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April 16, 2015

**Hannah Smith, Interim Attorney General
The Eastern Band of Cherokee Indians
Office of the Attorney General
561 Sequoyah Trail
P.O. Box 455
Cherokee, NC 28719**

RE: Resolution Number 261 (passed October 14, 2014)

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Dear Attorney General Smith:

I am honored to represent the Eastern Band of Cherokee Indians for Justice & Accountability with regards to challenging Tribal Council's passage of Resolution Number 261. As you should already be aware, Resolution Number 261 clearly violates the explicit terms and plain meaning of the Charter and Governing Document Section 7 and the Cherokee Code Section 117-15(a). Any argument to the contrary strains credibility.

My clients are deeply troubled by this Tribal Council's flagrant disregard for Tribal law demonstrated by the passage of Resolution Number 261. My clients estimate the value of public funds wrongfully converted by Tribal Council at approximately \$1 million. At a time when vital Tribal programs in the areas of health, elder services, families and children continue to be underfunded, such exploitation of public office for personal gain is simply unconscionable. Service on Tribal Council is precisely that – a service. It is not an entitlement designed to line the pockets of those privileged to serve the people.

The Eastern Band of Cherokee Indians for Justice & Accountability are prepared to challenge Tribal Council's actions in court. Attached is a draft of our Complaint. Our claims are firmly grounded in the law. Our claims will be brought against each Tribal Council member who voted for the passage of Resolution Number 261 in their individual capacities. Governmental officials cannot invoke the cloak of immunity that the office provides when they exploit the office to flagrantly violate the law for personal gain. Moreover, claims against Tribal Council



members in their individual capacities will not be barred by sovereign immunity. We will seek to recover costs and attorney fees, should we be forced to vindicate our claims in court.

We hereby demand that Tribal Council rescind Resolution Number 261 immediately and, in the interim, return to the general budget all illegal funds received by each current and former Tribal Council member since the passage of Resolution Number 261. We expect that this action will take place at the next Tribal Council meeting on May 7, 2015.

Our position is clear. The law is clear. We will not accept anything less than full respect for the Charter and Governing Document Section 7, abidance by the Cherokee Code Section 117-15(a), and a renewed commitment to upholding the oath of office that elected Tribal Council members are privileged to hold.

Sincerely,

A handwritten signature in dark ink, appearing to read "Meghann K. Burke". The signature is fluid and cursive, with the first name being the most prominent.

Meghann K. Burke

Enclosure: Draft Complaint

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|-----|---|---|
| Cc: | Terri Henry, Chairwoman Painttown Township | Tommye Saunooke Painttown Township |
| | Bill Taylor, Vice-Chairman Wolftown Township | Bo Crowe Wolftown Township |
| | Perry Shell Big Cove Township | Brandon Jones Snowbird & Cherokee Co. Township |
| | Teresa McCoy Big Cove Township | Adam Wachacha Snowbird & Cherokee Co. Township |
| | Gene Crowe, Jr. Birdtown Township | David Wolfe Yellowhill Township |
| | Albert Rose Birdtown Township | Alan B. Ensley Yellowhill Township |

CHEROKEE TRIBAL COURT
EASTERN BAND OF CHEROKEE INDIANS
CHEROKEE, NORTH CAROLINA
CASE NO. _____

THE EASTERN BAND OF CHEROKEE)
INDIANS FOR JUSTICE & ACCOUNTABILITY,)

Plaintiffs)

v.)

TERRI HENRY, individually, BILL TAYLOR,)
individually, GENE CROWE, JR. individually,)
ALAN B. ENSLEY, individually, ALBERT R.)
ROSE, individually, TOMMYE SAUNOOKE,)
individually, PERRY SHELL, individually,)
ADAM WACHACHA, individually,)
DAVID WOLFE, individually, and the)
EASTERN BAND OF CHEROKEE INDIANS)
TRIBAL COUNCIL,)

Defendants)
_____)

COMPLAINT FOR
DECLARATORY JUDGMENT
AND INJUNCTIVE RELIEF

JURY TRIAL DEMANDED

NOW COMES Plaintiffs, the Eastern Band of Cherokee Indians for Justice & Accountability, pursuant to Charter and Governing Document § 7, Cherokee Code § 117-15(a), and Rules 57 and 65 of the North Carolina Rules of Civil Procedure, complaining of the Defendants, Terri Henry, individually, Bill Taylor, individually, Gene Crowe, Jr., individually, Alan B. Ensley, individually, Albert Rose, individually, Tommye Sanooke, individually, Perry Shell, individually, Adam Wachacha, individually, David Wolfe, individually, and the Eastern Band of Cherokee Indians Tribal Council, allege and say as follows:

INTRODUCTION

1. This lawsuit is filed on behalf of the Eastern Band of Cherokee Indians for Justice & Accountability to challenge illegal pay raises the Defendants gave themselves by way of enacting Resolution Number 261 on October 14, 2014 in violation of the Charter and Governing Document § 7 and Cherokee Code § 117-15(a). The explicit terms of the Charter and Governing Document § 7 and Cherokee Code § 117-15(a) state in no uncertain terms: “no pay raise [shall] take effect until the next council is seated,” and “[p]ay increases for the Tribal Council members shall not exceed the amount appropriated in that fiscal year for tribal employees.” On October 14, 2014, Tribal Council passed Resolution Number 261, which gave each current and former Tribal Council member an annual salary increase *retroactive to 2010*. Tribal Council members began to distribute illegal pay raises to themselves in the middle of their terms, in October 2014. Likewise, former Tribal Council members received paychecks for retroactive pay increases long after their terms had ended. By enacting Resolution Number 261, Tribal Council wrongfully converted an estimated \$1 million in public funds for personal gain. By law, a term on Tribal

Council is a service to the Tribe, not an entitlement from it. This action seeks declaratory and injunctive relief to redress their blatantly illegal conduct.

PARTIES, JURISDICTION, AND VENUE

2. The Eastern Band of Cherokee Indians for Justice & Accountability is an organization of people who are concerned enrolled members of the Eastern Band of Cherokee Indians. Each individual member of the Eastern Band of Cherokee Indians for Justice & Accountability would have standing to sue in their own right; the interests the Eastern Band of Cherokee Indians for Justice & Accountability seek to protect are germane to the organization's purpose; the organization seeks to protect individual members from retaliation; and neither the claims asserted nor the relief sought herein require the participation of individual members in this lawsuit. Included among its membership are enrolled members who are not government officials and Tribal employees.

3. Defendant, Chairwoman Terri Henry, is an enrolled member, Tribal Council member, and resident of Painttown Township. Defendant Henry voted for Resolution Number 261. She is sued in her individual capacity.

4. Defendant, Vice Chairman Bill Taylor, is an enrolled member, Tribal Council member, and resident of Wolfetown Township. Defendant Taylor voted for Resolution Number 261. He is sued in his individual capacity.

5. Defendant, Councilman Gene Crowe, Jr., is an enrolled member, Tribal Council member, and resident of Birdtown Township. Defendant Crowe voted for Resolution Number 261. He is sued in his individual capacity.

6. Defendant, Alan B. Ensley, is an enrolled member, Tribal Council member, and resident of Yellowhill Township. Defendant Ensley voted for Resolution Number 261. He is sued in his individual capacity.

7. Defendant, Albert Rose, is an enrolled member, Tribal Council member, and resident of Birdtown Township. Defendant Rose voted for Resolution Number 261. He is sued in his individual capacity.

8. Defendant, Tommye Sanooke, is an enrolled member, Tribal Council member, and resident of Painttown Township. Defendant Sanooke voted for Resolution Number 261. He is sued in his individual capacity.

9. Defendant, Councilman Perry Shell, is an enrolled member, Tribal Council member, and resident of Big Cove Township. Defendant Shell voted for Resolution Number 261. He is sued in his individual capacity.

10. Defendant, Adam Wachacha, is an enrolled member, Tribal Council member, and resident of Snowbird/Cherokee County Township. Defendant Wachacha voted for Resolution Number 261. He is sued in his individual capacity.

11. Defendant, David Wolfe, is an enrolled member, Tribal Council member, and resident of Yellowhill Township. Defendant Wolfe voted for Resolution Number 261. He is sued in his individual capacity.

12. The Charter and Governing Document of the Eastern Band of Cherokee Indians, § 18, provides the oath of office for Tribal Council members. It states in relevant part:

“I do solemnly swear (or affirm) that I will faithfully execute the duties of the office of [Tribal Council] of the Eastern Band of Cherokees and will to the best of my ability, preserve, protect and defend the charter and governing document and laws confirmed and ratified by the enrolled members of the Eastern Band of Cherokee Indians. I do solemnly swear (or affirm) that I have not obtained my election or appointment to Tribal office by bribery or any undue or unlawful means or fraud, and that in all measures which may come before me I will so conduct myself as in my judgment shall appear most conducive to the interest and prosperity of the Eastern Band of Cherokees.”

13. The acts of the individual defendants named above and as described herein are blatantly and facially illegal in violation of the plain meaning and explicit terms of the Charter and Governing Document § 7, Cherokee Code § 117-15(a), and the oath of office cited above. Each individual defendant named herein is barred from claiming sovereign immunity for such unlawful conduct. The individually-named defendants exceeded the course and scope of their elected office by the unlawful conduct described herein and are thus barred from invoking the sovereign immunity granted to government officials acting within the scope of their official duties.

14. Defendant, the Eastern Band of Cherokee Indians Tribal Council, is a duly constituted elected body organized and existing under the laws of the Cherokee Code, Article II.

15. This Court has jurisdiction over the parties to this action.

16. This Court has jurisdiction over the subject matter of this action.

17. Venue is proper.

FACTS

18. The Charter and Governing Document of the Eastern Band of Cherokee Indians, § 7, states in relevant part:

The members of the Tribal Council shall receive such compensation as shall be appropriated by Tribal Council, with no pay raise to take effect until the next council is seated.

19. The Cherokee Code, § 117-15, states in relevant part:

(a) *Tribal Council pay.* Pay increases for Tribal Council members shall not exceed the amount appropriated in that fiscal year for Tribal employees. These pay increases shall not take effect until the next elected Tribal Council

members are seated, per Charter and Governing Document of the Eastern Band of Cherokee Indians.

20. On July 8, 2014, Resolution Number 261 (attached hereto as Exhibit A) was introduced by the Principal Chief. Resolution Number 261 is an annual operating budget for Fiscal Year 2015, beginning October 1, 2014 through September 30, 2015.

21. The budget contained in Resolution Number 261 budgeted, among other line items, a pay increase for Tribal Council members in the amount of \$11,397.00 for Chairwoman Henry, \$11,017.00 for Vice Chairman Taylor, and \$10,637.00 for the remaining Tribal Council members for Fiscal Year 2014.

22. The budget introduced by the Principal Chief also included the following proposed retroactive salary increases for each individual current and former Tribal Council member, depending on years of service: a range of \$6,797.00 to \$7,283.00 for Fiscal Year 2013, a range of \$6,797.00 to \$7,283.00 for Fiscal Year 2012, a range of \$4,200.00 to \$4,500.00 for Fiscal Year 2011, and a range of \$4,200.00 to \$4,500.00 for Fiscal Year 2010. (See attached Exhibit B.)

23. According to the Tribal Council's responses to public record requests, the cumulative amount of retroactive pay up to Fiscal Year 2014 is \$395,066.00.

24. During a budget hearing on October 14, 2014, Tribal Council passed Resolution Number 261 without amendment. Defendants Shell, Crowe, Ensley, Wolfe, Taylor, Henry, Wachacha, Rose, and Saunooke voted for it. Councilman Bo Crowe voted against it. Councilwoman Teresa McCoy and Councilman Brandon Jones were absent.

25. On or around October 23, 2014, Councilwoman Teresa McCoy and Councilman Albert Rose submitted protests of Resolution Number 261 to Defendant and Chairwoman Henry. The protests sought to rescind Resolution Number 261 at the November 6, 2014 Tribal Council meeting, citing Charter and Governing Document §§ 7, 18. The protests were denied.

26. Current Tribal Council members began to receive the retroactive and prospective pay increases in or around October 2014. The next Tribal Council will not be seated until October 2015.

27. Former Tribal Council members received retroactive pay increases in the form of a lump-sum payment in or around October 2014. By definition, former Tribal Council members are no longer in office.

28. According to the Tribal Council's response to public record requests, the average Tribal employee pay raise was 1% of their then-existing salaries in 2013. Historically, pay increases have been, on average, 3% of each employee's then-existing salary. Thus, Tribal Council pay raises far exceed "the amount appropriated in that fiscal year for Tribal employees" under Cherokee Code § 117-15(a).

29. Upon information and belief, the total amount of wrongfully converted funds inclusive of illegal retroactive pay increases, illegal prospective pay increases, and prospective retirement benefits is estimated at approximately \$1 million.

FIRST CAUSE OF ACTION
(Declaratory Judgment)

30. Plaintiffs restate and incorporate by reference the allegations contained in Paragraphs 1-29 of this Complaint as if fully set forth.

31. The Charter and Governing Document of the Eastern Band of Cherokee Indians § 7, states: “The members of the Tribal Council shall receive such compensation as shall be appropriated by Tribal Council, with no pay raise to take effect until the next council is seated.”

32. The Cherokee Code § 117-15(a), states: “Pay increases for Tribal Council members shall not exceed the amount appropriated in that fiscal year for Tribal employees. These pay increases shall not take effect until the next elected Tribal Council members are seated, per Charter and Governing Document of the Eastern Band of Cherokee Indians.”

33. The next Tribal Council will not be seated until October 2015. However, Tribal Council members began receiving pay increases pursuant to Resolution Number 261 in the middle of their current terms.

34. There is no legal authority for giving former Tribal Council members a retroactive pay raise. These individuals are no longer in office.

35. As alleged herein, Resolution Number 261 gives current and former Tribal Council members a midterm, retroactive pay increase which exceeds the amount appropriated in Fiscal Year 2015 for Tribal Employees, in violation of Charter and Governing Document § 7 and Cherokee Code § 117-15(a).

36. There is an actual and existing controversy between Plaintiffs and Defendants as to the validity of Resolution 261 pursuant to the Charter and Governing Document § 7 and Cherokee Code § 117-15(a).

37. Pursuant to the Charter and Governing Document § 7, Cherokee Code § 117-15(a), and N.C. R. Civ. P. Rule 57, Plaintiffs are challenging the unlawful actions of the Defendants and are entitled to have the Court declare the validity or invalidity of Resolution Number 261.

SECOND CAUSE OF ACTION
(Injunctive Relief)

38. Plaintiffs restate and incorporate by reference the allegations contained in Paragraphs 1-37 of this Complaint as if fully set forth.

39. This case presents an actual controversy because Defendants’ present and ongoing acceptance of illegal pay subjects the Tribe to serious, immediate, irreparable, and ongoing harm warranting the issuance of both declaratory and injunctive relief.

40. Plaintiffs seek an injunction to protect the Tribe and to avoid the further wrongful conversion of public funds. A favorable decision enjoining all named Defendants from

disbursing and accepting illegal pay raises would redress and prevent immediate, irreparable loss to Plaintiffs, for which Plaintiffs have no other adequate remedy at law.

41. The Defendants will incur no burden in respecting the Charter and Governing Document, upholding the Cherokee Code, and discharging their oaths of office. Any purported burden incurred by Defendants would be substantially outweighed by the interests of the Tribe.

42. Pursuant to the Charter and Governing Document § 7, Cherokee Code § 117-15(a), and N.C. R. Civ. P. Rule 65, Plaintiffs are entitled to injunctive relief enjoining all named Defendants from disbursing and accepting the illegal pay raises described herein.

THIRD CLAIM FOR RELIEF
(Violation of Equal Protection, Indian Civil Rights Act, 25 U.S.C. § 1302)

43. Plaintiffs restate and incorporate by reference the allegations contained in Paragraphs 1-42 of this Complaint as if fully set forth.

44. Resolution Number 261, which, as alleged herein, facially and blatantly violates the explicit terms and plain meaning Charter and Governing Document and Cherokee Code.

45. Defendants' conduct as alleged herein treats enrolled members who are not government officials and Tribal Council members differently in that the law applies to the former but not the latter.

46. Further, Defendants' conduct as alleged herein treats Tribal Council officials and Tribal employees differently in that the former receive illegal pay raises that violate and exceed the plain meaning of Cherokee Code § 117-15(a).

47. There is no rational basis whatsoever for permitting government officials to flagrantly violate the law.

48. There is no rational basis whatsoever for permitting Tribal Council members to use the duties of elected office to exploit Tribal funds for personal gain.

49. This unlawful conduct by the Tribal Council reflects a denial of equal protection of the laws and due process to Tribal members and Tribal employees in violation of 25 U.S.C. § 1302.

50. Pursuant to Cherokee Code §§ 1-2(g), 7-2, 7-3, 7-4 and N.C. R. of Civ. P. Rules 57 and 65, Plaintiffs are entitled to declaratory and injunctive relief prohibiting Defendants from disbursing and accepting illegal pay raises pursuant to Resolution Number 261.

WHEREFORE, Plaintiffs respectfully pray unto the Court as follows:

1. That this Court declare that Resolution Number 261 violates Charter and Governing Document § 7, Cherokee Code § 117-15(a).

2. That this Court declare that enforcement of Resolution 261 violates the Indian Civil Rights Act, 25 U.S.C. § 1302.

3. That this Court preliminarily and permanently enjoin Defendants' enforcement of Resolution Number 261 by enjoining Defendants from disbursing and/or accepting pay raises in violation of the Charter and Governing Document § 7, Cherokee Code § 117-15(a).

4. That this Court order that Defendants and all current and former Tribal Council members return funds that have already been disbursed in violation of Charter and Governing Document § 7, Cherokee Code § 117-15(a) to the Tribe.

5. That the costs of this action, including costs, expenses, and attorney fees, be taxed against the Defendants, and

6. For such other relief as the Court may deem just, equitable, and proper.

THIS the ____ day of April, 2015.

Respectfully submitted,

BRAZIL & BURKE, P.A.

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