IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

HCI DISTRIBUTION, INC.; and ROCK RIVER MANUFACTURING, INC., Plaintiffs, v. DOUGLAS PETERSON, Nebraska Attorney General; TONY FULTON, Nebraska Tax Commissioner, Defendants.	)	Case No. 8:18-cv-00173-JMG-MDN

BRIEF IN OPPOSITION TO UNITED STATES' MOTION TO STAY AND REQUEST TO INTERVENE

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INTRODUCTION

HCI Distribution, Inc. ("HCID") and Rock River Manufacturing, Inc. ("RR") (collectively "Tribal Entities") submit this opposition to the United States' Motion to Stay All Proceedings and Request for Permission to Intervene. [1] The Tribal Entities are operating arms of the Winnebago Tribe of Nebraska ("Tribe"), created for the express purpose of participating in economic development activities to support the self-sufficiency and self-determination of the Tribe and to benefit the Tribal membership. Complaint ¶ 1. The Tribal Entities manufacture and distribute tobacco products from their respective headquarters on the Winnebago Reservation. *Id*. ¶¶ 8 – 20. The Tribal Entities are very small players, indeed miniscule, in the broader American tobacco market – a multi-billion dollar industry dominated by a group of massive for-profit corporate entities colloquially known as Big Tobacco.[2]

The Tribal Entities' participation in the tobacco industry is apt. Unlike Big Tobacco, tribally-owned entities like HCID and Rock River are functioning within the continuum of an ancient marketplace. Tobacco is, of course, New World flora that pre-Columbian Natives cultivated, traded, and ingested both ceremonially and recreationally for millennia.[3] Indeed, the

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[1] As an initial matter, the United States violated Nebraska Civil Rule 7.1(a)(1) by failing to file a separate motion and brief. "Unless the rule states otherwise, a party who does not follow this rule may be considered to have abandoned in whole or in part that party's position on the pending motion." *Id.* at 7.1. While courts in this jurisdiction sometimes issue warnings for Rule 7.1 deficiencies, *e.g., Fergin v. Westrock Company*, No. 8:16CV26, 2017 WL 5990126 (D. Neb. Dec, 1, 2017), they can also be grounds for denying the motion, *e.g., Stamm v. County of Cheyenne, Nebraska*, No. 4:17CV3146, 2018 WL 2926282 (D. Neb. Jun. 11, 2018).

[2] Jennifer Maloney & Saabira Chaudhuri, *Against All Odds, the U.S. Tobacco Industry Is Rolling in Money*, WALL ST. J. (Apr. 23, 2017), https://www.wsj.com/articles/u-s-tobacco-industry-rebounds-from-its-near-death-experience-1492968698.

[3] Iain Gately, *Tobacco: A Cultural History of How an Exotic Plant Seduced the World* 3 (2001); *see also* Ronald J. Rychlak, Cards and Dice in Smoky Rooms: Tobacco Bans and

Winnebago people still use tobacco ceremonially in a sacred way.[4] The earliest commercial interactions between Europeans and the original inhabitants of this continent were in the tobacco trade in a marketplace that ultimately edged out Native people and established the financial foundations of this country.[5] The Tribe's reentry into this market with the establishment of the Tribal Entities was simply one step in a much longer history.

Unlike Big Tobacco, the Tribal Entities do not exist to generate private profit. The Tribal Entities' profits flow back to the Winnebago Tribe to support essential Tribal governmental and social programs, complaint ¶¶ 9, 12, 14, 19, a sovereign function of the Tribe that is explicitly contemplated by the United States Supreme Court, which has acknowledged that "due in large part to the insuperable (***and often state imposed***) barriers Tribes face in raising revenues through traditional means," tribes must pursue commercial economic development to achieve self-sufficiency and prosperity. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2043 (2014) (emphasis added).

The Supreme Court's observation in *Bay Mills* is particularly relevant to the instant lawsuit, in which the Tribal Entities have brought a ***facial challenge*** to a pair of State statutes that ***do not impose taxes***[6] and purport to illegally regulate Tribal on-Reservation activity in a manner that is impeding their ability to generate important revenue. *See generally* Complaint. As a facial challenge to this lawsuit, the questions before this Court are primarily legal. Factual questions, as

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Modern Casinos, 57 Drake L. Rev. 467, 469 (2009).

[4] Paul Radin, *The Ritual and Significance of the Winnebago Medicine Dance*, The Journal of American Folklore, Vol. 24, No 92 (1911).

[5] Joseph C. Robert, *The Story of Tobacco in America*, 5-6 (2008).

[6] Neb. Rev. Stat. §§ 69-2703(1)-(2) and 69-2704-2709.

demonstrated by the Tribal Entities' early discovery requests, are logically confined to issues of legislative history.

This is the context in which the United States has filed the instant motion to intervene and stay this proceeding. As set forth herein, the government makes the claim that a fact-intensive, ongoing criminal investigation into the Tribal Entities, in which no grand jury has been impaneled, no indictments have issued, no target letters have been received, and which is premised upon a ***federal statute that implicates on-Reservation taxation***, substantively overlaps with this ***facial challenge to a non-tax state-law***. Without demonstrating any substantive overlap or interference between the civil and criminal proceeding, the United States has requested a complete, indefinite stay of this entire civil proceeding without suggesting any substantive or temporal limits whatsoever. In so doing, it wholly flouts the legal standards that govern this process. It completely ignores the Federal Rules of Civil Procedure, failing to even intervene in this matter prior to setting forth arguments for its motion to stay that are not on point and do not respect the well-established legal framework for such motions. To grant the government's motion to intervene and stay under these circumstances would permit the United States to abuse its power and abuse the judicial system in a manner that would illegally impair the rights of a sovereign Tribe and its operating arms. This is a scenario not unknown to the Tribe, but one that seems misplaced in the 21st century. The United States' bears the burden of proving its entitlement to both intervention and stay and hence its motion must be denied in its entirety.

FACTUAL AND PROCEDURAL BACKGROUND

As is clearly set forth in the Complaint, this matter involves a facial challenge to the application of two Nebraska statutes. The Tribal Entities have clearly alleged that these statutes are unenforceable against them in Indian Country. Even a cursory review of the Complaint

demonstrates that the legal and factual scope of this lawsuit has nothing to do with the United States or the U.S. Attorney's criminal investigation regarding the Tribal Entities. *See, generally,* ECF 1.

Since the inception of the 1998 Master Settlement Agreement ("MSA") and its related statutes, Neb. Rev. §§ 69-2701-69-2703.1 ("Escrow Statute") and 69-2704-2709 ("Directory Statute"), Nebraska and 45 other states with largely identical statutes have attempted to destroy tribal economies at the request of Big Tobacco. *Id.* at ¶¶ 21-33. Despite state pressure, tribes – sovereigns in their own right – have managed to create a tribal tobacco economy that has provided a great economic benefit to tribal governments. However, state pressure in enforcing these statutes has severely limited the growth of tribal economies and unfortunately has been successful in destroying some tribal tobacco businesses. Index at Attachment A, Declaration of Erin Morgan ("Morgan Decl.") at ¶¶ 6-9; Index at Attachment B, Declaration of Adam Bowen ("Bowen Decl.") at ¶¶ 12-16.

The Tribal Entities have brought this lawsuit for the sole purpose of determining their rights as sovereigns to operate within Indian Country free from the inappropriate intrusion of State law. ECF 1 at ¶¶ 51-77. The threat created by these statutes severely limits their ability to reach their full growth potential and has limited their ability to generate revenue. Morgan Decl. at ¶¶ 6-9; Bowen Decl. at ¶¶12-16.

On January 30, 2018, three months prior to the filing of the instant lawsuit, the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") executed four search warrants on the Tribal Entities sovereign land on the Winnebago Reservation in Nebraska. Index at Attachment C, Declaration of Joseph V. Messineo ("Messineo Decl.") at ¶ 5, Ex. 4. The United States has indicated that it is investigating the Tribal Entities for alleged violations of the Contraband

Cigarette Trafficking Act ("CCTA") 18 U.S.C. §§ 2341 et seq. *Id.* at ¶ 5, Ex. 4, p. 3 (noting forfeiture authority as being the CCTA). All CCTA criminal violations are premised on failure to pay an applicable tax. 18 U.S.C. § 2341(2) (defining contraband cigarette as cigarettes where there is no indication of payment of applicable state excise tax). The CCTA does not implicate the Escrow Statute or the Directory Statute.

DISCUSSION

Whether this Court may grant the total and open-ended stay that the United States has requested is subject to a two-part inquiry that imposes the burden of proof on the United States in both instances. First, the Court must find that the United States is entitled to intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure. *See generally, S.E.C. v. Chestman*, 861 F.2d 49, 49 (2d Cir. 1988) (noting that the United States may intervene in a civil matter for the ***limited purpose of staying discovery*** if it proceeds under Fed. R. Civ. P. 24(a) or (b). *See also Ashworth v. Albers Med., Inc.*, 229 F.R.D. 527, 529-30 (S.D. W. Va. 2005); *Sec. & Exch. Comm'n v. Mutuals.com, Inc.*, No. 3:03-CV-2912-D, 2004 WL 1629929, at * 1 (N.D. Tex. July 20, 2004); *Twenty First Century Corp. v. LaBianca*, 801 F. Supp. 1007, 1009 (S.D. N.Y. 1992); *White v. Mapco Gas Prod., Inc.*, 116 F.R.D. 498, 501 (E.D. Ark. 1987)). Only after the Court has granted intervention may it consider whether a stay of any part of the proceedings is appropriate. *White*, 116 F.R.D. at 501. That inquiry is subject to five-part test that balances the civil plaintiff's interests and burdens, burden on the defendants, convenience of the court, interests, of non-parties, and the public interest, *e.g.*, *Kozlov v. Assoc. Wholesale Grocers, Inc.*, Nos. 4:10-cv-03211, 4:10-cv-03212, 8:10-cv-03191, 2012 WL 12887562, at *1 (D. Neb. Feb. 15, 2012), guided by the assumption that "in the absence of substantial prejudice of the parties involved, simultaneous

parallel civil and criminal proceedings are unobjectionable." *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir. 1995).

As set forth in detail below, the United States has neither properly moved to intervene nor has it met any relevant test for staying the instant proceeding. The instant motion must therefore be denied.

I. The United States Does Not Meet Any Standard for Intervention

A. The United States Has Not Properly Moved for Intervention Under Rule 24; Hence Its Motion Should Be Denied

Intervention in an existing civil litigation is governed by Rule 24 of the Federal Rules of Civil Procedure. Rule 24(a) permits a third party to intervene as of right if they have an unconditional right to intervene under a federal statute or if they claim the disposition of the civil matter may impair their interest in a property or transaction. Rule 24(b) provides for permissive intervention where the proposed intervenor has a conditional right to intervene under a federal statute or if the proposed intervenor has a claim or defense that "shares with the main action a common question of law or fact."

Unsurprisingly, the Rules of Civil Procedure govern intervention even when the proposed intervenor is the United States. The United States fails to acknowledge this fundamental legal principle, however. Without even a passing reference to Rule 24, the government makes the unsupported claim that it enjoys "specific statutory authority conferred pursuant to 28 U.S.C. § 517" to intervene in this lawsuit to seek the total and open-ended stay of proceedings at issue here. ECF 16 at p. 1. It cites no authority in support of this claim and presumably hopes to appeal to this Court's general supervisory powers.

It has been some time since a court in this circuit has addressed such a presumptuous application on the part of the government, however it is not unheard of. In *White v. Mapco Gas*

Prods., Inc., 116 F.R.D. 498 (E.D. Ark. 1987), the court considered the United States' motion to stay discovery in a suit brought by individuals against two gas companies, which coincided with a grand jury investigation of the gas companies. *Id.* at 500-01. The gas companies in the civil case had issued subpoenas to various witnesses who were also testifying in the grand jury proceeding, specifically requesting production of documents related to the grand jury and cooperation with the government. *Id.*

As it has done here, the United States in *White* moved for a stay of the civil proceedings without seeking a determination on the threshold question of "whether the Government, not being a party to this private civil action, has any standing to ask for a stay of discovery." *Id.* at 500. Also as here, the United States failed to move under, or even reference, Rule 24. Instead, it referenced an inapposite federal statute and appealed to the court's general supervisory powers. *Id.* The court balked, admonishing the United States that "[t]he government may not just 'insinuate itself into a private civil lawsuit between others' as it seeks to do here." *Id.* at 501 (quoting *Martindell v. Int'l Tel. and Tel. Corp.*, 594 F.2d 291, 294 (2d. Cir. 1979). The court further explained that "'[t]he proper procedure, as the Government should know, was to seek permissive intervention in the private action pursuant to Rule 24(b) of the Federal Rules of Civil Procedure.'" *Id.* (quoting *Martindell*, 594 F.2d at 294). The court ruled that the United States lacked standing to bring a motion to stay the civil proceeding because it wholly failed to move under or acknowledge the existence of Rule 24, concluding that "the Government does not have standing to ask for a stay of discovery in a case in which it is not a party or has not been granted intervention." *Id.*

The United States should not be permitted to insinuate itself into the present lawsuit without any regard to the basic procedural rules that govern civil cases in federal court and without any regard to basic constitutional notions of standing. Although it is true that Rule 24 is to be

liberally construed, *e.g.*, *United States v. Union Elec. Co.*, 64 F.3d 1152, 1158 (8th Cir. 1995), it is also true that the party seeking intervention bears the burden of proving that it is entitled to intervention under the Rule. *United States v. California*, 538 Fed. App'x 759, 760 (9th Cir. 2013). Failing to make any effort at all to meet the burden cannot be sufficient to satisfy even the most liberal construction of Rule 24. To permit the United States to do so here would hold the government to a separate standard outside of the law. On that basis alone this Court should deny the United States' motion. *See White*, 116 F.R.D. at 501.

B. The United States' Motion Does Not Satisfy Either Rule 24(a) or 24(b)

Even if this Court were to construe the United States' motion as one brought under Rule 24, the government has failed to meet any standard for intervention under either Fed. R. Civ. P. 24(a), concerning intervention of right, or Fed. R. Civ. P. 24(b), concerning permissive intervention.

The government's conclusory assertion that it is entitled to intervene under 28 U.S.C. § 517 suggests that the United States here may be laboring under the misapprehension that this statute by its own force provides it with an unconditional right to intervene. That is not so. The statute states simply that "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States. . . ." 28 U.S.C. § 517. By its plain language, 28 U.S.C. § 517 is not an intervention statute. Instead, it is one of "[s]everal statutes [that] grant the United States the authority to file ***statements of interest*** in trial-level litigation." Victor Zapana, *The Statement of Interest as a Tool in Federal Civil Rights Enforcement*, 52 HARV. C.R.-C.L. L. REV. 227, 231 (2017) (emphasis added). Statements of interest authorized by 28 U.S.C. § 517 are simply memoranda "designed to explain to a court the

interests of the United States in litigation between private parties." *Hunton & Williams v. U.S. Dept. of Justice*, 590 F.3d 272, 291 (4th Cir. 2010). Federal courts well-understand that 28 U.S.C. § 517 exists to provide the United States with an opportunity to assert the interest of the United States without taking the more formal and involved steps of either intervening under Rule 24 or petitioning to participate as amicus curiae. *E.g.*, *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 384-85 (3rd Cir. 2006) (describing a statement of interest under 28 U.S.C. § 517 as an alternative to intervention or an amicus brief); *Nice v. L-3 Commc'ns Vertex Aerospace LLC*, 885 F.3d 1308, 1311 n. 3 (11th Cir. 2018).

Therefore, 28 U.S.C. § 517 does not provide the United States with an unconditional right that entitles it to intervene pursuant to Rule 24(a)(1). Consequently, if this Court were to permit the United States to intervene under Rule 24, it would have to construe its motion as one brought under Rule 24(b), which notably is the subsection under which the government typically moves when it is seeking to stay a civil proceeding that coexists with a criminal proceeding. But even if this Court so liberally reads the United States' deficient motion, the government simply does not meet the test.

A plurality of decisions that grant Rule 24(b) intervention to the government where civil and criminal cases coexist are ones in which the United States has brought a civil regulatory action against a defendant for conduct that ultimately ripens into a criminal indictment. *E.g.*, *SEC v. Beacon Hill Asset Mgmt. LLC*, No. 02 Civ. 8855, 2003 WL 554618 (S.D. N.Y. Feb. 27, 2003); *SEC v. Doody*, 186 F. Supp.2d 379 (S.D. N.Y. 2002); *SEC v. Mersky*, No. CIV. A. 93-5200, 1994 WL 22305 (E.D. Pa. Jan. 25, 1994); *SEC v. Downe*, No. 92 Civ. 4092, 1993 WL 22126 (S.D. N.Y. Jan. 26, 1993). A smaller number arise out of private lawsuits that ultimately ripen into a criminal indictment. *E.g.*, *Garret v. Cassity*, No. 4:09CV01252, 2011 WL 2689359 (July 11, 2011, E.D.

Mo.); *Bureerong v. Uvawas*, 167 F.R.D. 83 (C.D. Cal. 1996); *White*, 116 F.R.D. 498. In either scenario, Rule 24(b) requires the proposed intervenor to first prove that a common question of law and fact exists between the civil and criminal matters and only then will the court consider intervention "***for the limited purpose of moving to stay discovery***." *Twenty First Century Corp.*, 801 F. Supp. at 1009 (emphasis added). *See Javier H. v. Garcia-Botello*, 218 F.R.D. 72, 74 (W.D. N.Y. 2003); *Bureerong*, 167 F.R.D. at 86.

The commonality of questions of law and fact are clear in cases in which the government successfully has intervened. In those cases, particular conduct common to both proceedings implicated ***analogous*** civil and criminal laws such that the civil case had the potential to frustrate the criminal case. *E.g. Beacon Hill Asset Mgmt. LLC*, 2003 WL 554618, at * 1 (finding common questions of law or fact where SEC sued defendant for violations of federal securities law and a grand jury investigated the same transactions for securities fraud); *Doody*, 186 F. Supp.2d at 381 (finding common questions of law or fact where defendant was indicted for securities fraud and sued by the SEC and both actions were based upon the allegations of insider trading); *Mersky*, 1994 WL 22305, at *2 (finding common questions of law or fact where SEC suit and federal criminal investigation arose from the same transactions); *Downe*, 1993 WL 22126, at *1, 11 (finding common questions of law or fact where SEC suit for insider trading and ongoing grand jury investigation for insider trading arose from same transaction); *Bureerong*, 167 F.R.D. at 86-7 (finding common questions of law or fact where individuals sued defendants for false imprisonment, involuntary servitude, and labor violations and the government indicted defendants for harboring, transporting, and employing illegal aliens arising from the same conduct); *Twenty First Century Corp.*, 801 F. Supp. at 1008-09 (finding common questions of law or fact where civil RICO suit and federal criminal indictment arose from the same conduct and calling the two

cases "companions"); *Javier H.*, 218 F.R.D. at 74 (finding common questions of law or fact where individuals sued defendants for violating federal labor and state tort laws and grand jury indicted defendants for the same conduct).

In order for intervention to be appropriate under Rule 24(b), the proposed intervenor must be able to demonstrate that any commonality between the civil and criminal matters impacts ***substance or procedure*** in the criminal matter, otherwise, of course, the government does not have a genuine interest and intervention is pointless. In *Javier H.*, the court explained that intervention was appropriate because "[t]he criminal and civil cases involve[d] nearly identical questions of fact," and "the same witnesses and much of the same evidence would be produced to substantiate or refute allegations . . ." in both cases, and therefore the government's intervention for the limited purpose of preventing discovery abuses was appropriate. 218 F.R.D. at 74-5. In *Garret v. Cassity*, the criminal and civil case shared "similar, if not almost identical allegations . . ." and hence the government's intervention was appropriate to prevent defendants from exploiting liberal discovery proceedings and "to prevent Indicted Defendants form being able to craft their testimony and manufacture evidence in response to the evidence against them." 2001 WL 2689359, at *2. Finally, outside of the white collar context, a court permitted a state to intervene in a civil case where there were many common questions of law and fact and "[i]n both cases, the question [was] whether or not the Defendant raped the Plaintiff, and the defense is that the two had consensual sex." *Lizarraga v. City of Nogales*, No. CV 06-474, 2008 WL 40779991, at * 3 (D. Ariz. Aug. 29, 2008).

In the instant case, there is no dispute that the civil and the criminal matters concern tobacco. However, significantly, the government has failed to demonstrate that any overlap exists that risks any genuine, appreciable impact on substance or procedure in the criminal matter. The

Tribal Entities are the plaintiffs in this lawsuit. *See generally* Complaint. The Tribal Entities distribute and manufacture tobacco products. *Id.* The Tribal Entities were the subject of search and seizure warrants related to their distribution of tobacco products that the government served and executed on January 30, 2018. The overlap ends there.

The United States makes no effort in its briefing to discuss the substance of the Tribal Entities' lawsuit or how it relates to its request to intervene and stay. Significantly, on the face of the Tribal Entities' Complaint, this lawsuit is exceedingly narrow in both its legal and factual scope. Pursuant to fundamental principles of federal Indian law that prohibit state regulation of on-reservation Tribal activities, the Tribal Entities seek declarative and injunctive relief against the ***State of Nebraska's*** efforts to enforce a pair of ***state laws***: (1) the Escrow Statute, which purports to require the Tribal Entities to join the Tobacco Master Settlement Agreement or escrow certain funds; and (2) the Directory Statute, which withholds state approval from tobacco distributors and manufacturers that do not comply with the Escrow Statute. The legal controversy in this lawsuit is a question of law: whether the U.S. Constitution and principles of federal Indian law permit the State to enforce its laws against the Tribal Entities. ***Importantly, this controversy does not encompass whether the State of Nebraska may impose taxes on the Tribal Entities.***[7] Any factual issues relevant to this question are, as a necessary function of the nature of the Complaint, confined to legislative history of the two laws, participation of third parties in drafting the two laws, the State's attempts to enforce the laws, or other interactions between the Tribal Entities and the State. Indeed, the Tribal Entities already have served early Requests for Production of Documents pursuant to Fed. R. Civ. P. 26(d)(2) that seek information related to these issues. Messineo Decl. ¶ 4, Exs. 2-3. Significantly, these requests are so innocuous and unlikely

[7] The lawsuit does not address any state tax issues.

to exceed whatever facts may be at issue in the criminal matter that they seek documents of a kind that the Tribal Entities can, and have previously, obtained via a standard Freedom of Information Act ("FOIA") request. *Id.* at ¶¶ 7-8, Exs. 6-7.

The United States likewise makes no effort to discuss the substance of its criminal investigation or how it relates to this motion to intervene and stay. As to facts, the warrants requested and the ATF seized all forms of communications, documents, and records, electronic and hard copy related to all aspects of the Tribal Entities' business. Not one of the requests concerns information relating to the Directory or Escrow Statutes, the legislative history regarding the same, or the State-Tribal relationship as described above. The government seized three semi-trailer loads of documents and tobacco products and massive amounts of electronic data pursuant to the warrant.

As to the law, while the United States has refused to discuss the substance of the criminal proceeding in the instant motion, the United States has been clear that the basis for the criminal investigation is the CCTA. Messineo Decl. ¶ 5, Ex. 4, p. 3. The criminal provision of the CCTA renders it "unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes. . . ." 18 U.S.C. § 2342(a). Contraband cigarettes are those upon which no applicable state tax has been paid. 18 U.S.C. § 2341. The scope of the ATF's Notice of Seizure lines up perfectly with 18 U.S.C. §§ 2341, 2342(a).

The legal and factual scope of the civil proceeding and the legal and factual scope of the criminal investigation are both explicitly known to the United States or otherwise simple to discern. Yet, despite the fact that it bears the burden of proof, the United States makes no effort to describe how the instant civil proceeding would either substantively or procedurally frustrate the criminal matter.

Instead, it simply makes the vague claim that the Tribal Entities' civil Complaint "relate[s] to rulings that will likely be made in the pending criminal proceedings," without any further elaboration anywhere in its brief. ECF 16 at p. 3. The government claims that this conclusory assertion is relevant to a series of cases in which courts stayed lawsuits brought under 42 U.S.C. § 1983 by criminal defendants against law enforcement for various causes of action related to the validity of their arrests. *See id.* at pp. 4-5 (citing *Estes-El v. Long Island Jewish Med. Ctr.*, 916 F. Supp. 268, 269 (S.D. N.Y 1995) (concerning action brought under 42 U.S.C. § 1983); *Guillory v. Wheeler*, 303 F. Supp. 2d 808, 811 (M.D. La. 2004) (same); *Gallipeau v. Mitchell*, No. 07-3522, 2009 WL 539947 (D. S.C. Mar. 4, 2009) (same); *Dickerson v. City of Charleston Police Dep't*, No. 10-1625, 2011 WL 3880958 (D. S.C. Aug. 10, 2011) (same); *Max-George v. Keel*, No. 10-1215, 2010 WL 2010876 (S.D. Tex. May 18, 2010) (same); *Crooker v. Burns*, 544 F. Supp.2d 59 (D. Mass 2008) (same); *Motley v. Wolf*, No. 07-823, 2007 WL 4270569 (E.D. Mo. Dec. 3, 2007) (same)).

These cases are simply not on point for a number of reasons. First, the parties that moved for and obtained a stay in the § 1983 actions were the ***defendant*** law enforcement officers in those civil actions and therefore had no need to meet the threshold question of standing and intervention under Rule 24.[8] Second, those § 1983 actions were, by their very nature, all cases in which the law and facts in the criminal case were wholly aligned with the civil. The civil plaintiff had been arrested and charged and his criminal case was pending. The substance of his civil case was premised on the precise law and conduct that precipitated the criminal case, and the outcome of

[8] The United States' inapt and heavy reliance on these § 1983 cases may explain why the government thought it was absolved from complying with Rule 24 in the first place.

the civil case depended on invalidity of criminal proceeding. Hence a stay of the civil case was appropriate. This one-to-one alignment and these very specific § 1983 facts are not present here.[9]

The United States has relied on the irrelevant § 1983 line of cases because it does meet the applicable test for intervention under Fed. R. Civ. P. 24(b), which is clear. The United States bears the burden of proving that a common question of law and fact exists between the civil and criminal matters, such that the court may consider intervention "for the limited purpose of moving to stay discovery." *Twenty First Century Corp.*, 801 F. Supp. at 1009. The policy of such intervention requires more than just naked commonality between the two matters; it requires commonality that interferes with the criminal proceeding by permitting a party to abuse discovery, obtain protected criminal information, or otherwise frustrate justice. *See*, *e.g.*, *Beacon Hill Asset Mgmt. LLC*, 2003 WL 554618, at * 1; *Doody*, 186 F. Supp.2d at 381; *Mersky*, 1994 WL 22305, at * 2; *Downe*, 1993 WL 22126, at *1, 11; *Bureerong*, 167 F.R.D. at 85-86; *Twenty First Century Corp.*, 801 F. Supp. at 1008-09; *Javier H.*, 218 F.R.D. at 74.

The United States has failed to demonstrate – indeed, it has failed even to try to demonstrate – that this commonality exists here. It cannot explain how the Tribal Entities' ***facial*** challenge to Nebraska's Directory and Escrow Statutes under principles of federal Indian law overlaps with its criminal investigation in such a way that would permit the Tribal Entities to abuse discovery, obtain protected criminal information, or otherwise frustrate the criminal proceeding. Failing either to address or meet this standard, the government cannot intervene in this civil matter, and

[9] The government's repeated reference to and reliance on *Wallace v. Kato*, 549 U.S. 384 (2007) and *Heck v. Humphrey*, 512 U.S. 477 (1994) are similarly misplaced. *Wallace* and *Heck* are also § 1983 cases, indeed the very authorities on which the government's litany of § 1983 cases relied. Furthermore, both *Wallace* and *Heck* are primarily concerned with when a § 1983 action accrues.

its request to stay proceedings must be denied. However, in the event this Court permits the United States' intervention, it should deny its request to stay proceedings as set forth in detail below.

II. The United States Has Failed to Make Any Showing that a Stay of This Proceeding Is Warranted

To its credit, the United States did not completely side-step the well-established standards governing its request to stay proceedings as it did the standards governing intervention, however, its treatment of the relevant factors is cursory and fails to demonstrate that it is entitled to the complete and indefinite stay of proceedings requested in its motion.

This Court of course enjoys "discretionary authority to stay proceedings on its docket when the interests of justice require such action." *Kozlov v. Assoc. Wholesale Grocers, Inc.*, Nos. 4:10-cv-03211, 4:10-cv-03212, 8:10-cv-03191, 2012 WL 12887562, at *1 (D. Neb. Feb. 15, 2012) (internal citation omitted). *See Sierra Club v. U.S. Army Corps of Engineers*, 446 F.3d 808, 816 (8th Cir. 2006) (citing *Clinton v. Jones*, 520 U.S. 681, 706 (1997)). "Depending on the particular facts of the case . . . ," the Court may in its discretion "decide to stay civil proceedings, postpone civil discovery, or impose protective orders." *Id.* (quoting *Volmar Distribs., Inv. v. New York Post Co., Inc.*, 152 F.RD. 36, 39 (S.D. N.Y. 1993).

However, the Constitution does not require a stay of civil proceedings during the pendency of a criminal case. *Kozlov*, 2012 WL 12887562, at *1 (citing *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir. 1995). "'In the absence of ***substantial prejudice*** to the rights of the parties involved, simultaneous parallel civil and criminal proceedings are ***unobjectionable***. . . .'" *Keating*, 45 F.3d at 324 (quoting *Sec. & Exch. Comm'n v. Dresser Indus.*, 628 F.2d 1368, 1374 (D.C. Cir. 1890)) (emphasis added). The party seeking a stay bears the burden "to show that there is pressing need for the delay, and that neither the other party nor the

public will suffer harm from entry of the order." *F.T.C. v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 627 (6th Cir. 2014).

Importantly, courts disfavor broad, open-ended stays of civil proceedings. *See Dellinger v. Mitchell*, 442 F.2d 782, 786-87 (D.C. Cir. 1972); *Landis v. North American Co.*, 299 U.S. 248, 257 (1936) ("[A] stay is immoderate and hence unlawful unless so framed in its inception that its force will be spent within reasonable limits, so far at least as they are susceptible of prevision and description."). Consistent with the intervention principle set forth above, permitting the government to intervene for the "limited purpose" of staying discovery, *e.g.*, *Twenty First Century Corp.*, 801 F. Supp. 1009, courts generally grant only limited stays in such civil-criminal scenarios. Significantly, successful motions for stay are generally both temporally limited and substantively limited. *E.g., Beacon Hill Asset Mgmt LLC*, 2003 WL 554618, at *2 (granting substantively limited stay of discovery on particular subjects tailored to prevent discovery abuses); *Doody*, 186 F. Supp.2d at 382 (same); *Downe*, 1993 WL 22126, at *14 (same); *Bureerong*, 167 F.R.D. at 87; *Javier H.*, 218 F.R.D. at 76 (same).

In this jurisdiction, courts consider five factors when evaluating a motion to stay a civil proceeding where overlap with a criminal matter has been alleged:

> (1) plaintiffs' interest in proceeding expeditiously with litigation and the potential prejudice to the plaintiffs of a delay; (2) the burden that the proceeding will cause the defendants; (3) the convenience of the court in the management of its cases and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation and (5) the public's interests in the pending civil and criminal litigation.

Kozlov, 2012 WL 12887562, at *1; *accord Microfinancial Inc. v. Premier Holidays Intern.*, 385 F.3d 72, 78 (1st Cir. 2004); *Keating*, 45 F.3d at 324. Courts in this jurisdiction note that "'the strongest case for granting a stay is where a party under criminal indictment is required to defend a civil proceeding involving the same matter.'" *Kozlov*, 2012 WL 12887562, at *2 (quoting

Volmar Distribs., Inc., 152 F.R.D. at 39). Protection of the criminal defendant's Fifth Amendment privilege against self-incrimination is paramount in that calculus. *Id.*

Whether to grant a stay is a highly nuanced determination. "The decision to grant or deny such a stay involves competing interests. Balancing these interests is a situation specific task, and an inquiring court must take a careful look at the idiosyncratic circumstances of the case before it." *Microfinancial, Inc.*, 385 F.3d at 78; (citing *Dresser*, 628 F.2d at 1375). This is undoubtedly an idiosyncratic situation. The United States has sought a stay that concerns two proceedings that do not significantly overlap in terms of either law or facts and, improbably, it claims that the "most compelling reason to stay the pending civil matter" is the United States' gratuitous and unnecessary concern for Tribal Entities' Fifth Amendment rights. ECF 16 at p. 9. As set forth below, the United States has not met the test for a stay of this proceeding and its motion should be denied.

A. The Tribal Entities' Fifth Amendment Privilege Against Self-Incrimination Is Not a Factor in this Analysis

The Tribal Entities are heartened, if not surprised, that the United States has evinced such a concern for their potential to jeopardize their Fifth Amendment rights, but this should not factor in the present analysis. As an initial matter, the Tribal Entities are Tribally-owned corporations organized under Winnebago Tribal law. Complaint at ¶ 1. It is settled law that "a corporation is not protected by the constitutional privilege against self-incrimination." *Curcio v. United States*, 354 U.S. 118, 122 (1957). Hence, the government's concern for the Tribal Entities' rights is misplaced.

Nevertheless, the government is correct that the Fifth Amendment concerns of a criminal defendant are generally the strongest factor in a motion to stay. *E.g., Kozlov*, 2012 WL 12887562, at *2 (quoting *Volmar Distribs., Inc.*, 152 F.R.D. at 39). Further, while the Tribal Entities

assuredly do not enjoy the protection of the Fifth Amendment, its employees and officers do. However, impacts on these individuals are purely speculative and, at this, time unlikely. None of the Tribal Entities' officers or employees is a party to this suit. *See* Complaint. The nature of this lawsuit as a ***facial challenge*** to a pair of State statutes that renders it unlikely that a Tribal Entities' employee or officer would be required to provide incriminating factual testimony in this suit. There is no indication that the State will seek to depose any Tribal Entity officer or employee in this proceeding. And, finally, no officer or employee of the Tribal Entities has received a subpoena, request for interview, or a target letter in the government's criminal investigation. Index at Attachment D, Declaration of Ann Marie Bledwoe-Downes ("Bledsoe-Downes Decl.") ¶ 5.

Even if an officer's or employee's Fifth Amendment privilege were a live concern in this civil proceeding, it is axiomatic that the Fifth Amendment privilege against self-incrimination is an individual right that cannot be asserted by someone else. *E.g.*, *Hale v. Henkel*, 201 U.S. 43, 76 (1906). Further, even if the United States in its beneficence could assert the Fifth Amendment rights of these as yet unknown individuals, the Eighth Circuit has held that it will not uphold a stay based on a blanket assertion of the Fifth Amendment. *Koester v. Am. Republic Invs., Inc.*, 11 F.3d 818, 823 (8th Cir. 1993). An individual (or even the government acting on his behalf) "cannot hide behind a blanket invocation of the Fifth Amendment privilege." *Id.* Instead, that individual (or the government acting on his behalf) "must make a strong showing either that the two proceedings are so interrelated that he cannot protect himself . . . by selectively invoking his Fifth Amendment privilege . . . , or that the two trials will so overlap that effective defense of both is impossible." *Id.* (internal citations and punctuation omitted). The government has made no such showing (*see* Section B. II *supra*) and hence this consideration does not weigh in favor of a stay.

B. The Tribal Entities' Interest in Proceeding Expeditiously Bears upon the Sovereign Right of the Winnebago Tribe of Nebraska to Self-Sufficiency and Self-Determination

Factor one of this analysis requires the court to consider "the plaintiffs' interest in proceeding expeditiously with litigation and the potential prejudice to the plaintiffs of a delay." *Kozlov*, 2012 WL 12887562, at *1. The United States casually brushes aside the interests of the Tribal Entities in this matter and calls the potential burden of a stay "slight," because a state enforcement action has not commenced. ECF 16 at p. 8. This ignores the substance of the Tribal Entities' Complaint, in which the Tribal Entities have alleged that the ongoing dispute over the State statutes at issue here have forced the Tribal Entities to "operat[e] under a cloud of uncertainty in their business dealings." Complaint at ¶ 50. "This uncertainty and threat of penalty and retaliation has created a serious impediment to their business operations and, thus, the ability to expand economically." *Id.* These are immediate concerns that have a significant effect on the Tribal Entities' day-to-day revenues and, by extension, the day-to-day revenue of the Winnebago Tribe of Nebraska. Morgan Decl. ¶ 9; Bowen Decl. ¶ 16; Index at Attachment E, Declaration of Alan Post ("Post Decl.") ¶¶ 5-9, Exs. 1 & 2.

It is critical to understand in this analysis that the Tribal Entities are not run-of-the-mill for-profit corporations. Rather, they are corporations established under the laws of the Winnebago Tribe of Nebraska and wholly owned by Ho Chunk, Inc. ("HCI"), the economic development arm of the Tribe. Complaint at ¶ 1. Both Tribal Entities were created with the express purpose "to foster economic development of the Tribe and to create economic opportunities for Tribal members." *Id.* at ¶¶ 9, 14. The Tribe's creation of the Tribal Entities and their sister Tribal economic development arms are the reason that the Winnebago Tribe of Nebraska has been steadily rising above the economic depression and chronic unemployment that once defined Tribal

life. *Id.* at ¶¶ 9, 14. And today, the Tribal Entities net profits are distributed to the Tribe to support Tribal social welfare programs such as elder and child care, down-payment assistance for Tribal members buying their first homes on the Reservation, and basic government services. *See generally* Post Decl.; *see also*, *id.* at ¶ 12. When the Tribal Entities' revenues are impacted, it necessarily impacts these critical functions of the Tribe. *See generally*, Post Decl.

Tribal economic development entities, like HCID and Rock River, are distinguished from mere profit-making businesses because they are critical to the sovereign existence of the Tribe. As the U.S. Supreme Court has observed, "tribes face a number of barriers to raising revenue in traditional ways" because they lack the same revenue-generating abilities as states and municipalities. *Bay Mills*, 134 S. Ct. at 2043. Significantly for purposes of the instant proceeding, the Supreme Court has explicitly acknowledged that tribes' existing economic barriers are "due in large part to the insuperable (***and often state-imposed***) barriers Tribes face in raising revenue through more traditional means." *Id.* (emphasis added). Consequently, "[i]f Tribes are ever to become more self-sufficient and fund a more substantial portion of their own governmental functions, commercial enterprises will likely be a central means of achieving that goal." *Id.*

As a result of these concerns, the United States long has recognized that "[a] key goal of the Federal Government is to render Tribes more self-sufficient and better positioned to fund their own sovereign functions, rather than relying on federal funding." *Id.* To that end, Congress has acted repeatedly to encourage and facilitate tribal economic development operations like the Tribal Entities here. *E.g.,* The Native American Business Development, Trade Promotion, and Tourism Act, 25 U.S.C. § 4301(b)(1)(A)-(B) (committing the United States to "revitalize the economically and physically distressed Native American economies by . . . encouraging formation of new businesses by eligible entities, and the expansion of existing businesses"); 25 U.S.C. § 2701(4)

("[A] principle goal of federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government. . . .").

The Tribal Entities are suffering financial harm from the unresolved questions of law that are the subject of this proceeding today, as set forth above. Moreover, the government has requested a completely open-ended, procedurally unlimited stay of this entire proceeding and has offered no insight into when the possible criminal matter might conclude. If the Court were to grant this stay, the burden on the Tribal Entities could last indefinitely, permitting the United States to hold the Tribal Entities hostage.

Further, the financial impact of staying this case on the Tribal Entities and the Tribe that owns it has the potential to be profound and in contravention of policy goals explicitly undertaken by Congress and endorsed by the United States Supreme Court, as further set forth above. Financial hardships are a key consideration in the burden analysis for stays of this kind. *Cf. Clark v. United States*, 481 F. Supp. 1086, 1099-1100 (S.D. N.Y. 1979) (granting criminal defendants' motion to stay on the grounds that the financial strain of defending two actions was too burdensome and refusing to undertake a factual inquiry into defendants' financial resources as financial hardship was reasonable to assume in the circumstances). Where those financial hardships accrue to Tribal Entities and the sovereign Indian Tribe that they support, that hardship must weigh even more heavily. This factor tips away from the requested stay.

C. Neither the State of Nebraska nor the United States Has Demonstrated that the Overlap Between the Two Matters Imposes any Genuine Burden on Any Party

Factor two of this analysis requires the court to consider "the burden that the proceeding will cause the defendants." *Kozlov*, 2012 WL 12887562, at *1. The United States makes a passing reference to the interest of the Defendants in this matter noting that, "were the civil action permitted to move forward prior to resolution of the criminal matter, individual defendants

Attorney General Peterson and Commissioner Fulton would be forced to defend claims that might ultimately be barred by *Heck v. Humphrey*, 512 U.S. 477 (1994)." ECF 16 at p. 7. As discussed at length in part B. II. *supra*, once again the government makes no effort to describe precisely what substantive legal or factual overlap exists between its broad criminal investigation and this narrow civil lawsuit. Notwithstanding the United States' burden in this analysis, it leaves it to the reader to guess what "claims" it may be referring to. But even if the government had elaborated on this point, the authorities are clear: "[i]n the absence of ***substantial prejudice*** to the rights of the parties involved, simultaneous parallel civil and criminal proceedings are ***unobjectionable***. . . ." *Keating*, 45 F.3d at 324 (quoting *Dresser*, 628 F.2d at 1374) (emphasis added). And the United States' repeated reliance on *Heck* and other § 1983 cases is wholly misplaced. These cases arose in the context of a one-to-one relationship between a criminal proceeding and a civil proceeding where the civil plaintiff had been arrested and charged and his criminal case was pending. The substance of his civil case was premised on the precise law and conduct that precipitated the criminal case, and the outcome of the civil case depended on the invalidity of criminal proceeding. *E.g.*, *Estes-El*, 916 F. Supp. 269; *Guillory*, 303 F. Supp.2d at 811; *Gallipeau*, 2009 WL 539947; *Dickerson*, 2011 WL 3880958; *Max-George*, 2010 WL 2010876; *Crooker*, 544 F. Supp.2d 59; *Motley*, 2007 WL 4270569.

The United States has shown no prejudice to the Defendants in the expeditious resolution of this civil litigation. Furthermore, the Defendants have failed to affirmatively weigh in on this question either by filing a joinder or a statement of non-opposition. They have been silent. Instead, it appears that the U.S. Attorney has been acting on their behalf – both requesting an extension of time to file their Answer and by confirming that the Defendants are prepared to file their Answer as scheduled on June 15, 2018. Messineo Decl. ¶ 9, Ex. 8. If the U.S. Attorney indeed is

empowered to speak on behalf of the Defendants, then the Tribal Entities will take this to mean that Defendants *will not* be prejudiced by an order denying a stay of these proceedings. In light of that fact and the foregoing, this factor tips in favor denying the requested stay.

D. The United States Has Failed to Describe Any Prejudice to Either this Court or the Court that Issued the Criminal Warrant

Factor three of this analysis requires this Court to "consider the convenience of the court in the management of its cases and the efficient use of judicial resources." *Kozlov*, 2012 WL 12887562, at *1. Once again, for the reasons set forth in part B. II. *supra*, the legal and factual overlap between this civil litigation and the nascent criminal matter is not sufficient to cause any genuine substantive or procedural burden on either proceeding. Nonetheless, examining the status of the two proceedings remains useful.

The civil proceeding is in its earliest stages. The Defendants have not yet filed their Answer. The Tribal Entities have served early requests for production of documents, so innocuous that the same documents could be obtained via a standard FOIA request. Messineo Decl. ¶¶ 7-8, Exs. 6-7. And as is clear from the scope of served discovery, the Tribal Entities have no interest in using this proceeding to seek information related to or regarding the criminal issue. Further, there are no Fifth Amendment or improper ruling issues anywhere on the horizon.

The criminal matter is likewise in its earliest stages. The United States apparently has not completed its review of seized documents. Bledsoe-Downes Decl. ¶ 3. The Tribal Entities are not aware that a grand jury has been empaneled. *Id.*, ¶ 4. The Tribal Entities are not aware that any entity or individual associated with the criminal investigation has received a target letter. *Id.*, ¶ 5. The Tribal Entities are not aware that any entity or individual that has been indicted in conjunction with the criminal investigation. *Id.*, ¶ 6.

It is difficult to discern how either court could suffer prejudice under the present facts. Notably, many courts have held that a stay of any kind where there has not even been an indictment in the criminal matter is unwarranted. *United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk Inc.*, 811 F. Supp. 802, 805 (E.D. N.Y. 1992) ("Pre-indictment requests for a stay of civil proceedings are generally denied."). *See Dresser*, 528 F.2d at 1376 (holding that where no indictment has issued, the purpose of staying civil proceedings during pending criminal proceedings is a "far weaker one"). Further, even if this matter ripens into something that would actually prejudice either court, the appropriate remedy is a protective order or a limited stay of discovery – not the ***blanket and indefinite stay of proceedings*** requested by the United States here. *E.g., Secs. & Exch. Comm'n v. Joseph Schlitz Brewing Co.*, 452 F. Supp. 824, 833 (E.D. Wisc. 1978) (noting that where no prejudice has yet been shown in a motion to stay civil proceeding "any [future] prejudice which may occur can be alleviated by protective orders, upon proper application to the court").

In the present case, the United States has failed to demonstrate the existence of either present or threatened prejudice to either court. Consequently, this factor tips in favor of the Tribal Entities.

E. Expeditious Resolution of the Important Legal Issues Pending before this Court Are Critical to the Winnebago Tribe of Nebraska, Its Members, the Tribe's Surrounding Non-Indian Community, and Other Tribal Tobacco Interests Around the Nation

Factor four of this analysis requires this Court to consider "the interests of persons not parties to the civil litigation." *Kozlov*, 2012 WL 12887562, at *1. This question typically implicates the interest of either the United States when the United States has not moved to intervene in the civil proceeding to protect its own interest (which is technically the case here), *Ashworth*, 229 F.R.D. at 529-30, or witnesses, *White*, 116 F.R.D. at 501.

Relevant non-parties for purposes of this analysis also include non-party victims who are left dangling during unresolved civil case or powerless while their financial resources are wasted. *E.g.*, *Banks v. Yokemick*, 144 F. Supp.2d 272, 275-76 (S.D. N.Y. 2001) (considering impact of stay on non-party mother who had sued under § 1983 for police-involved murder of her son); *Chao v. Fleming*, 498 F. Supp.2d 1034, 1040 (W.D. Mich. 2007) (considering impact of stay on 69 retirement plan participants who were affected by defendants' ERISA violations).

The dire impact to the Winnebago Tribe of Nebraska flowing from the government's proposed stay is discussed fully in part II. D. *supra*, but that impact flows inevitably to other non-parties, including: individuals (both Indian and non-Indian) who rely on the Tribal Entities for employment; individual Tribal members who rely on the Tribe for services that are funded by Tribal Entity distributions; and the broader Sioux City area community that relies on the robust economic engine of HCI to drive that local economy. Messineo Decl. ¶ 3, Ex. 1. While the Tribal Entities cannot predict a positive outcome in this litigation that would resolve the financial harm posed by the two statutes at issue in this case, an expeditious resolution of this lawsuit can prevent these non-parties (some of whom have a greater interest than others) from "dangling in a state of uncertainty . . ." and "waiting indefinitely for something that might not happen." *Banks*, 144 F. Supp.2d at 276.

Moreover, resolution of the legal uncertainty arising from the two statutes at issue in this litigation is a concern of national import. Messineo Decl. ¶ 6, Ex. 5. Tribal tobacco operations across the country are facing the same legal and financial hardship arising from identical state statutes. The instant lawsuit is believed to be the only existing challenge to the MSA Directory and Escrow Statutes in the nation. This Court's resolution of that question has the potential to

guide the rest of the country and provide certainty well beyond the borders of the District of Nebraska.

The United States has not identified any non-party, other than itself, who may be impacted by this litigation. For that reason, this factor tips in favor of the Tribal Entities.

F. The Public Interest Favors Expeditious Resolution of This Lawsuit

Finally, factor five requires this Court to consider "the public's interest in the pending civil and criminal litigation." *Kozlov*, 2012 WL 12887562, at *1. Again, the United States does not opine on any impact, either way, to the public interest. The Tribal Entities concede that there is a general public interest that exists in broad law enforcement goals and protecting law enforcement processes, but the United States has not offered any reason why that should weigh in favor of the requested stay. As to the civil case, the public interest in this proceeding is set forth in the prior section – individuals and communities that rely on the Tribal Entities and the Tribe have an interest in seeing the civil case to a conclusion. As set forth in the Tribal Entities' Complaint, moreover, it would seem that even the Defendants in this matter (who have been silent on the subject of a stay) also have in interest in expeditious conclusion of the instant civil proceeding. As set forth fully in the Tribe's Complaint, the legal uncertainty surrounding the two statutes at issue has jeopardized the enormous payments that the State of Nebraska receives from Big Tobacco under the MSA. ECF 1 at ¶¶ 39-43. Nebraska's MSA payment in 2017 was $37.7 million.

Consequently, the public interest would seem squarely in favor of resolving this case expeditiously.

CONCLUSION

Based on the foregoing, the Tribal Entities respectfully request that this Court deny the United States' motion in its entirety on the grounds that the United States has failed to properly

intervene in this matter and lacks standing to move this Court. However, if the Court should grant the government's motion to intervene in spite of the deficiency, the Tribal Entities respectfully request that this Court deny the government's motion to stay. Finally, if this Court should impose any stay, the Tribal Entities respectfully request that it is one that is both substantively and temporally limited in a way rationally related to the facts of this case.

Respectfully submitted this 14th day of June, 2018.

HCI DISTRIBUTION, INC. and ROCK RIVER MANUFACTURING, INC., Plaintiffs,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of June, 2018 a copy of the foregoing was filed electronically with the Clerk of the Court. The electronic filing prompted automatic service of the filing to all counsel of record in this case who have obtained CM/ECF passwords.

s/Nicole E. Ducheneaux