IN THE SUPREME COURT OF THE

MISSISSIPPI BAND OF CHOCTAW INDIANS

Sally Williams, et al.
Virginia Keams, et al.
Plaintiffs-Appellees

vs.

Parke-Davis, a Division of
Warner-Lambert
Defendant-Appellant

Civ. Act. #1142-01
Civ. Act. #1141-01

OPINION AND ORDER

PER CURIAM (Chief Justice Vaughn, Associate Justices Pommersheim and Vicenti)

I. Facts

The plaintiffs in these consolidated cases are members of the Mississippi Band of Choctaw Indians who have brought a product liability case-sounding in both tort and contract – against Parke-Davis, an unincorporated division of the Warner-Lambert Company. Plaintiffs allege that they have suffered physical and emotional harm from the use of the prescription drug Rezulin, a drug therapy for Type 2 diabetes. Rezulin was manufactured and distributed nationally by defendant during the period of March 1997-March 2000, after which it was withdrawn from the market.

The defendant is also currently being sued in many state court actions, at least one other tribal court namely that of the Navajo Nation, and many federal court actions currently proceeding in Multidistrict Litigation ('MDL') in the Southern District of New York.

This action was originally filed in the Tribal Trial Court in July of 2001 alleging physical and emotional injuries as a result of the use and ingestion of Rezulin. Plaintiffs allege that Rezulin was prescribed for them by their treating physicians, who are employed by the Tribe and work at the Mississippi Band of Choctaw Health Center located on Tribal trust land within the exterior boundaries of the Mississippi Band of Choctaw Reservation. These prescriptions for Rezulin were filled at the Mississippi Band of Choctaw Pharmacy which is also located on Tribal trust land within the exterior boundaries of the Reservation. Plaintiffs also allege that a representative of the defendant came onto the Reservation and met with Tribal officers and employees with the specific intent to have the drug Rezulin made available at the Tribal pharmacy.

The defendant subsequently moved to dismiss for lack of subject matter jurisdiction or in the alternative for the trial court to abstain so that the case could be transferred to the 'MDL' proceeding taking place in the Southern District of New York. Limited but incomplete discovery ensued and a hearing on defendant's motion to dismiss was subsequently held on October 4, 2001. In a comprehensive opinion authored by Judge Webb, defendant's motion to dismiss was denied on July 2, 2003.

The defendant/appellant subsequently sought interlocutory review of the trial court's decision and order denying its motion to dismiss. This Court issued its own order to hear the request for interlocutory review on the limited question of whether interlocutory review was proper in this case. Oral argument was heard on April 19, 2003.

Subsequent to the oral argument held on April 19, 2003, this Court issued an order on April 22, 2003, ordering the parties to file supplemental briefs on the specific questions of the jurisdictional reach of Article II of the Revised Constitution of the Mississippi Band of Choctaw Indians and the reach of the Tribal long arm authority in this matter. The order also requested that the Tribe itself file an amicus brief and otherwise participate in this aspect of the litigation. Oral argument (which included an appearance by the Tribe's Attorney General's office) was held on September 22, 2003.

II. Issue

The sole issue presented at this point in the litigation is whether the denial of the defendant/appellant's motion to dismiss for lack of (subject matter) jurisdiction is appealable on an interlocutory basis because it constitutes 'obvious error.'

III. Discussion

The Mississippi Band of Choctaw Tribal Code does permit, in limited circumstances, interlocutory appeals when the trial court has "[c]omitted an obvious error which would render further lower Court proceedings useless or substantially limit the freedom of a party to act and a substantial question of law is presented which would determine the outcome of the appeal."[1] While both sides concede that the jurisdictional issue involves 'a substantial question of law' and 'would determine the outcome of the appeal,' they vigorously disagree as to whether the trial court committed 'obvious error' in its ruling below.

The essence of the defendant/appellant's claim is that the failure of the U.S. Supreme Court (or Congress) to expressly authorize tribal court jurisdiction in this type of case (*e.g.* products liability claim for a product manufactured off the reservation and not directly distributed by the manufacturer on the reservation) constitutes 'obvious error.' The essence of the plaintiffs/appellees' claim is that in the absence of an express ban by the Supreme Court (or

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[1] Mississippi Band of Choctaw Tribal Code § 7-1-10(d)(1).

Congress) on the tribal court's jurisdiction in this context there is no 'obvious error' and interlocutory review must be denied.[2]

The short answer to this inquiry is that there is no 'obvious error' and therefore the trial court's denial of the defendant's motion to dismiss is *not* appealable on an interlocutory basis. This answer is required by the Supreme Court's own decision in *Nevada v. Hicks*, 533 U.S. 353 (2001). More specifically, it is the statement of the Court in footnote two[3] that "our holding in this case is limited to the question of tribal-court jurisdiction over the officers enforcing state law. *We leave open the question of tribal-court jurisdiction over nonmember defendants in general.*"[4] Since the Supreme Court did *not* foreclose potential tribal-court jurisdiction over nonmembers in general and because the facts in the instant case are distinguishable from previous cases decided by the Supreme Court in this area of law,[5] it logically follows that no 'obvious error' has been committed by the trial court. Defendant's entire argument rests on a *prediction* that the Supreme Court will *extend* the reach of its previous decisions. 'Obvious error,' however, must be grounded in what the law *is* not what it may (or may not) *become*.

In addition to this brief (yet dispositive) answer, the Court has chosen to provide additional analysis of the relevant law in order to provide a more comprehensive perspective. This is so because counsel for defendant/appellant has made it clear that if his client loses in its attempt to secure interlocutory review before this Court, it plans to proceed directly to federal court for additional review rather than try the case on its merits in the Tribal trial court.[6]

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[2] As the proponent of the motion for interlocutory review, the burden of persuasion rests with the defendant/appellant. The appropriate standard is the preponderance of the evidence norm.

[3] The footnote reads in its entirety:
In *National Farmers Union Ins. Cos. V. Crow Tribe*, 471 U.S. 845, 855-856 (1985), we avoided the question whether tribes may generally adjudicate against nonmembers claims arising from on-reservation transactions, and we have never held that a tribal court had jurisdiction over a nonmember defendant. Typically, our cases have involved claims brought against tribal defendants. See, *e.g., Williams v. Lee*, 358 U.S. 217 (1959). In *State v. A-1 Contractors*, 520 U.S. 438, 453 (1997), however, we assumed that "where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumably lies in the tribal courts." without distinguishing between nonmember plaintiffs and nonmember defendants. See also *Iowa Mut. Ins. Co. V. LaPlante*, 480 U.S. 9, 18 (1987). Our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law. We leave open the question of tribal-court jurisdiction over nonmember defendants in general.

533 U.S. at 358

[4] *Id.* (Emphasis added.)

[5] See decision *infra* at pp. 8-9. In addition, counsel for defendant conceded at oral argument that there was *no* Supreme Court case directly on point.

[6] See *infra* at 9.

An in-depth analysis concerning the existence of 'obvious error' includes the following: a description of the demographics and land tenure patterns of the Mississippi Band of Choctaw Reservation, a review of the Supreme Court decision in *Montana v. United States*, subsequent application of *Montana v. United States* by the Supreme Court and other courts, and review of the principles governing the Supreme Court's 'exhaustion' of tribal court remedies' jurisprudence.

A. Demographic and Land Tenure Patterns on the Mississippi Band of Choctaw Reservation

In matters involving civil jurisdiction in Indian country, (federal) courts often rest much of their analysis of the demographic and land tenure patterns of the particular reservation involved. Such analysis has been central in all the significant jurisdictional cases of the past 25 years ranging from *Montana v. U.S.*, 450 U.S. 544 (1981) through *Nevada v. Hicks*, 533 U.S. 353 (2001).[7] In each of these cases, a critical element of the Court's analysis was whether the controverted action took place on trust (i.e. Indian) or non-trust (i.e. non-Indian) land and whether an Indian or non-Indian (resident or non-resident traveling through the reservation) was the defendant.

The situation on the Mississippi Choctaw Reservation does not readily lend itself to such analysis. All land that is found within the boundaries of the Mississippi Choctaw Reservation is currently held in trust. There is no land held by non-Indians. See, e.g., *United States v. John*, 437 U.S. 634 (1978). See also Tribe's *amicus* brief at 14. The Mississippi Band of Choctaw Indians (not the state) provides all necessary health and education services to people on the reservation. In terms of raw demographics, the current (2000) census data indicates a population of 5,794 Indians and 98 non-Indians. *See, e.g.*, Mississippi Band of Choctaw Demographic Survey (1997).

This data would not necessarily seem relevant to whether the Tribe has (civil) jurisdiction in any particular Indian except that the Supreme Court has repeatedly indicated that it is. Therefore it is provided here to indicate that there is no significant non-Indian presence or land ownership on the Mississippi Choctaw Reservation.

B. *Montana v. United States*

Montana v. United States is often identified by the Supreme Court as the "pathmarking" case in the tribal court civil jurisdiction area.[8] Indeed, this phrase has become something of mantra for the Court. Unfortunately for tribes invocation of this mantra by the Court usually

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[7] *See also South Dakota v. Bourland*, 508 U.S. 679 (1993), *Strait v. A-1 Contractors*, 520 U.S. 438 (1997), and *Atkinson Trading Post v. Shirley*, 532 U.S. 645 (2001).

[8] *See e.g., Strait v. A-1 Contractors*, 520 U.S. at 438. Of course, this rule is not absolute. See the famous *Montana* proviso at 565-66 and discussed *infra* at 4-6.

means that the tribe loses and its court has no jurisdiction over the controversy at hand.[9]

The "pathmarking" thrust of *Montana* is usually summarized in nutshell fashion by the Court with quotation of this language from the case:

> But 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.[10]

Yet with all due respect, this oft quoted language employed by the Court cannot really constitute some free floating common law (jurisdictional) principle uncoupled from the statutory context that gave rise to it in the first instance.

Recall *Montana*. In that case, the Supreme Court described the case as involving the:

> sources and scope of the power of an Indian tribe to regulate hunting and fishing by non-Indians on lands within its reservation owned in fee simple by non-Indians. Relying on its purported ownership of the bed of the Big Horn River, on the treaties which created its reservation and on its inherent power as a sovereign, the Crow Tribe of Montana claims the authority to prohibit all hunting and fishing by non-members of the Tribe on non-Indian property within reservation boundaries.[11]

In *Montana*, the Court made it clear that the primary ground for the loss of treaty derived regulatory authority over non-Indians on non-Indian (fee) land within the Reservation was the alienation of the land occasioned by two *federal statutes* namely the General Allotment Act of 1887 and the Crow Allotment Act of 1920. *Id.* at 561. The effect of these *statutes* was to create a strong, though not irrebutable, presumption in favor of the state (not tribal) regulatory authority on fee land within the reservation.

Since neither of these statutes *expressly* extinguished tribal jurisdiction over non-Indians on fee land, the Court drew heavily on the relevant *legislative* history. For example, the Court noted that "there is simply no suggestion in the legislative history that Congress intended that non-Indians who would settle upon alienated land would be subject to tribal regulatory authority. Indeed, throughout the congressional debates, allotment of tribal land was consistently equated with the dissolution of tribal affairs and jurisdiction." *Id.* at 560 (f.8)

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[9] There are a few (but not many) lower federal court decisions that have not been narcotized by this mantra. *See* discussion *infra* at 7-8.

[10] *Montana*, 450 U.S. at 564.

[11] *Id.* at 547.

In addition, the Court, when it turned its attention from the analysis discussed above to the issue of inherent tribal sovereignty, announced that this inherent power was subject not only to the express limitations contained in any treaty or federal statute but to the Court's own (potential) declaration that the exercise of any particular power was "inconsistent with the dependent states of the tribes." Specifically, the Court said:

> But 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 tribes and so cannot survive without express Congressional delegation. *Id.* at 564.

Needless to say, such a jurisprudential approach is grounded in neither the Constitution nor any federal statute and it is quite troubling in arrogating to the Court an unbridled discretion to demarcate the extent of tribal authority.[12]

In *Brendale v. Confederated Tribes and Bands of Yakima*, 492 U.S. 408 (1989), the Court reiterated its *Montana* treaty analysis by quoting itself to the effect that "treaty rights with respect to reservation laws must be read in light of subsequent alienation of those lands" 450 U.S. at 561. It is also significant to note that Justice Blackmun in his (concurring and dissenting) opinion squarely recognized *Montana* not as a restatement but rather a revision 'flatly inconsistent' with the Court's prior decisions defining the scope of inherent tribal jurisdiction, 408 U.S. at 455:

> But to recognize that *Montana* strangely reversed the otherwise consistent presumption in favor of inherent tribal sovereignty over reservation lands is not to excise the decision from our jurisprudence. Despite the reversed presumption, the plain language of *Montana* itself expressly preserves substantial tribal authority over non-Indian activity on reservations, including fee land, and more particularly, may sensibly be read as recognizing inherent tribal authority to zone fee lands. *Id.* at 456.

The absence of any express statutory termination of tribal authority left in place *potential* tribal civil jurisdiction in accordance with the terms of the well known *Montana* proviso:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee land. A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements. . .

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[12] If the Court's rule is part of the federal common law (which the Court makes *no* mention of), it is a very strange common law precept indeed. Strange in that it fills no substantive *gap* - the usual function of federal common law - but rather allows the federal judiciary to define and regulate the authority of another sovereign which is normally the function of the Constitution not the unbounded discretion of the Court.

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, economic security, or the health or welfare of the tribe. *Id.* at 565-66.

C. Post *Montana* Cases

As the Supreme court itself noted in the case of *Nevada v. Hicks*, 533 U.S. 353 (2001), it has yet to decide a case in which it found either prong of the *Montana* proviso satisfied. These cases include *Brendale v. Confederated Tribes and Bands of Yakima*,[13] *South Dakota v. Bourland*,[14] *Strait v. A-1 Contractors*,[15] *Atkinson Trading Post v. Shirley*[16] and the *Hicks* case itself.[17] Yet the Court also admitted that it was leaving open the question of tribal-court jurisdiction over nonmember defendants in general.[18]

These cases follow an interesting trajectory. Initially, the cases expanded the territorial reach of the fee land analysis of *Montana* to include federal taken land in *Bourland* and highway rights of way granted to states in *Strait*. Then in *Hicks*, for the first time, the Supreme Court held that the state *may* have some (criminal) jurisdiction over trust land.[19] Presumably, the *Hicks* case is limited to its unique facts concerning *state* interest in an off-reservation *criminal* matter and does *not* apply to a *private civil* dispute arising on trust land. *See e.g., McDonald v. Means*, 300 F.3d 1037 (9th Cir. 2002), upholding tribal court jurisdiction and holding that *Nevada v. Hicks* was limited to its special facts and *Montana v. U.S.* did *not* apply to a car accident that occurred on a Bureau of Indian Affairs road within the Northern Cheyenne Indian Reservation.

While the Supreme Court has not been particularly hospitable to tribal claims of civil jurisdiction over non-Indians on fee land, it has not overruled or revoked the potential opportunity for tribal civil jurisdiction contained in the *Montana* proviso. In this regard, there

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[13] *Supra* at 6.

[14] 508 U.S. 679 (1993) (*Montana* analysis applies to federal taking land within a reservation.).

[15] 520 U.S. 438 (1997 (*Montana* analysis applies to car accident involving a non-Indian that occurred on a state highway (with a right of way on tribal trust land) on a reservation).

[16] 532 U.S. 645 (2001) (*Montana* analysis applies to tribal tax of motel non-Indian customer staying at a motel located on fee land within reservation.).

[17] 533 U.S. 353 (2001) (*Montana* analysis applies to execution of state search warrant on trust land within reservation.).

[18] *Id.* note 2 at 358.

[19] At least for the execution of a state (and tribal) search warrant on a tribal member's residence located on trust land within the reservation for a crime that allegedly took place off the reservation.

are at least two circuit court decisions that have found tribal civil jurisdiction over non-Indians on fee land in accordance with the *Montana* proviso. In both *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996) and *Montana v. Environmental Protection Agency*, 137 F.3d 1135 (9th Cir. 1998), the respective circuit courts held that tribes involved (Isleta Pueblo and Confederated Salish and Kootenai Tribes) had legitimately established water quality and source pollution standards that bound non-Indians and even non-Indian municipalities such as Albuquerque, New Mexico.

There is also an unsettling asymmetry in the defendant/appellant's argument. While the defendant/appellant seeks to avoid the tribal forum as a *defendant*, it would be the *only* forum available if Parke-Davis was a *plaintiff* in this matter. For example, if Parke-Davis sought to collect on a debt that arose on the Reservation against a tribal member or the Tribe itself, its only resource would be tribal court. *See e.g., Williams v. Lee*, 358 U.S. 217 (1959). Likewise if Parke-Davis' sales agent (or even its attorneys) were involved in an alleged tort - say a car accident with a tribal vehicle in the Tribal Court parking lot - the only recourse would be in tribal court. In fact, the Tribe itself has enacted a Tribal Tort Claims Act to facilitate this process (including a waiver of Tribal sovereign immunity). *See* Choctaw Tribal Code Section 25.

Parke-Davis, it seems, would like to secure the benefits of doing business on the Reservation without any attendant responsibility. Such an asymmetrical approach by a party would clearly be impermissible in any state or federal situation and it should be no less so in a tribal situation. Respect and parity cannot be one-sided *for* the state and federal sovereign but *against* the Tribal sovereign.

D. The Case at Bar

Despite the anomalous jurisprudence of *Montana* and its progeny, the case cannot be ignored. Yet by its own terms it does not govern the case at hand. Distribution of the drug Rezulin, manufactured and distributed by the defendant/appellant Parke-Davis, took place at the Tribal pharmacy located on Tribal trust land within the boundaries of the Mississippi Band of Choctaw Reservation. If inherent tribal sovereignty is to have any meaning, it certainly must pertain to events that transpired at a Tribal pharmacy located on Tribal trust land.

Application of the expansive territorial reach of *Nevada v. Hicks* onto non-fee trust land is not justified in the instant case. The critical event – the sale of the drug Rezulin – took place on Tribal trust land and *Hicks* directly involved a significant state public interest relevant to criminal activity, while the case at bar involves a lawsuit between two private parties.

In addition, the alleged harmful drug Rezulin was not simply put into the general stream of commerce, but rather involved an agent of the defendant coming on the Mississippi Band of Choctaw reservation to meet with various Tribal employees and officials with the *express* objective of convincing them to add the drug Rezulin to the Tribal formulary. In which endeavor, the defendant was successful.

In any event, both prongs of the *Montana* proviso are satisfied. The consensual prong is satisfied because the plaintiffs' claim involves allegations relevant to the breach of the warranty of merchantability which is, at least in part, contractual in nature. *See e.g., Childs v. G.M.C.*, 73 F. Supp.2d 669 (N.D. Miss. 1999). In addition, the sale and distribution on Tribal land of an allegedly harmful drug to Tribal members represents quintessential conduct "that threatens or has some direct effect on the . . . *health* or welfare of the tribe." *Montana* at 566 (emphasis added).[20] In sum, this case is governed by neither *Nevada v. Hicks* nor *Montana v. U.S.* It is a civil case between private parties arising on tribal trust land in which there presumably is tribal jurisdiction. If *Montana* is invoked, both of its prongs are satisfied.

E. Exhaustion

The basic principle of the exhaustion of tribal court remedies as articulated in the seminal case of *National Farmer Union Inc. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) also supports the denial of interlocutory review in this case. Certainly, both this Court and the Trial Court have set forth the jurisprudential details of why the Court has jurisdiction and now the substantive claims of the plaintiffs should be heard on the merits.

The defendant/appellant has indicated that if interlocutory review is denied, it will seek immediate federal review. This would seem to turn *National Farmers Union* on its head changing it from a case respecting tribal court integrity and competence to a case facilitating federal court review with only most perfunctory concern for tribal court dignity and expertise to decide a case on its substantive merits. This Court does not believe that *National Farmers Union* case can be considered that pitiful.

Similarly, the Court in *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987), recognized Tribal Court authority over non-Indians' activities on reservation lands as an important component of tribal sovereignty. This case involved an automobile accident occurring within the boundaries of the reservation in which a member of the Blackfeet Indian tribe was injured by a non-member. The injured member was an employee of a Montana corporation operating a ranch on the reservation which was sued in Tribal Court. In staying the case pending exhaustion of Tribal Court remedies, the Court said:

> Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the Tribal Courts unless affirmatively limited by a specific treaty provision or federal statute . . . in the absence of any indication tht Congress intended the diversity statute to limit the jurisdiction of Tribal Courts, we decline

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[20] In *Nelson v. Pfizer* (WR-CV-255-01, 2001), the Navajo Trial Court dismissed a Rezulin based claim for lack of subject matter jurisdiction. The slip opinion does *not* reveal facts similar to the case at bar, *i.e.*, a sales representative of the defendant coming on the reservation and soliciting business and, therefore, it is distinguishable. Note however the Navajo Supreme Court has recently reversed the trial court and remanded the case with instructions that it be set for trial on the merits.

petitioners' invitation to hold that tribal sovereignty can be impaired in this fashion.

Id. at 18.

F. Long Arm Jurisdiction

The defendant/appellant does *not* seriously contest long arm (personal) jurisdiction. Having failed to raise the issue in its motion to dismiss and by appearing generally, rather than specially, defendant/appellant has effectively waived any claims concerning personal jurisdiction. *See e.g.*, Rule 12(h), Mississippi Band of Choctaw Rules of Civil Procedure.

Waiver aside, it is clear that the elements of long arm jurisdiction are satisfied in this matter. The Tribe does have a long arm/personal jurisdiction statute which is found at § 1-2-3 of the Choctaw Tribe Code. At least two of the enumerated provisions, namely (2)(c) (conducting business within the reservation) and (2) (g) (committing a tortious act, engaging in tortious conduct within the reservation), are clearly satisfied by the facts set out above.

There is no doubt that the defendant/appellant - through its sales agent - purposely availed itself of conducting activities within the forum, such that the defendant could have reasonably foreseen being hauled into court there. *See e.g., Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987).

G. Jurisdiction Pursuant to the Tribal Constitution.

The relevant section of the Tribal Constitution is Article II which provides that:

> The jurisdiction of the Mississippi Band of Choctaw Indians shall extend to all lands now held or which may hereafter be acquired by and for or which may be used under proper authority by the Mississippi Band of Choctaw Indians, *and* to all persons who are now or may hereafter become members of the Mississippi Band of Choctaw Indians. (Emphasis added.)

The language in Article II precisely captures the two discrete elements of tribal authority namely the physical, territorial reach of tribal jurisdiction and the potential activities of members wherever they might occur. Tribal jurisdiction - and Indian law jurisdiction in general - is often territorially defined. *See e.g.*, 18 U.S.C. § 1151 which defines the physical boundaries of Indian country for jurisdictional purposes and includes all land within the exterior boundaries of a reservation. Since *all* of the Mississippi Band of Choctaw reservation is trust land within Indian country as defined at 18 U.S.C. § 1151, there is no doubt that such territory is within the legitimate locus of potential tribal jurisdiction. This necessarily includes activities on these lands regardless of who the actors are. Tribes generally understand their jurisdiction territorially, and

the Mississippi Choctaw Band is no different in this regard.[21]

If this is so (and it is), one might ask why there is the additional reference in Article II to jurisdiction over "all persons who are now or may hereafter become members of the Mississippi Band of Choctaw Indians." The answer is simply that the fact of tribal *membership* involves legal relationships that remain within the purview of tribal jurisdictional authority regardless of the residence of the tribal member. Examples in this area include such matters as probate, voting, and per-capita distributions.

To try to interpret Article II as being limited to 'dirt and Indians'[22] ultimately makes no legal sense and would clearly be contrary to the intent of the Mississippi Band of Choctaw Indians when it adopted its original Constitution in 1945 and its Revised Constitution in 1975.

IV. Conclusion

For all the above stated reasons it is clear that the Trial Court committed no 'obvious error' and the defendant/appellant's motion for interlocutory review is denied and the case is remanded for a prompt trial on the merits.

IT IS SO ORDERED.

FOR THE COURT:

Chief Justice Rae Nell Vaughn

Dated: April 26th, 2004

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[21] *See e.g.*, Article II of the Constitution and By-Laws for the Blackfeet Tribe of the Blackfeet Indian Reservation of Montana was amended in 1978 and states that: "[t]he jurisdiction of the Blackfeet Tribe shall extend to the territory within the confines of the Blackfeet Reservation boundaries as defined in the agreement of September 26, 1895; and to such other lands as may be hereafter added thereto under any law of the United States, except as otherwise provided by law." (Emphasis added.); *See also* The amended Constitution of the Yankton Sioux Tribal Business and Claims Committee. Article VI. Territory Section 1 (The territory under which this Constitution shall exist shall extend to all original lands now owned by the Tribe under the Treaty of 1858.) (Emphasis added.); Constitution and By-Laws of the Confederated Tribe of Warm Springs Reservation of Oregon. As Amended. Article II - Territory. Section 1 (The jurisdiction of the Confederated Tribes of the Warm Springs Reservation of Oregon shall extend to all lands contained within the present boundaries of the Warm Springs Reservation and to such lands as may have been heretofore or may hereafter be acquired by the Confederated Tribes of the Warm Springs Reservation or by the United States in trust for such tribes.) (Emphasis added.)

[22] Metaphor used by plaintiffs' counsel at oral argument.

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The defendant is also currently being sued in many state court actions, at least one other tribal court namely that of the Navajo Nation, and many federal court actions currently proceeding in Multidistrict Litigation ('MDL') in the Southern District of New York.

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[1] Mississippi Band of Choctaw Tribal Code § 7-1-10(d)(1).

Congress) on the tribal court's jurisdiction in this context there is no 'obvious error' and interlocutory review must be denied.[2]

The short answer to this inquiry is that there is no 'obvious error' and therefore the trial court's denial of the defendant's motion to dismiss is *not* appealable on an interlocutory basis. This answer is required by the Supreme Court's own decision in *Nevada v. Hicks*, 533 U.S. 353 (2001). More specifically, it is the statement of the Court in footnote two[3] that "our holding in this case is limited to the question of tribal-court jurisdiction over the officers enforcing state law. *We leave open the question of tribal-court jurisdiction over nonmember defendants in general.*"[4] Since the Supreme Court did *not* foreclose potential tribal-court jurisdiction over nonmembers in general and because the facts in the instant case are distinguishable from previous cases decided by the Supreme Court in this area of law,[5] it logically follows that no 'obvious error' has been committed by the trial court. Defendant's entire argument rests on a *prediction* that the Supreme Court will *extend* the reach of its previous decisions. 'Obvious error,' however, must be grounded in what the law *is* not what it may (or may not) *become*.

In addition to this brief (yet dispositive) answer, the Court has chosen to provide additional analysis of the relevant law in order to provide a more comprehensive perspective. This is so because counsel for defendant/appellant has made it clear that if his client loses in its attempt to secure interlocutory review before this Court, it plans to proceed directly to federal court for additional review rather than try the case on its merits in the Tribal trial court.[6]

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[2] As the proponent of the motion for interlocutory review, the burden of persuasion rests with the defendant/appellant. The appropriate standard is the preponderance of the evidence norm.

[3] The footnote reads in its entirety:
In *National Farmers Union Ins. Cos. V. Crow Tribe*, 471 U.S. 845, 855-856 (1985), we avoided the question whether tribes may generally adjudicate against nonmembers claims arising from on-reservation transactions, and we have never held that a tribal court had jurisdiction over a nonmember defendant. Typically, our cases have involved claims brought against tribal defendants. See, *e.g., Williams v. Lee*, 358 U.S. 217 (1959). In *State v. A-1 Contractors*, 520 U.S. 438, 453 (1997), however, we assumed that "where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumably lies in the tribal courts," without distinguishing between nonmember plaintiffs and nonmember defendants. See also *Iowa Mut. Ins. Co. V. LaPlante*, 480 U.S. 9, 18 (1987). Our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law. We leave open the question of tribal-court jurisdiction over nonmember defendants in general.

533 U.S. at 358

[4] *Id.* (Emphasis added.)

[5] See decision *infra* at pp. 8-9. In addition, counsel for defendant conceded at oral argument that there was *no* Supreme Court case directly on point.

[6] See *infra* at 9.

An in-depth analysis concerning the existence of 'obvious error' includes the following: a description of the demographics and land tenure patterns of the Mississippi Band of Choctaw Reservation, a review of the Supreme Court decision in *Montana v. United States*, subsequent application of *Montana v. United States* by the Supreme Court and other courts, and review of the principles governing the Supreme Court's 'exhaustion' of tribal court remedies' jurisprudence.

A. Demographic and Land Tenure Patterns on the Mississippi Band of Choctaw Reservation

In matters involving civil jurisdiction in Indian country, (federal) courts often rest much of their analysis of the demographic and land tenure patterns of the particular reservation involved. Such analysis has been central in all the significant jurisdictional cases of the past 25 years ranging from *Montana v. U.S.*, 450 U.S. 544 (1981) through *Nevada v. Hicks*, 533 U.S. 353 (2001).[7] In each of these cases, a critical element of the Court's analysis was whether the controverted action took place on trust (i.e. Indian) or non-trust (i.e. non-Indian) land and whether an Indian or non-Indian (resident or non-resident traveling through the reservation) was the defendant.

The situation on the Mississippi Choctaw Reservation does not readily lend itself to such analysis. All land that is found within the boundaries of the Mississippi Choctaw Reservation is currently held in trust. There is no land held by non-Indians. See, e.g., *United States v. John*, 437 U.S. 634 (1978). See also Tribe's *amicus* brief at 14. The Mississippi Band of Choctaw Indians (not the state) provides all necessary health and education services to people on the reservation. In terms of raw demographics, the current (2000) census data indicates a population of 5,794 Indians and 98 non-Indians. *See, e.g.*, Mississippi Band of Choctaw Demographic Survey (1997).

This data would not necessarily seem relevant to whether the Tribe has (civil) jurisdiction in any particular Indian except that the Supreme Court has repeatedly indicated that it is. Therefore it is provided here to indicate that there is no significant non-Indian presence or land ownership on the Mississippi Choctaw Reservation.

B. *Montana v. United States*

Montana v. United States is often identified by the Supreme Court as the "pathmarking" case in the tribal court civil jurisdiction area.[8] Indeed, this phrase has become something of mantra for the Court. Unfortunately for tribes invocation of this mantra by the Court usually

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[7] *See also South Dakota v. Bourland*, 508 U.S. 679 (1993), *Strait v. A-1 Contractors*, 520 U.S. 438 (1997), and *Atkinson Trading Post v. Shirley*, 532 U.S. 645 (2001).

[8] *See e.g., Strait v. A-1 Contractors*, 520 U.S. at 438. Of course, this rule is not absolute. See the famous *Montana* proviso at 565-66 and discussed *infra* at 4-6.

means that the tribe loses and its court has no jurisdiction over the controversy at hand.[9]

The "pathmarking" thrust of *Montana* is usually summarized in nutshell fashion by the Court with quotation of this language from the case:

> But 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.[10]

Yet with all due respect, this oft quoted language employed by the Court cannot really constitute some free floating common law (jurisdictional) principle uncoupled from the statutory context that gave rise to it in the first instance.

Recall *Montana*. In that case, the Supreme Court described the case as involving the:

> sources and scope of the power of an Indian tribe to regulate hunting and fishing by non-Indians on lands within its reservation owned in fee simple by non-Indians. Relying on its purported ownership of the bed of the Big Horn River, on the treaties which created its reservation and on its inherent power as a sovereign, the Crow Tribe of Montana claims the authority to prohibit all hunting and fishing by non-members of the Tribe on non-Indian property within reservation boundaries.[11]

In *Montana*, the Court made it clear that the primary ground for the loss of treaty derived regulatory authority over non-Indians on non-Indian (fee) land within the Reservation was the alienation of the land occasioned by two *federal statutes* namely the General Allotment Act of 1887 and the Crow Allotment Act of 1920. *Id.* at 561. The effect of these *statutes* was to create a strong, though not irrebutable, presumption in favor of the state (not tribal) regulatory authority on fee land within the reservation.

Since neither of these statutes *expressly* extinguished tribal jurisdiction over non-Indians on fee land, the Court drew heavily on the relevant *legislative* history. For example, the Court noted that "there is simply no suggestion in the legislative history that Congress intended that non-Indians who would settle upon alienated land would be subject to tribal regulatory authority. Indeed, throughout the congressional debates, allotment of tribal land was consistently equated with the dissolution of tribal affairs and jurisdiction." *Id.* at 560 (f.8)

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[9] There are a few (but not many) lower federal court decisions that have not been narcotized by this mantra. *See* discussion *infra* at 7-8.

[10] *Montana*, 450 U.S. at 564.

[11] *Id.* at 547.

In addition, the Court, when it turned its attention from the analysis discussed above to the issue of inherent tribal sovereignty, announced that this inherent power was subject not only to the express limitations contained in any treaty or federal statute but to the Court's own (potential) declaration that the exercise of any particular power was "inconsistent with the dependent states of the tribes." Specifically, the Court said:

> But 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 tribes and so cannot survive without express Congressional delegation. *Id.* at 564.

Needless to say, such a jurisprudential approach is grounded in neither the Constitution nor any federal statute and it is quite troubling in arrogating to the Court an unbridled discretion to demarcate the extent of tribal authority.[12]

In *Brendale v. Confederated Tribes and Bands of Yakima*, 492 U.S. 408 (1989), the Court reiterated its *Montana* treaty analysis by quoting itself to the effect that "treaty rights with respect to reservation laws must be read in light of subsequent alienation of those lands" 450 U.S. at 561. It is also significant to note that Justice Blackmun in his (concurring and dissenting) opinion squarely recognized *Montana* not as a restatement but rather a revision 'flatly inconsistent' with the Court's prior decisions defining the scope of inherent tribal jurisdiction, 408 U.S. at 455:

> But to recognize that *Montana* strangely reversed the otherwise consistent presumption in favor of inherent tribal sovereignty over reservation lands is not to excise the decision from our jurisprudence. Despite the reversed presumption, the plain language of *Montana* itself expressly preserves substantial tribal authority over non-Indian activity on reservations, including fee land, and more particularly, may sensibly be read as recognizing inherent tribal authority to zone fee lands. *Id.* at 456.

The absence of any express statutory termination of tribal authority left in place *potential* tribal civil jurisdiction in accordance with the terms of the well known *Montana* proviso:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee land. A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements. . .

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[12] If the Court's rule is part of the federal common law (which the Court makes *no* mention of), it is a very strange common law precept indeed. Strange in that it fills no substantive *gap* - the usual function of federal common law - but rather allows the federal judiciary to define and regulate the authority of another sovereign which is normally the function of the Constitution not the unbounded discretion of the Court.

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, economic security, or the health or welfare of the tribe. *Id.* at 565-66.

C. Post *Montana* Cases

As the Supreme court itself noted in the case of *Nevada v. Hicks*, 533 U.S. 353 (2001), it has yet to decide a case in which it found either prong of the *Montana* proviso satisfied. These cases include *Brendale v. Confederated Tribes and Bands of Yakima*,[13] *South Dakota v. Bourland*,[14] *Strait v. A-1 Contractors*,[15] *Atkinson Trading Post v. Shirley*[16] and the *Hicks* case itself.[17] Yet the Court also admitted that it was leaving open the question of tribal-court jurisdiction over nonmember defendants in general.[18]

These cases follow an interesting trajectory. Initially, the cases expanded the territorial reach of the fee land analysis of *Montana* to include federal taken land in *Bourland* and highway rights of way granted to states in *Strait*. Then in *Hicks*, for the first time, the Supreme Court held that the state *may* have some (criminal) jurisdiction over trust land.[19] Presumably, the *Hicks* case is limited to its unique facts concerning *state* interest in an off-reservation *criminal* matter and does *not* apply to a *private civil* dispute arising on trust land. *See e.g., McDonald v. Means*, 300 F.3d 1037 (9th Cir. 2002), upholding tribal court jurisdiction and holding that *Nevada v. Hicks* was limited to its special facts and *Montana v. U.S.* did *not* apply to a car accident that occurred on a Bureau of Indian Affairs road within the Northern Cheyenne Indian Reservation.

While the Supreme Court has not been particularly hospitable to tribal claims of civil jurisdiction over non-Indians on fee land, it has not overruled or revoked the potential opportunity for tribal civil jurisdiction contained in the *Montana* proviso. In this regard, there

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[13] *Supra* at 6.

[14] 508 U.S. 679 (1993) (*Montana* analysis applies to federal taking land within a reservation.).

[15] 520 U.S. 438 (1997 (*Montana* analysis applies to car accident involving a non-Indian that occurred on a state highway (with a right of way on tribal trust land) on a reservation).

[16] 532 U.S. 645 (2001) (*Montana* analysis applies to tribal tax of motel non-Indian customer staying at a motel located on fee land within reservation.).

[17] 533 U.S. 353 (2001) (*Montana* analysis applies to execution of state search warrant on trust land within reservation.).

[18] *Id.* note 2 at 358.

[19] **At least for the execution of a state (and tribal) search warrant on a tribal member's residence located on trust land within the reservation for a crime that allegedly took place off the reservation.**

are at least two circuit court decisions that have found tribal civil jurisdiction over non-Indians on fee land in accordance with the *Montana* proviso. In both *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996) and *Montana v. Environmental Protection Agency*, 137 F.3d 1135 (9th Cir. 1998), the respective circuit courts held that tribes involved (Isleta Pueblo and Confederated Salish and Kootenai Tribes) had legitimately established water quality and source pollution standards that bound non-Indians and even non-Indian municipalities such as Albuquerque, New Mexico.

There is also an unsettling asymmetry in the defendant/appellant's argument. While the defendant/appellant seeks to avoid the tribal forum as a *defendant*, it would be the *only* forum available if Parke-Davis was a *plaintiff* in this matter. For example, if Parke-Davis sought to collect on a debt that arose on the Reservation against a tribal member or the Tribe itself, its only resource would be tribal court. *See e.g., Williams v. Lee*, 358 U.S. 217 (1959). Likewise if Parke-Davis' sales agent (or even its attorneys) were involved in an alleged tort - say a car accident with a tribal vehicle in the Tribal Court parking lot - the only recourse would be in tribal court. In fact, the Tribe itself has enacted a Tribal Tort Claims Act to facilitate this process (including a waiver of Tribal sovereign immunity). *See* Choctaw Tribal Code Section 25.

Parke-Davis, it seems, would like to secure the benefits of doing business on the Reservation without any attendant responsibility. Such an asymmetrical approach by a party would clearly be impermissible in any state or federal situation and it should be no less so in a tribal situation. Respect and parity cannot be one-sided *for* the state and federal sovereign but *against* the Tribal sovereign.

D. The Case at Bar

Despite the anomalous jurisprudence of *Montana* and its progeny, the case cannot be ignored. Yet by its own terms it does not govern the case at hand. Distribution of the drug Rezulin, manufactured and distributed by the defendant/appellant Parke-Davis, took place at the Tribal pharmacy located on Tribal trust land within the boundaries of the Mississippi Band of Choctaw Reservation. If inherent tribal sovereignty is to have any meaning, it certainly must pertain to events that transpired at a Tribal pharmacy located on Tribal trust land.

Application of the expansive territorial reach of *Nevada v. Hicks* onto non-fee trust land is not justified in the instant case. The critical event – the sale of the drug Rezulin – took place on Tribal trust land and *Hicks* directly involved a significant state public interest relevant to criminal activity, while the case at bar involves a lawsuit between two private parties.

In addition, the alleged harmful drug Rezulin was not simply put into the general stream of commerce, but rather involved an agent of the defendant coming on the Mississippi Band of Choctaw reservation to meet with various Tribal employees and officials with the *express* objective of convincing them to add the drug Rezulin to the Tribal formulary. In which endeavor, the defendant was successful.

In any event, both prongs of the *Montana* proviso are satisfied. The consensual prong is satisfied because the plaintiffs' claim involves allegations relevant to the breach of the warranty of merchantability which is, at least in part, contractual in nature. *See e.g., Childs v. G.M.C.*, 73 F. Supp.2d 669 (N.D. Miss. 1999). In addition, the sale and distribution on Tribal land of an allegedly harmful drug to Tribal members represents quintessential conduct "that threatens or has some direct effect on the . . . *health* or welfare of the tribe." *Montana* at 566 (emphasis added).[20] In sum, this case is governed by neither *Nevada v. Hicks* nor *Montana v. U.S.* It is a civil case between private parties arising on tribal trust land in which there presumably is tribal jurisdiction. If *Montana* is invoked, both of its prongs are satisfied.

E. Exhaustion

The basic principle of the exhaustion of tribal court remedies as articulated in the seminal case of *National Farmer Union Inc. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) also supports the denial of interlocutory review in this case. Certainly, both this Court and the Trial Court have set forth the jurisprudential details of why the Court has jurisdiction and now the substantive claims of the plaintiffs should be heard on the merits.

The defendant/appellant has indicated that if interlocutory review is denied, it will seek immediate federal review. This would seem to turn *National Farmers Union* on its head changing it from a case respecting tribal court integrity and competence to a case facilitating federal court review with only most perfunctory concern for tribal court dignity and expertise to decide a case on its substantive merits. This Court does not believe that *National Farmers Union* case can be considered that pitiful.

Similarly, the Court in *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987), recognized Tribal Court authority over non-Indians' activities on reservation lands as an important component of tribal sovereignty. This case involved an automobile accident occurring within the boundaries of the reservation in which a member of the Blackfeet Indian tribe was injured by a non-member. The injured member was an employee of a Montana corporation operating a ranch on the reservation which was sued in Tribal Court. In staying the case pending exhaustion of Tribal Court remedies, the Court said:

> Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the Tribal Courts unless affirmatively limited by a specific treaty provision or federal statute . . . in the absence of any indication tht Congress intended the diversity statute to limit the jurisdiction of Tribal Courts, we decline

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[20] In *Nelson v. Pfizer* (WR-CV-255-01, 2001), the Navajo Trial Court dismissed a Rezulin based claim for lack of subject matter jurisdiction. The slip opinion does *not* reveal facts similar to the case at bar, *i.e.*, a sales representative of the defendant coming on the reservation and soliciting business and, therefore, it is distinguishable. Note however the Navajo Supreme Court has recently reversed the trial court and remanded the case with instructions that it be set for trial on the merits.

petitioners' invitation to hold that tribal sovereignty can be impaired in this fashion.

Id. at 18.

F. Long Arm Jurisdiction

The defendant/appellant does *not* seriously contest long arm (personal) jurisdiction. Having failed to raise the issue in its motion to dismiss and by appearing generally, rather than specially, defendant/appellant has effectively waived any claims concerning personal jurisdiction. *See e.g.*, Rule 12(h), Mississippi Band of Choctaw Rules of Civil Procedure.

Waiver aside, it is clear that the elements of long arm jurisdiction are satisfied in this matter. The Tribe does have a long arm/personal jurisdiction statute which is found at § 1-2-3 of the Choctaw Tribe Code. At least two of the enumerated provisions, namely (2)(c) (conducting business within the reservation) and (2) (g) (committing a tortious act, engaging in tortious conduct within the reservation), are clearly satisfied by the facts set out above.

There is no doubt that the defendant/appellant - through its sales agent - purposely availed itself of conducting activities within the forum, such that the defendant could have reasonably foreseen being hauled into court there. *See e.g., Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987).

G. Jurisdiction Pursuant to the Tribal Constitution.

The relevant section of the Tribal Constitution is Article II which provides that:

> The jurisdiction of the Mississippi Band of Choctaw Indians shall extend to all lands now held or which may hereafter be acquired by and for or which may be used under proper authority by the Mississippi Band of Choctaw Indians, *and* to all persons who are now or may hereafter become members of the Mississippi Band of Choctaw Indians. (Emphasis added.)

The language in Article II precisely captures the two discrete elements of tribal authority namely the physical, territorial reach of tribal jurisdiction and the potential activities of members wherever they might occur. Tribal jurisdiction - and Indian law jurisdiction in general - is often territorially defined. *See e.g.*, 18 U.S.C. § 1151 which defines the physical boundaries of Indian country for jurisdictional purposes and includes all land within the exterior boundaries of a reservation. Since *all* of the Mississippi Band of Choctaw reservation is trust land within Indian country as defined at 18 U.S.C. § 1151, there is no doubt that such territory is within the legitimate locus of potential tribal jurisdiction. This necessarily includes activities on these lands regardless of who the actors are. Tribes generally understand their jurisdiction territorially, and

the Mississippi Choctaw Band is no different in this regard.[21]

If this is so (and it is), one might ask why there is the additional reference in Article II to jurisdiction over "all persons who are now or may hereafter become members of the Mississippi Band of Choctaw Indians." The answer is simply that the fact of tribal *membership* involves legal relationships that remain within the purview of tribal jurisdictional authority regardless of the residence of the tribal member. Examples in this area include such matters as probate, voting, and per-capita distributions.

To try to interpret Article II as being limited to 'dirt and Indians'[22] ultimately makes no legal sense and would clearly be contrary to the intent of the Mississippi Band of Choctaw Indians when it adopted its original Constitution in 1945 and its Revised Constitution in 1975.

IV. Conclusion

For all the above stated reasons it is clear that the Trial Court committed no 'obvious error' and the defendant/appellant's motion for interlocutory review is denied and the case is remanded for a prompt trial on the merits.

IT IS SO ORDERED.

FOR THE COURT:

Chief Justice Rae Nell Vaughn

Dated: April 26th 2004

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[21] *See e.g.*, Article II of the Constitution and By-Laws for the Blackfeet Tribe of the Blackfeet Indian Reservation of Montana was amended in 1978 and states that: "[t]he jurisdiction of the Blackfeet Tribe shall extend to the territory within the confines of the Blackfeet Reservation boundaries as defined in the agreement of September 26, 1895; and to such other lands as may be hereafter added thereto under any law of the United States, except as otherwise provided by law." (Emphasis added.); *See also* The amended Constitution of the Yankton Sioux Tribal Business and Claims Committee, Article VI. Territory Section 1 (The territory under which this Constitution shall exist shall extend to all original lands now owned by the Tribe under the Treaty of 1858.) (Emphasis added.); Constitution and By-Laws of the Confederated Tribe of Warm Springs Reservation of Oregon. As Amended, Article II - Territory, Section 1 (The jurisdiction of the Confederated Tribes of the Warm Springs Reservation of Oregon shall extend to all lands contained within the present boundaries of the Warm Springs Reservation and to such lands as may have been heretofore or may hereafter be acquired by the Confederated Tribes of the Warm Springs Reservation or by the United States in trust for such tribes.) (Emphasis added.)

[22] Metaphor used by plaintiffs' counsel at oral argument.

IN THE CHOCTAW TRIBAL COURT
MISSISSIPPI BAND OF CHOCTAW INDIANS

BRENDA ISAAC, BERT ISAAC, EMMA WILLIS and LAURA JOE, **CIVIL ACTION NO. CV 962-03**

PLAINTIFFS,

V.

PARKE-DAVIS, a division of WARNER-LAMBERT COMPANY, and WARNER-LAMBERT COMPANY,

DEFENDANTS.

FINAL JUDGMENT OF DISMISSAL WITH PREJUDICE

This cause having come on to be heard on the ore tenus motion of the plaintiffs and defendants, by and through their attorneys, to dismiss the complaint with prejudice and it being made known to the Court that this civil action has been fully compromised and settled, and that there remain no issues to be litigated by or between the parties and all parties consenting to the entry of this judgment and agreeing that this action should be completely dismissed with prejudice with the parties to bear their own costs,

IT IS, ORDERED AND ADJUDGED, that this civil action is hereby dismissed with prejudice as to all defendants with the parties to bear their own costs.

SO ORDERED AND ADJUDGED this 21st day of September, 2004.

JUDGE

FILED
SEP 2 1 2004
CHOCTAW TRIBAL COURT
BY: [signature]
COURT CLERK

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