ruling will be non-final and subject to reconsideration at any time before judgment.⁵ It would also be subject to the supervisory powers of the Tribe’s Supreme Court through original jurisdiction or an eventual appeal.⁶ Any waiver of CAJA’s bond requirements may be revisited at the request of a new tribal council, a new chief, a new attorney general, or this attorney general, and be reconsidered by Cherokee Nation judicial officers.

Third, the agreement to waive would not be binding and enforceable in this Court against the Tribe, a non-party to the federal proceedings. Although AG Hembree states that he will not seek to enforce any judgment “until all federal court review . . . is complete” (Mem. at 4), he has not addressed, much less offered, the one thing that would allow that representation to bind the Tribe: a waiver of the Tribe’s sovereign immunity. Indeed, AG Hembree lacks authority unilaterally to waive the Tribe’s sovereign immunity. As does the tribal court. The Tribe’s Sovereign Immunity Act, 73 C.N.C.A. §§ 1, *et seq.*, requires a legislative act or resolution of the

⁵ “[A]ny order . . . that adjudicates fewer than all the claims . . . does not end the action as to any of the claims . . . and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties’ rights and liabilities.” Fed. R. Civ. P. 54(b); 12 C.N.C.A. § 5(A) (adopting the Federal Rules of Civil Procedure). “Thus, every order short of a final decree is subject to reopening at the discretion of the district judge.” *Elephant Butte Irrigation Dist. v. U.S. Dep’t of Interior*, 538 F.3d 1299, 1306 (10th Cir. 2008) (internal quotation marks omitted).

⁶ “The original jurisdiction of the Supreme Court shall extend to a general supervisory control over all lower courts.” Cherokee Nation Const. art. VIII, § 4. “The appellate jurisdiction of the Supreme Court shall extend to all cases at law and in equity arising under the laws or Constitution of the Cherokee Nation.” *Id.*

Tribal Council for waivers of sovereign immunity. *E.g., id.* at § 4(B). Tribal Council member David Walkingstick raised concerns at an April 27, 2017 meeting of the Council's Rules Committee regarding the possibility of a countersuit by the Defendants. Assistant Attorney General Chrissi Nimmo provided assurances in response that the Tribe's sovereign immunity would bar any such action.⁷ The Tribe has not taken the necessary steps to waive its sovereign immunity and consent to the jurisdiction of a state or federal court to enforce any agreement not to execute a tribal court judgment or to return any bond ordered by the Tribe's district or supreme courts.

Fourth, the Tribe's sovereign immunity could serve as an absolute bar to recovery of any funds Plaintiffs here may be required to pay in order to appeal an adverse decision to the Tribe's Supreme Court. Although AG Hembree takes offense at the suggestion that the Tribe would not authorize recovery in a federal action of a bond collected under CAJA, this is exactly the scenario CAJA—a statute he drafted—is designed to create: a party cannot obtain a stay of judgment without posting a bond that is immediately payable upon affirmance by the Tribe's Supreme Court. The Tribe's sovereign immunity means that, once that happens, there is no court that can hear a demand by Plaintiffs for a return of their funds.

Fifth, and finally, there is no merit to the Tribe's contention that the harm to Plaintiffs is speculative because it depends on other intervening events. Plaintiffs will experience irreparable harm if they are required to exhaust tribal remedies because, under the plain terms of CAJA,

⁷ The video of this meeting is available at the Tribe's Legistar website, <https://cherokee.legistar.com/MeetingDetail.aspx?ID=539700&GUID=449BBA57-E757-4F1E-A2F6-89EA4001EA78&Options=&Search=> and at <https://www.youtube.com/watch?v=bl88icC4324> (last visited Oct. 4, 2017). The exchange between Councilor Walkingstick and Assistant Attorney General Nimmo occurs from approximately 24:44 to 25:15 of the video.

their next opportunity to seek federal review of jurisdiction will be after an adverse judgment, an appeal, and the return of the bond to the Tribe. Just as with the Tenth Circuit's affirmance of this Court's decision in *Crowe & Dunlevy, P.C. v. Stidham*, any further attempt to overturn that judgment through federal review could well be in vain due to the Tribe's sovereign immunity. 640 F.3d 1140, 1157-58 (10th Cir. 2011).

Accordingly, for these and the other reasons set forth in Plaintiffs' prior briefing, the Tribe plainly lacks jurisdiction to prosecute or adjudicate the *Cherokee Nation* Action, exhaustion is not required, and a preliminary injunction should issue.

DATED October 6, 2017

Respectfully submitted,

s/Richard Schirtzer

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s/Susan E. Huntsman