IN THE SUPREME COURT OF THE CHEROKEE NATION

CHEROKEE NATION,	)	
	)	
	)	
Appellant,	)	
	)	
	)	
v.	)	**Case No. SC 2016-07**
	)	
DAVID COMINGDEER,	)	
	)	
Appellee.	)	

MOTION TO DISMISS APPEAL

Appellee Comingdeer, ("Comingdeer") moves the Court to dismiss Cherokee Nation's ("Nation") appeal of the August 16, 2018 District Court Order , denying the Nation's Motion to Reconsider the District Court's May 3, 2018 Order Overruling Defendant's Motion to Dismiss and Ruling on Other Pending Motions.

The Nation moved the District Court to dismiss several of Comingdeer's causes of action on grounds of sovereign immunity. The Nation did not move to dismiss a cause of action for Whistleblowing pursuant to the "Public Integrity and Whistleblower Protection Act" LA 13-4. After extensive briefing, the District Court denied the Nation's Motion. It is undisputed that even if the District Court had dismissed the causes of action that the Nation objected to, a cause of action for Whistleblowing would remain and the case is set for jury trial on October 29, 2018.

I. ARGUMENT AND AUTHORITY

Proposition One: The Nation's appeal is not a final judgment and is premature and speculative.

The Nation may only appeal a final Judgment and may not piecemeal Comingdeer's District Court case by serial appeals. The Nation can only speculate that Comingdeer will prevail at jury trial. Only after disposition of *all* of Comingdeer's causes of action by the District

Court, can there be a final appealable judgment in this case. If the Nation prevails at jury trial, there is nothing to appeal; if the Nation does not prevail, it may appeal the causes of action denied by the District Court. A final judgment must adjudicate all the claims and all the parties' rights and liabilities- not a fraction of them. *See* Fed. R. Civ. P. 54 (b). In other words, this Court should dismiss this appeal because it is an impermissible interlocutory appeal, not an appeal of a final judgment.

Proposition Two: The Nation failed to secure the District Court's certification of a final judgment in violation of Fed. R. Civ. P. 54 (b).

The Nation failed to comply with Fed. R. Civ. P. 54 (b), which requires the District Court to make a determination that there is no just reason to delay entering a final judgment when a case has multi-causes of action.[1] The Nation failed to seek a final judgment before the District Court and failed to seek certification by the District Court that an interlocutory appeal of selected causes of action would be prudent.

Certification for immediate appeal of final judgment of dismissal entered on less than all plaintiff's claims is not appropriate, where entry of judgment as to the previously dismissed claims would likely result in the appellate court considering the same factual scenario on more than one occasion and that several claims in complaint were still pending before district court, and parties to those claims were identical to the parties in the dismissed claims that would be heard on appeal. *See Martin v. Boyce*, M.D.N.C.2003, 217 F.R.D. 368. That is the case here.

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[1] Fed. R. Civ. P. 54 (b) Judgment on Multiple Claims or Involving Multiple Parties. When an action presents more than one claim for relief--whether as a claim, counterclaim, crossclaim, or third-party claim--or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

Piecemeal appeals of judgments entered in multi-claim lawsuits are disfavored, *See Gonzalez Figueroa v. J.C. Penney Puerto Rico, Inc.*, C.A.1 (Puerto Rico) 2009, 568 F.3d 313. Under Fed. R. Civ. P. 54(b), when more than one claim for relief is presented, the court may direct entry upon final judgment as to one or more but fewer than all of claims, *only* upon an express determination that there is no just reason for delay and an express direction for entry of judgment. The entry of final judgment is not to be done lightly, particularly when action remains pending as to all parties. *See Brunswick Corp. v. Sheridan*, C.A.2 (N.Y.) 1978, 582 F.2d 175.

There has been no final Judgment and no order disposing of all causes of action entered in this case. Because the Nation has not sought nor has the District Court entered an order permitting an interlocutory appeal of a fraction of the causes of action pending in the District Court, this Court must dismiss this appeal because no final judgement has been entered.

II. CONCLUSION

Since Comingdeer's lawsuit before the District Court has multi-claims, the Nation can only file an appeal upon express entry of Judgement on several claims, which has not been done in this case. In this case, it would be a waste of judicial resources and imprudent to allow the Nation to piecemeal the case with serial, improper interlocutory appeals, repeatedly hearing the same facts with the same parties. This case is set for jury trial on October 29, 2018 and only after disposition of all the causes of action may there be a final appealable judgement. Therefore, the Court should dismiss the Nation's appeal as premature and in violation of Fed. R. Civ. P. 54 (b).

Submitted this 4th day of September 2018.

_____/ss/_____
Chadwick Smith
CNBA # 08
22902 S. 494 Road

Tahlequah, OK 74464
chad@chadsmith.com
918 453 1707
Attorney for Plaintiff:
David Comingdeer

Certificate of Delivery

I, Chad Smith, hereby certify that on this 4th day of September 2018, a copy of the above document was emailed pursuant to SC Rule 7 to the following:

_____/ss/_____
Chadwick Smith

John C. Young
Paiten Taylor-Qualls
Assistant Attorney General
Cherokee Nation
P.O. Box 1533
Tahlequah, OK 74465
John-young@cherokee.org
Paiten-qualls@cherokee.org