IN THE MUSCOGEE (CREEK) NATION SUPREME COURT

BIM STEPHEN BRUNER,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	Case No.: **SC 18-04**
MUSCOGEE (CREEK) NATION,	)	(District Court Case No. CF-17-42)
	)	
Respondent.	)	

Appeal from District Court, Okmulgee District, Muscogee (Creek) Nation.

Trevor L. Reynolds, Tulsa Law Group, P.C., Tulsa, Oklahoma; George Miles, James E. Frasier, Steven R. Hickman, Frasier, Frasier & Hickman, L.L.P., Tulsa, Oklahoma; Jeff Davis, Barnes & Thornburg, L.L.P., Grand Rapids, Michigan; for the Appellant.

Shelly Harrison, Assistant Attorney General, Muscogee (Creek) Nation; Adam Weintraub, Savage, O'Donnell, Affeldt, Weintraub, & Johnson, P.L.L.C., Tulsa, Oklahoma; for the Respondent.

ORDER AND OPINION

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, and MCNAC, *JJ.*

DEER AND SUPERNAW, *JJ*, recused and not participating in the decision.

LERBLANCE, *J*, delivered the opinion of the Court, in which ADAMS, *C.J.*, THOMPSON, *V.C.J.*, and MCNAC, *J.*, joined.

HARJO-WARE, *J.*, writing separately and concurring with the judgment of the Court.

Order of the District Court vacated.

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

LERBLANCE, *J.*, delivered the opinion of the Court.

Bim Stephen Bruner (hereinafter, the "Appellant") submits his interlocutory appeal of the Muscogee (Creek) Nation District Court's November 5, 2018, *Order re Defendant's Motion to Recuse*.[2] The Appellant asserts that the District Court erred in denying his October 1, 2018, *Motion to Recuse*; arguing that M(C)NCA Title 26 § 4-103 (E)(1)(a) required Judge Bigler to recuse due to certain "first-hand knowledge of disputed evidentiary facts" [3] allegedly obtained during a no-notice Ex Parte Emergency Hearing on August 16, 2017. Further, that M(C)NCA Title 26 § 4-103 (E)(1)(d)(i) required Judge Bigler to recuse because the Judge was named as a party in a now-dismissed federal court action involving the Appellant's spouse.[4] Finally, the Appellant argues that M(C)NCA Title 26 § 4-103 (E)(1)(d)(iii) required Judge Bigler to recuse because, it is argued, the Judge has more than a *de minimis* interest in the outcome of the case. On the record presented, and for the reasons set forth below, we vacate the November 5, 2018, *Order* of the District Court, remand the matter back to the District Court for further proceedings consistent with this *Opinion*,

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[2] The instant appeal was filed pursuant to M(C)NCA Title 27, App. 2, Rule 3 (A), which provides:

> "A non-final judgment or order not appealable as a right under Rule 2 may be appealed via an interlocutory appeal to the Supreme Court prior to a final judgment or order upon leave granted by the Supreme Court if the original hearing body determines that an interlocutory appeal will (or may):
> 1. Materially advance the termination of the litigation or clarify further proceedings in the litigation;
> 2. Protect the petitioner from substantial or irreparable injury; or
> 3. Clarify an issue of general importance in the administration of justice.

On November 26, 2018, District Judge Gregory Bigler filed with this Court a *District Court Determination Regarding Interlocutory Appeal*, wherein the original hearing body concluded that "because Defendant's application presents issues of first impression regarding a judge's pre-trial issuance of warrants and criminal processes, and when judicial disqualification is proper under Muscogee law" the "interlocutory appeal is meritorious in this instance[.]" On December 3, 2018, this Court filed its *Order Accepting Appellant's Application for Interlocutory Appeal and Request to Stay the Proceedings of the District Court*.

[3] As stated in *Appellant's Brief in Chief*, pg. i, filed on December 13, 2018.

[4] *See*, Kalyn Free v. Kevin W. Dellinger, et al., case number: 18-CV-181-CVE-JFJ, United States District Court for the Northern District of Oklahoma.

as detailed below, and remove the stay of proceedings issued by this Court's *Order* of December 3, 2018.

BACKGROUND

On August 16, 2017, the Respondent appeared before Judge Gregory Bigler, in the Muscogee (Creek) Nation District Court, to present its *Complaint for an Emergency Ex Parte Temporary Restraining Order, Preliminary Injunctive Relief, and Declaratory Judgment* in District Court case number CV-2017-129GB (a companion civil action to the criminal proceedings underlying this appeal). No notice was provided to the Appellant and an Ex Parte Emergency Hearing was conducted on that same day.

During the Ex Parte Emergency Hearing the Respondent presented arguments and evidence to Judge Bigler supporting its *Complaint*. The Respondent alleged that the Appellant was involved in constructing "an area specifically for gaming operations [on the Appellant's property] and [had taken] delivery of a number of machines. Additionally, the [Appellant was] advertising to hire experienced gaming employees."[5]

At the conclusion of the Ex Parte Emergency Hearing, Judge Bigler granted an *Emergency Ex-Parte Temporary Restraining Order* and also signed an *Out of Custody Affidavit* and *Search Warrant* for the Appellant's property. A *Criminal Complaint and Information* was also filed against the Appellant and the Appellant was arrested later that same evening.

On October 1, 2018, over one (1) year following the Ex Parte Emergency Hearing and the Appellant's arrest, the Appellant filed his *Motion to Recuse* with the District Court. The Appellant argued that, "as a result of [the District Court's] actions in the issuance of the initial search and

[5] *See, Complaint for an Emergency Ex Parte Temporary Restraining Order, Preliminary Injunctive Relief, and Declaratory Judgment*, pg. 3, filed on August 16, 2017, in District Court Case No: CV-2017-129GB.

arrest warrant the Judge has personal knowledge of disputed evidentiary facts[,]"[6] and that, as a result of the federal court action filed by the Appellant's wife, Kalyn Free, Judge Bigler "may have a personal bias or prejudice concerning the [Appellant.]"[7]

On November 5, 2018, Judge Bigler issued his *Order* denying the Appellant's *Motion to Recuse*, finding that the Appellant did not meet the burden of proof to establish "facts regarding how the Court was exposed to extrajudicial knowledge of disputed evidentiary facts by issuing search and arrest warrants[,]"[8] and that the "bare assertion of "possible" bias created by the actions of the [Appellant's] wife in federal court must fail."[9]

On November 13, 2018, the Appellant filed an *Application for Interlocutory Appeal and Request to Stay the Proceedings of the District Court*, which was accepted by *Order* of this Court on December 3, 2018.

JURISDICTION, SCOPE AND STANDARD OF REVIEW

Appellate jurisdiction is proper under M(C)NCA Title 27, § 1-101 (C).[10] This Court will review issues of law *de novo* and issues of fact for clear error.[11] This Court also reviews decisions of the District Court in matters of recusal for clear abuse of discretion.[12]

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[6] *See*, *Motion to Recuse*, pg. 1, filed on October 1, 2018, in District Court Case No: CRF-2017-42.
[7] *Id.*
[8] *See*, *Order re Defendant's Motion to Recuse*, pg. 2, filed on November 5, 2018, in District Court Case No: CRF-2017-42.
[9] *Id.* at 3.
[10] M(C)NCA Title 27, § 1-101 (C), vests this Court with exclusive appellate jurisdiction over all matters under the Nation's jurisdiction, as described in M(C)NCA Title 27, § 1-102.
[11] *See* A.D. Ellis v. Checotah Muscogee Creek Indian Community, et al., SC 10-01 at 3, ___ Mvs. L.R. ___ (May 22, 2013); In the Matter of J.S. v. Muscogee (Creek) Nation, SC 93-02, 4 Mvs. L.R. 124 (October 13, 1994); McIntosh v. Muscogee (Creek) Nation, SC 86-01, 4 Mvs. L.R. 28 (January 24, 1987).
[12] *See* In Re: The Practice of Law before the Courts of the Muscogee (Creek) Nation, SC 04-02 at 4, 4 Mvs. L.R. 249 (February 14, 2005).

ISSUES PRESENTED

Part I. Do the provisions of M(C)NCA Title 26, § 4-103 (E)(1), et seq., concerning judicial recusal, support a finding that the impartiality of District Court Judge Gregory Bigler might reasonably be questioned and that recusal is proper?

DISCUSSION

The Supreme Court has a continuing statutory duty to consider both traditional and modern Mvskoke law when crafting its decisions.[13] This commitment has been consistently reaffirmed by the Court in the preamble of every *Opinion* issued since December 9, 2010.[14] In issues of recusal, this Court has previously examined a judicial officer's duty to provide impartiality and fairness to all litigants (both Mvskoke citizens or otherwise) under traditional Mvskoke law.[15] We have stated that:

> Under traditional Mvskoke law controversies were resolved by clan Vculvkvlke (elders). Their integrity was considered beyond reproach. They were obligated by the responsibilities of their position to decide cases fairly, and honestly, regardless of clan or family affiliation. Since this Nation's establishment of a constitutional form of government in 1867, Mvskoke law is ruled upon by appointed Judges, but the obligations under traditional Mvskoke law remain in effect.[16]

Recusal was not commonplace under traditional Mvskoke law. Controversies were resolved within the clan by elders who were considered, for all practical purposes, to be part of one's extended family. They were entrusted to do what was in the best interest of all those involved

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[13] *See* M(C)NCA Title 27, § 1-103 (A): "In all cases, the Muscogee (Creek) Nation Courts shall apply the Constitution and duly enacted laws of the Muscogee (Creek) Nation, the common law of the Muscogee people as established by customs and usage, and the Treaties and Agreements between the Muscogee (Creek) Nation and the United States.

[14] The first page of each *Opinion* issued by the Muscogee (Creek) Nation Supreme Court states: "MVSKOKVLKE FVTCECKV CUKO HVLWAT VKERRICKV HVYAKAT OKETV YVNKE VHAKV HAKATEN ACAKKAYEN MOMEN ENTENFVTCETV, HVTVM MVSKOKE ETVLWVKE ETEHVLVTKE VHAKV EMPVTAKV" which translates to "The Muscogee (Creek) Nation Supreme Court, after due deliberation, makes known the following decision based on traditional and modern Mvskoke law." *See* Muscogee (Creek) Nation, et al. v. Muscogee (Creek) Election Board, et al., SC 09-10, ___ Mvs. L.R. ___ (December 9, 2010).

[15] *See* In Re: The Practice of Law before the Courts of the Muscogee (Creek) Nation, SC 04-02, 4 Mvs. L.R. 249 (February 14, 2005)

[16] *Id.* at 2.

because they were part of this broader family. As our Nation has grown, as it has been influenced by western forms of government, and as we have adapted our Courts to interact with other tribal, state and federal jurisdictions, our Nation has consistently sought to advance where improvements could be made, while at the same time honoring our traditions. With respect to recusal, our traditional notions of fairness, honesty and impartiality have always remained. However, we have recognized that there may be occasions when the appearance of impartiality (as compared to actual bias) by a judicial officer might have an untenably negative impact on the trustworthiness of the judicial branch. We have previously found it to be "critical that cases before Mvskoke Courts be decided without any question raised as to the bias of the Judge[,]"[17] concluding that "[f]airness by judges to all is essential to maintain and foster respect for the tribal courts."[18] We have further advised that a judge "consider how his decision will be perceived by prospective litigants in Muscogee (Creek) Nation Courts[;]"[19] going so far as to counsel our judicial officers that they may "desire to step aside in an abundance of caution to remove all doubt."[20]

The National Council has codified specific legislation to ensure that all litigants coming before the Courts of the Muscogee (Creek) Nation receive a fair and impartial review of their case, further recognizing that there are limited situations where it is best...and even required...for the assigned judge to recuse.[21] The application of these recusal procedures form the basis of this appeal.

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[17] *Id.*
[18] *Id.*
[19] *Id* at 3.
[20] Preferred Management Corporation, et al. v. National Council of the Muscogee (Creek) Nation, SC 89-05 at 2, 4 Mvs. L.R. 44, at 49
[21] *See*, M(C)NCA Title 26, § 4-103 (E)

> E. Disqualification.
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> 1. A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
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> a. the judge has a personal bias or prejudice concerning a party or a party's lawyer, or first-hand knowledge of disputed evidentiary facts concerning the proceeding;

M(C)NCA Title 26 § 4-103 (E)(1) provides that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned[.]" The statute goes on to list a number of specific scenarios in which a judicial officer's impartiality would be suspect, though this list is not exhaustive. We have previously held that "[i]t is the responsibility of the Judge in all cases to determine, himself, using his best judgment, if his decisions will be perceived as unfair requiring recusal."[22] In deciding whether a decision will be perceived as unfair, a judicial officer should consider the case from both a subjective standpoint (assessing whether the judicial officer considers himself or herself to be impartial) and an objective standpoint (asking whether the public would reasonably consider the judicial officer to be impartial). Such an approach is consistent with the statutory recusal requirements of M(C)NCA Title 26 § 4-103 (E)(1) and with our previous rulings in which we have recognized that "public confidence" in the judicial branch depends on the "fairness and reasonableness of their courts."[23]

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b. the judge served as a lawyer, advocate, or personal representative in the matter before the Court or a person with whom the Judge has been associated in a professional capacity served as a lawyer, advocate or personal representative concerning the matter;
c. the judge knows that the judge, individually or as a fiduciary, or the judge's extended family, wherever residing, or any other person residing in the judge's household has a financial interest in the subject matter in controversy, is a party to the proceeding or has any other interest that could be substantially affected by the outcome of the proceeding.
d. the judge, the judge's spouse, or the judge's extended family, wherever residing, or any other person residing in the judge's household:
    i. is a party to the proceeding, or an officer, director or trustee of a party;
    ii. is acting as a lawyer in the proceeding
    iii. is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding; or
    iv. is to the judge's knowledge, likely to be a material witness in the proceeding;
e. the judge, while a judge, has made a public statement that commits, or appears to commit, the judge with respect to:
    i. an issue in the proceeding; or
    ii. the controversy in the proceeding.

2. A judge shall keep informed about the judge's personal and fiduciary economic interests, and make reasonable efforts to keep informed about the personal economic interests of the judge's extended family, wherever residing.

[22] *See* In Re: The Practice of Law before the Courts of the Muscogee (Creek) Nation, SC 04-02 at pg. 3, 4 Mvs. L.R. 249 (February 14, 2005)
[23] *Id.*

In reviewing the pleadings of the parties and the transcripts of various proceedings which have taken place, it is clear that, while the integrity of Judge Bigler, to this Supreme Court, is without question; and while Judge Bigler may himself rightly feel that he is impartial and capable of fairly and reasonably presiding over this action, it would nonetheless be in the public's interest to assign a new judicial officer to continue the action going forward. In reaching this decision, we focus on two significant events in the underlying proceeding.

First, this Court has recognized that criminal defendants are entitled to certain due process protections under M(C)NCA Title 14 § 1-303 and the Indian Civil Rights Act, 25 U.S.C. § 1301, et seq.[24] The Appellant has asserted that his due process rights were violated by the Court's failure to assign a neutral "magistrate judge" to review all preliminary matters filed prior to his arrest. [25] While the Court does not believe the use of the same judge for preliminarily matters that will be used for trial automatically triggers a due process violation,[26] nor do we feel that such a scenario should always result in the recusal of the judge hearing the preliminary matters, we do believe this should be a factor weighed by the judicial officer when reviewing a recusal request, particularly when the judicial officer will be forced to review his own preliminary orders under a *Motion to Suppress*, as is the case here.

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[24] *See*, Derek Huddleston v. Muscogee (Creek) Nation, SC 18-02, at 4-5, ___ Mvs. L.R. ___ (October 4, 2018).

[25] Including the Respondent's August 16, 2017, *Complaint for an Emergency Ex Parte Temporary Restraining Order, Preliminary Injunctive Relief, and Declaratory Judgment*, the resulting Ex Parte Emergency Hearing and the initial Search and Arrest Warrants.

[26] The Court looks to persuasive authority from the United States Supreme Court in the case Withrow v. Larkin, 421 U.S. 35, 56 - 57, "Judges repeatedly issue arrest warrants on the basis that there is probable cause to believe that a crime has been committed and that the person named in the warrant has committed it. Judges also preside at preliminary hearings where they must decide whether the evidence is sufficient to hold a defendant for trial. Neither of these pretrial involvements has been thought to raise any constitutional barrier against the judge's presiding over the criminal trial and, if the trial is without a jury, against making the necessary determination of guilt or innocence." And "We should also remember that it is not contrary to due process to allow judges and administrators who have had their initial decisions reversed on appeal to confront and decide the same question a second time around."

Secondly, in the Court's review of the August 16, 2017, Ex Parte Emergency Hearing transcript, we noted three (3) occasions in which the District Judge questioned whether notice of the hearing was required to be provided to the Appellant prior to the Ex Parte Hearing, asking each time for the Respondent to provide the basis for the emergency. The District Court stated:

> THE COURT: Well, the thing is our Code does not have really much in it or procedures as to temporary restraining orders and issuance thereof. The main thing I would want to know, amongst other things, of course, whether or not it's appropriate to issue; but secondly is that ex parte orders tend to be frowned upon; disfavored by the courts, unless there is extraordinary reason why notice can't be given or was improper to be given to begin with, and that's where – I didn't see anything in here that alleged why notice should not be or could not be given.[27]

Later, in response to the Respondent's argument that "irreparable harm" justified the issuance of a temporary restraining order, the District Court again explained:

> THE COURT: That would be – but that goes as to the propriety at issue in the restraining order, not as to why we don't give notice to them. That's one of the foundational principles of our due process, that they get notice as to an action; the more serious the action, the more likely you're required to give notice.[28]

And again the District Court stated:

> THE COURT: So why no notice? It's just pure and simple as that. Why can't we give notice to them, even today or tomorrow?[29]

Finally, the District Court recessed the hearing to allow the Respondent time to call in additional witnesses to support the emergency nature of the *Complaint*, stating:

> THE COURT: Mr. Dellinger, would it perhaps be helpful if you had a five- or ten-minute recess to confer with, perhaps, your law enforcement to see if one of them might be able to testify as to why immediate ex parte order was needed?[30]

Without reaching the merits of the District Court's issuance of the *Ex Parte Temporary Restraining Order* or any other issue not currently before this Court on appeal, we do find that it

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[27] *See*, Transcript of Proceedings of August 16, 2017, Pg. 4, Ln. 2 – 12.
[28] *See*, Transcript of Proceedings of August 16, 2017, Pg 5, Ln. 6 – 12.
[29] *See*, Transcript of Proceedings of August 16, 2017, Pg. 6, Ln. 4 – 6.
[30] *See*, Transcript of Proceedings of August 16, 2017, Pg. 7, Ln. 22 – 55, and Pg. 8, Ln. 1.

would be reasonable for an individual to feel, based on the interactions detailed above, in which the Ex Parte Hearing was recessed in order for the Respondent to bring in additional witnesses to support the emergency nature of the *Complaint*, that the Judge may be partial to the arguments of the Respondent in this matter, whether or not that assumption is in-fact correct.

Based on the above analysis, this Court finds that the judicial officer's decision not to recuse was a clear abuse of discretion based on an objective (reasonable person) view of the case, though the judicial officer's subjective determination concluding that he is not impartial may in-fact be true. As such, we vacate the District Court's November 5, 2018, *Order re Defendant's Motion to Recuse*, remand the matter back to the District Court with directions that District Court Case Number CF-2017-42 be immediately transferred to the docket of District Court Judge Jeremy T. Pittman. We also remove the stay of proceedings issued by our December 3, 2018, *Order Accepting Appellant's Application for Interlocutory Appeal and Request to Stay the Proceedings of the District Court.*

IT IS HEREBY ORDERED that the District Court's November 5, 2018, *Order re Defendant's Motion to Recuse* is **VACATED**.

IT IS FURTHER ORDERED that the **STAY** of proceedings issued by this Court on December 3, 2018, is **REMOVED**.

IT IS FURTHER ORDERED that this matter is **REMANDED** to the District Court with direction to immediately transfer District Court Case Number CF-2017-42 to the docket of District Court Judge Jeremy T. Pittman.

FILED AND ENTERED: May 13, 2019

Andrew Adams III
Chief Justice

George Thompson, Jr.
Vice-Chief Justice

Richard C. Leblance
Associate Justice

Amos McNac
Associate Justice

HARJO-WARE, *J.*, writing separately and concurring with the judgment of the Court.

In a previous advisory opinion, this court stated that traditional Mvskoke law and the modern code of conduct were both applicable to our judges.[31] In that case, it was left to the district judge to decide for himself whether recusal was necessary. At that time, this court stated that "[d]ecisions of the District Court in issues of recusal will not be disturbed unless there is a clear abuse of discretion." In this case, the Appellant, Bim Stephen Bruner (Appellant), asked the Honorable Gregory Bigler, District Judge (Judge Bigler), to recuse, but he did not. Under traditional Mvskoke law, Judge Bigler was obligated to stay on the case until the bitter end. Therefore, he could not have clearly abused his discretion by refusing to recuse. With the adoption of the Judicial Code of Ethics,[32] recusal is required in some instances. Thus, we inquire whether recusal was required.

The Appellant set forth three (3) reasons, outlined in the majority opinion, why he believes Judge Bigler should have recused himself from the case. Neither the majority nor I find his reasons compelling. Instead, this case is about a recess and the way it is viewed by the bench. The recess was not raised as a reason for recusal by the Appellant.

It is clear from a review of the record that Judge Bigler recessed to allow presentment of additional evidence in order for him to make a decision. The courts of the Muscogee Nation are neither mini federal courts nor state courts. It is not out of the ordinary in traditional decision-making settings or even in some civil or administrative adjudicatory forums for the deciding official or judge to allow additional time for the submission of additional evidence or even require additional evidence. It is a discretionary practice of making sure that all necessary evidence is

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[31] *See* In Re: The Practice of Law before the Courts of the Muscogee (Creek) Nation, SC 04-02 at pg. 3, 4 Mvs. L.R. 249 (February 14, 2005)

[32] *See* M(C)NCA Title 26, § 4-101 et seq, as adopted by NCA 12-033 (April 10, 2012).

submitted for the deciding official's consideration. The granting of a recess or holding the record of a case open for additional evidence, in and of themselves, are not acts of bias. The majority did not find the recess to be an act of actual bias and I concur.

Although not raised by the Appellant as any kind of bias, the majority express their beliefs that the recess could be perceived as a bias, electing to vacate Judge Bigler's decision and assign another judge. In my view, the recess was a matter of discretionary judicial practice rather than a matter of judicial conduct. However, since the very freedom of a citizen is at stake and the wisdom of the judicial practice in this criminal proceeding has come into question, I concur with the majority that assignment of another judge would be advisable.

Lean Harjo-Ware
Associate Justice

CERTIFICATE OF MAILING

I hereby certify that on May 13, 2019, I mailed a true and correct copy of the foregoing Order and Opinion with proper postage prepaid to each of the following: Shelly Harrison, Muscogee (Creek) Nation, Department of Justice, P.O. Box 580, Okmulgee, Oklahoma 74447; Adam Weintraub, Savage, O'Donnell, Affeldt, Weintraub & Johnson, P.L.L.C., 110 W. Seventh Street, Suite 1010, Tulsa, Oklahoma 74119; Trevor Reynolds, 1700 Southwest Blvd., Tulsa, Oklahoma 74107; George Miles, James Frasier, Steven Hickman, Frasier, Frasier & Hickman, 1700 Southwest Blvd., Tulsa, Oklahoma 74107; Jeff Davis, Barnes & Thornburg, L.L.P., 171 Monroe Avenue, N.W., Suite 1000, Grand Rapids, Michigan 49503-2694. A true and correct copy was also hand-delivered to: Donna Beaver, Clerk of the Muscogee (Creek) Nation District Court.

Laura Marks, Deputy Court Clerk