BEFORE THE SUPREME COURT OF THE CHEROKEE NATION

HEATHER LOVETT, Appellant, v. **CHEROKEE NATION BUSINESSES, LLC,** Appellee.	Supreme Court Case No. SC-2018-03 District Court Case No. CV-2017-272 Employee Appeals Review Panel No. 17-05

CHEROKEE NATION BUSINESSES' MOTION TO DISMISS APPELLANT'S PETITION IN ERROR

COMES NOW Appellee Cherokee Nation Businesses, LLC ("CNB"), by and through the undersigned counsel, and hereby enters this *Motion to Dismiss* under the law of the case doctrine in response to Appellant Heather Lovett's ("Lovett") *Petition In Error* appealing the District Court's March 2, 2018 Order affirming the Employee Appeals Review Panel ("EARP") Order, which upheld the termination of Lovett. CNB's *Motion to Dismiss* complies with Cher. Nat. Sup. Ct. R. 30, 43.

LAW OF THE CASE DOCTRINE

The law of the case doctrine is a well-established common-law doctrine that "prevents a party from serially litigating an issue already presented and decided on appeal in the same proceeding." *State v. Parry*, 51 Kan. App. 2d 928, 928, 358 P.3d 101 (2015). This doctrine promotes judicial efficiency by preventing "relitigation of the same issues within successive stages of the same suit." *State v. Collier*, 263 Kan. 629, 634, 952 P.2d 1326 (1998).

Under the law of the case doctrine, "once an issue is decided by the [appellate] court, it should not be relitigated or reconsidered unless it is clearly erroneous or would cause manifest

injustice." *Id.* Essentially, this doctrine prevents litigants from taking unlimited bites at the proverbial apple by preventing "re-examination of [the] question absent a showing of subsequent evidence or change of law." *Matter of Yeampierre v Gutman*, 57 A.D.2d 898, 899 [1977]. Even an appeal to the highest court should not be relitigated absent such showing because "[a]n appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court, as well as on the appellate court." *J-Mar Serv. Ctr., Inc. v. Mahoney, Connor & Hussey*, 45 AD3d 809 (2d Dept. 2007).

To determine if Lovett's petition should be dismissed under the law of the case doctrine, this Court must examine the history of this case.

STATEMENT OF THE CASE

Lovett was terminated from employment by CNB for violations of CNB's Substance Abuse and Drug Testing policy, CNB's Standards of Conduct policy, and the Employee Administrative Procedures Act §1010(A) after selling her boss, Larry Annett, a prescription fentanyl pain patch. At her hearing before the EARP Lovett testified that, during an interview prior to her suspension, she admitted to CNB Loss Prevention Agent Larry Clayton that she had sold Annett a prescription fentanyl pain patch. (**Lovett Trans. p. 239, lns. 10- 17, February 24, 2017**.) On appeal to the District Court, CNB argued that (1) Annett's statements were not hearsay because they were offered for probative value, rather than the truth of the matter asserted, (2) Lovett was not denied the opportunity to confront and cross-examine her accuser because she became her own accuser when she admitted to selling Annett a prescription fentanyl patch, and (3) CNB offered more than enough evidence to sustain Lovett's termination.

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PROCEDURAL HISTORY

Lovett timely filed an appeal of adverse employment action to the EARP on November 30, 2016. Two days later, on December 2, 2016, Lovett filed a *Petition for Declaratory Judgment and Injunctive Relief* before the Cherokee Nation District Court asking the Court "to issue a temporary injunction restoring her employment until CNB provide[d] requisite pretermination due process." (***Lovett v. CNB* CV-2016-663, Petition for Declaratory Judgment and Injunctive Relief**) On December 22, 2016, after a hearing on matter, the District Court denied Appellant's request for temporary injunction, finding that Lovett did receive adequate pre-termination due process. The District Court stayed the balance of the case pending Appellant's appeal before the EARP, leaving this case unresolved. (***Lovett v. CNB* CV-2016-663, District Court Minute Order**)

Lovett's appeal was then heard by the EARP on February 24, 2017. After the hearing, Lovett filed a post-hearing motion, arguing that "the Hearing Officer erred by allowing hearsay evidence as to Larry Annett's out of court statements offered for the truth of the matter asserted." CNB subsequently filed a response brief arguing that Larry Annett's statements were not hearsay because they were offered for probative value only, and not offered for the truth of the matter asserted. Then on April 24, 2017, the EARP issued its Final Order, finding that Lovett violated multiple CNB policies and Cherokee law; therefore, "termination of her employment was supported by both the evidence and the law." The EARP also held that "the Hearing Officer did not err by allowing Annett's out-of-court statement offered for probative value." (***EARP-17-05*, Findings of Fact, Conclusions of Law and Order.**)

Lovett then appealed the EARP's ruling back to the Cherokee Nation District Court in *Lovett v. CNB* (CV-2017-272). After briefing and oral arguments, the District Court affirmed the EARP's decision on March 2, 2018, ruling that "the Findings of Fact, Conclusions of Law and