IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS CENTRAL DIVISION

MARLON BLACKWELL ARCHITECTS, P.A., Plaintiffs, v. HBG DESIGN, INC.; SARACEN DEVELOPMENT, LLC; and JOHN L. BERREY, in his official capacity as Chairman of the Quapaw Tribal Business Committee, Defendants.	)	No. 4:19-cv-00925-KGB

BRIEF OF DEFENDANT JOHN L. BERREY IN SUPPORT OF MOTION TO DISMISS

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February 6, 2020

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BRIEF IN SUPPORT OF MOTION OF DEFENDANT JOHN L. BERREY TO DISMISS

Defendant, John L. Berrey, in his official capacity as the Chairman of the Business Committee of the Quapaw Nation ("Berrey"), hereby files this brief in support of his motion to dismiss the claims asserted against him pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction and pursuant to the doctrine of tribal sovereign immunity (ECF No. 10).

INTRODUCTION

By suing an officer of the Quapaw Nation, Marlon Blackwell Architects, P.A. ("MBA"), seeks to assert claims that not only are barred by sovereign immunity but that are against a government not involved in the underlying project. The Saracen Casino Resort was financed and is being developed solely by Saracen Development, LLC, an Arkansas limited liability company ("Saracen"). Saracen, a non-governmental, state company, is wholly owned not by the Nation but by an autonomous enterprise of the tribe. The tribal government and its officers, acting as officers of the tribe, had no involvement in the project. These distinctions are dispositive, because no theory under controlling law—including under the doctrine of *Ex parte Young*—permits MBA to avoid the bar of sovereign immunity by ignoring the separate existence of entities so as to sue an unrelated governmental party.

The claims asserted in this case against John L. Berrey in his official capacity as Chairman of the Quapaw Nation's Business Committee are barred by sovereign immunity, and therefore are beyond the Court's jurisdiction.

BACKGROUND

The Saracen Casino Resort represents an expansion of the successful gaming resort operations of the Downstream Development Authority ("Downstream"), an enterprise of the Quapaw Nation that operates autonomously from the Nation. (Ex. A ¶¶ 3 & 16.) In developing

the new resort in Pine Bluff, Downstream formed Saracen as an Arkansas limited liability company, and also as a non-governmental entity. This ensured that Saracen, which was granted an Arkansas casino gaming license in 2019, would operate entirely under state law and solely within the jurisdiction of the Arkansas Racing Commission. (Ex. A ¶ 4.)

Downstream, as the parent of Saracen, began planning for Pine Bluff resort in 2018. In mid-2018, Marlon Blackwell ("Blackwell") and his firm provided preliminary design concepts to Downstream, for which MBA was paid.[1] (Ex. A ¶ 7.) Subsequently, in assembling a project team Downstream again approached Blackwell and MBA to serve not as the main architect of record on the project, but as an owner's consultant to oversee design work. (Ex. A ¶ 5.) However, after HBG Design, Inc. ("HBG"), was chosen as the architect of record, Blackwell advised the project team that he wanted to serve as a consultant to, and pursuant to a contract with, HBG. (Ex. A ¶ 6.) This arrangement was never formalized, because the project remained at a preliminary planning stage until after Blackwell and MBA withdrew.

Through early 2019, Blackwell and MBA worked as consultants to HBG, largely providing design concepts and conducting programming for the detailed design work being undertaken by HBG. (Ex. A ¶¶ 9 & 10.) By late February and March, the project team became increasingly concerned that Blackwell's and MBA's proposals involved design concepts that constantly exceeded the anticipated budget, that were impractical, and that were infeasible, and also by their resistance to scaling back their proposed designs to meet budget requirements. (Ex. A ¶¶ 9, 10 & 11.) Ultimately, in April 2019 Blackwell withdrew from the project. (Ex. A ¶¶ 12 & 13.)

The Arkansas Racing Commission granted a casino gaming license to Downstream in June

[1] MBA was paid $12,000 for the use of his design concepts in September 2018, and it was paid an additional $100,000 as a mobilization fee in January 2019. (Ex. A ¶¶ 7 & 8.)

2019, which enabled the project development and design to move forward. (Ex. A ¶ 4.) Thereafter, when Saracen began doing business, it assumed full responsibility for the development, operation, design, and financing of the project, (Ex. A ¶¶ 4 & 17.), and has operated an annex casino since September in conjunction with a travel plaza at the resort site, and construction is proceeding on the main resort, with an opening date targeted for mid-2020.

UNDISPUTED JURISDICTIONAL FACTS

The following jurisdictional facts are undisputed or are not in genuine dispute, as evidenced by the attached exhibits:

1. Berrey is the duly elected Chairman of the Business Committee of the Quapaw Nation (the "Business Committee"), which is the elected governing body of the Nation, a federally recognized Indian tribe. (Ex. A ¶ 3.)

2. Saracen Development, LLC, is an Arkansas limited liability company that is wholly owned by the Downstream Development Authority of the Quapaw Tribe of Oklahoma (O-Gah-Pah), which is its sole member. (Ex. A ¶ 4.)

3. Downstream is an unincorporated instrumentality of the Quapaw Nation, which was chartered as an autonomous entity of the Nation to engage in gaming and other business development. Downstream is governed by a separate board. (Ex. A ¶ 3.)

4. The development of the Saracen Casino Resort (the "Resort") has been conducted by Downstream, initially, and by Saracen. The Business Committee, as the elected governing body of the Nation, had and has no responsibility for or control of the development and operation of the Resort. In his capacity as Chairman of the Business Committee, Berrey has not and does not have authority or control over Saracen or the development of the Resort. (Ex. A ¶¶ 2, 4, 16 & 17.)

5. Pursuant to the Nation's laws, the Business Committee makes laws and policies for the tribe by enactments of the Business Committee as a whole. Berrey does not have the authority to make laws for the Nation. (Ex. A ¶ 15.)

STANDARDS OF REVIEW

The question of whether tribal sovereign immunity bars an action is one of subject matter jurisdiction and is properly challenged under Rule 12(b)(1). *See Hagen v. Sisseton-Wahpeton Cmty. College*, 205 F.3d 1040, 1043 (8th Cir. 2000). The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction. *See V S Ltd. P'ship v. Dep't. of Hous. & Urban Dev.*, 235 F.3d 1109, 1112 (8th Cir. 2000). Where a motion challenges the factual basis underlying subject matter jurisdiction, as opposed to a challenge to the substantive allegations in a plaintiff's pleading, a court may look beyond the pleadings and may consider documentary and similar evidence concerning the challenged jurisdictional facts. *See Osborn v. United States*, 918 F.2d 724, 729-30 (8th Cir. 1990). In deciding a motion to dismiss for lack of subject matter jurisdiction under tribal sovereign immunity, a court is not required to take any of a plaintiff's allegations as true. *See Branson Label, Inc. v. City of Branson*, 793 F.3d 910, 914-15 (8th Cir. 2015).

As with other motions challenging a court's subject matter jurisdiction, a motion seeking a dismissal on the basis of tribal sovereign immunity is a threshold matter to be determined before any other issue in the case.[2] *See Hagen*, 205 F.3d at 1044. Sovereign immunity is not merely a

[2] In view of the importance of the doctrine, a challenge to a federal court's jurisdiction on the basis of tribal sovereign immunity ordinarily is raised at the start of litigation, and an order denying the defense is immediately appealable. *See, e.g., Prescott v. Little Six, Inc.*, 387 F.3d 753, 755 (8th Cir. 2004) ("[T] the collateral order doctrine . . . permits an interlocutory appeal from a district court's denial of sovereign immunity."); *Osage Tribal Council ex rel. Osage Tribe of Indians v. United States Dep't of Labor*, 187 F.3d 1174, 1179-80 (10th Cir. 1999) (holding that that "the denial of tribal immunity is an immediately appealable collateral order"); *Tamiami*

defense to an action, but is a jurisdictional bar. *See United States v. Mitchell*, 463 U.S. 206, 215, 103 S. Ct. 2961, 2967 (1983); *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1244 (8th Cir. 1995) ("Sovereign immunity is a jurisdictional question."). The very purpose of sovereign immunity is to prevent the indignity of subjecting the sovereign party to the coercive judicial process. *See Puerto Rico Aqueduct & Sewer Auth.*, 506 U.S. at 146, 113 S. Ct. at 689.

SUMMARY OF THE ARGUMENT

MBA has asserted two claims against Berrey in his official capacity, copyright infringement and injunctive relief relating to the alleged copyright infringement. However, these claims—and all suits against Indian tribal governments, as well as against the officers and directors of such governments and enterprises—are barred by the doctrine of sovereign immunity, unless a tribe or Congress has provided consent or a waiver. No such waiver or consent exists in this case, and therefore any claims against Berrey as an individual tribal officer could proceed only if MBA could establish some applicable exception to this governmental immunity, which it cannot.

Recognizing the lack of any waiver of immunity, MBA named Berrey—apparently as a proxy for the Nation due to his position as Chairman of the Business Committee—in an attempt to recast this as a so-called "officer suit" pursuant to the doctrine of *Ex parte Young*. However, MBA cannot satisfy the requirements for applying *Young* as to Berrey for two primary reasons—

Partners, Ltd. v. Miccosukee Tribe of Indians of Fla., 63 F.3d 1030, 1050 (11th Cir. 1995); *see also Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc*., 506 U.S. 139, 147, 113 S. Ct. 684, 689 (1993); *Moreno v. Small Bus. Admin.*, 877 F.2d 715, 716 (8th Cir. 1989) (holding that "a rejection of a claim for absolute or qualified immunity is immediately appealable"). Without such interlocutory review, the value of the immunity to the sovereign could be lost. *See Puerto Rico Aqueduct & Sewer Auth.*, 506 U.S. at 146, 113 S. Ct. at 689 (noting immediate appeals of denials of immunity are necessary to ensure that sovereigns' interests are fully vindicated); *see also* 17A *Moore's Federal Practice* § 123.51, at 123-167 (3d ed. 2015) (noting an immediate appeal is necessary "because the value of immunity would be lost as litigation proceeds past motion practice").

namely, (1) Berrey had no authority to enact any policy or custom of the Quapaw Nation that played a part in any violation of federal law, and (2) MBA has not alleged any particular act by Berrey in his official capacity as a tribal officer that would constitute an ongoing violation of federal law. Both of these are fundamental requirements for an officer suit under *Young*.

Naming Berrey as a party-defendant is nothing more than an attempt by MBA to implicate the Quapaw Nation in the alleged copyright claims, without legal basis. MBA cannot satisfy the legal requirements to bring an officer suit against Berrey pursuant to *Ex parte Young*, as a matter of law. For the reasons set forth herein, the claims against Berrey should be dismissed in their entirety.

ARGUMENT & AUTHORITIES

I. NO WAIVER OR CONSENT TO SUIT EXISTS THAT PERMITS MBA'S CLAIMS TO PROCEED AGAINST THE CHAIRMAN OF THE NATION IN HIS OFFICIAL CAPACITY

As governments, Indian tribes—like the federal government and the states—possess sovereign immunity, except to the extent they grant valid waivers or unless Congress clearly provides for suits for specific claims. In this case, MBA can point neither to any applicable waiver or consent granted by the Nation's government or otherwise, nor to any congressional enactment permitting suits arising from its claims relating to the alleged copyright infringement. Absent any such waiver or congressional abrogation of the Nation's immunity, MBA's claims against Berrey as a tribal officer are barred, and are also beyond this Court's jurisdiction.

As the United States Supreme Court recently affirmed, federally recognized Indian tribes

are sovereign governments that are shielded by immunity from unconsented lawsuits.[3] *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788-89, 134 S. Ct. 2024, 2030-31 (2014); *see also, e.g., Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754, 118 S. Ct. 1700, 1702 (1998). Tribal sovereign immunity applies to both governmental and tribal commercial activities, and to suits for money damages as well as to suits for declaratory and injunctive relief.[4] Relevant in this case, tribal sovereign immunity extends to individual tribal officers and employees acting in their official capacities and within the scope of their authority.[5] *See, e.g., Baker Elec. Co-op., Inc. v. Chaske*, 28 F.3d 1466, 1471 (8th Cir. 1994); *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479-80 (9th Cir. 1985). Additionally, tribal sovereign immunity extends to arms and agencies of tribes, as well as to subdivisions of a tribe, including those engaged in economic activity. *See Hagen*, 205 F.3d at 1043; *Dillon v. Yankton Sioux Tribe Hous. Auth.*, 144 F.3d 581, 583 (8th Cir. 1998); *Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 670-71 (8th Cir. 1986).

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[3] Immunity from suit has long been recognized as a fundamental aspect of an Indian nation's inherent sovereignty. *See, e.g., Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509, 111 S. Ct. 905, 909 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 1677 (1978). Tribal sovereign immunity is recognized as a "a necessary corollary to Indian sovereignty and self-governance." *See Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890, 106 S. Ct. 2305, 2313 (1986).

[4] *See, e.g., Kiowa Tribe of Okla.*, 523 U.S. at 760, 118 S. Ct. at 1705 (commercial activities); *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991). Indian tribes face a number of challenges in exercising their sovereignty, due to—among other factors—their limited land bases, the limitations on their jurisdiction, and their limited resources. Without sovereign immunity tribes effectively would lose much of their ability to function independently as sovereign governments. *See generally Cohen's Handbook of Federal Indian Law* § 7.05, at 636 (2012 ed.) (discussing scope of tribal sovereign immunity).

[5] As it applies to tribal officials and tribal employees acting in their representative capacity and within the scope of their authority, this immunity is identical to that enjoyed by the tribe itself. *See Romanella v. Hayward*, 933 F. Supp. 163, 167 (D. Conn. 1996).

Accordingly, claims against a tribe, its arms, and its officials are barred unless tribal sovereign immunity has been waived. Sovereign immunity may be waived only through express and unequivocal waivers or consents validly granted by the tribe or as provided through an act of Congress. *See, e.g., Santa Clara Pueblo*, 436 U.S. at 58-59, 98 S. Ct. at 1677; *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 921-22 (6th Cir. 2009). Waivers of tribal sovereign immunity must be "unequivocally expressed," and cannot be merely implied. *Santa Clara Pueblo*, 436 U.S. at 58-59, 98 S. Ct. at 1677; *Rupp*, 45 F.3d at 1244.

In this case, MBA can point to no waiver of immunity granted by the Nation to pursue any claims, including claims for copyright infringement, against the tribal government and its officers. Likewise, no congressional authorization for this action exists. Absent such a waiver or consent, MBA's claims against the chairman of the tribe in his official capacity are barred.

II. MBA CANNOT SATISFY ANY OF THE FUNDAMENTAL REQUIREMENTS NECESSARY TO OBTAIN PROSPECTIVE INJUNCTIVE RELIEF AGAINST BERREY AS AN INDIVIDUAL TRIBAL OFFICER

Confronted with the absolute bar of tribal sovereign immunity, MBA has named Berrey as a defendant in his official capacity as Chairman of the Business Committee, the elected governing body of the Quapaw Nation, thereby seeking to invoke the so-called doctrine of *Ex parte Young*. However, the application of *Young* has limits. It permits suits against officers only where (1) a government has an unlawful policy or custom that plays a part in the violation of federal law and the individual sued had final authority to establish such polices, and (2) the individual sued has committed an actual violation of that law—requirements that cannot be satisfied in this case. Aside from *Young*, MBA has no other legal theory available that could overcome tribal governmental immunities.

A. Berrey Had No Authority to Enact an Unlawful Policy or Custom Supporting an Ongoing Violation of Federal Law

Originally applied to compel state officials to comply with federal law, the doctrine of *Ex parte Young* has been extended to allow suits against both state and tribal officers, but only for prospective injunctive relief to prevent ongoing violations of federal law. *See Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908). This doctrine avoids the bar of sovereign immunity by use of a legal fiction—namely, that officers who act in violation of federal law are stripped of authority to act because authority cannot be granted to violate federal law. *See id.* at 159-60. However, this legal theory does not have an open-ended application to any and all suits against officers. Instead, there must be an actual and identifiable ongoing violation of federal law for which injunctive relief is appropriate to prevent. *See Verizon Maryland, Inc. v. Public Service Comm'n of Maryland*, 535 U.S. 635, 645, 122 S. Ct. 1753, 1760 (2002).

The Supreme Court has stated that official capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S. Ct. 3099, 3105 (1985). As the Supreme Court has further explained, "[s]uits against [tribal] officials in their official capacity therefore should be treated as suits against the [tribe itself] . . . . Because the real party in interest in an official-capacity suit is the governmental entity and not the named official, the entity's policy or custom must have played a part in the violation of federal law." *Hafer v. Melo*, 502 U.S. 21, 25, 112 S. Ct. 358, 361-62 (1991) (internal quotation marks omitted). Accordingly, "to establish liability of an individual in an official capacity suit, a plaintiff must show either that the official took an action pursuant to an unconstitutional or unlawful governmental policy or custom, or that he or she possessed final authority to establish policies over the subject matter at issue and used that authority in an

unconstitutional or unlawful manner." *Issaenko v. Univ. of Minnesota*, 57 F. Supp.3d 985, 1012 (D. Minn. 2014) (citing *Nix v. Norman*, 879 F.2d 429, 433 (8th Cir. 1989)).

For example, in *Issaenko* the plaintiff brought copyright infringement claims against various officers of the University of Minnesota with respect to research allegedly performed by the plaintiff but claimed to be owned by the university. *Id.* at 993. With respect to the plaintiff's claim for injunctive relief against the university's officers, the court found that the complaint contained no allegations "about a policy or custom at the University of unlawfully infringing employees' copyrighted works" or "that the Individual Defendants . . . had final authority to establish University policies regarding copyright and exercised that authority in an unlawful manner." *Id.* at 1012. The only reference in the complaint to a policy of the University was a citation to the university's copyright policy which provides that "[c]onsistent with academic tradition, University faculty and students shall own the copyrights in the academic works they create unless otherwise provided in a written agreement between the creator(s) and the University." *Id.* (citation omitted). But the court held that this allegation did "not bear upon whether an unlawful or unconstitutional policy or custom of the university 'played a part in the violation of federal law.'" *Id.* (quoting *Hafer*, 502 U.S. at 25). Accordingly, the court concluded that the plaintiff failed to state a plausible claim for relief against the defendants in their official capacities, and granted defendants' motion to dismiss the copyright claim against them in their official capacities to the extent that the claim sought prospective injunctive relief. *Id.* (citing *Vogel v. Turner*, Civ. No. 11–446, 2012 WL 5381788, at *2 (D. Minn. Nov. 1, 2012) (dismissing official capacity claim against state employee because complaint did not plausibly allege that the employee was "'an official who has the final authority to establish governmental policy'") (quoting *Jane Doe A v. Special Sch. Dist.*, 901 F.2d 642, 645 (8th Cir.1990)).

Since the claim against Chairman Berrey in his official capacity is a proxy for a claim against the Quapaw Nation, there must be an allegation that the Nation had a practice or custom that played a part in the alleged violations of the federal copyright law—a claim MBA has not and cannot assert. In addition, even if Chairman Berrey had authority to establish the policy of the Quapaw Nation in his capacity as Chairman of the Business Committee—which he does not have and which has not been alleged—such authority would have no intrinsic bearing on the policies of Saracen Development, LLC, which is a separate entity not governed by the Business Committee, and indeed which is governed by its own officers. In fact, the complaint fails to reflect that the Quapaw Nation is implicated in these claims at all, when the owner and developer of the project is Saracen, and when the officers of the Nation have had no authority or responsibility for the project. (Ex. A ¶¶ 4 & 17.)

MBA appears to have named Berrey as a party to this suit in an attempt to sue the Quapaw Nation, when there are no allegations in the complaint that the Quapaw Nation is responsible for any alleged copyright infringement with respect to the Saracen Casino Resort. Even if the complaint could be read to implicate the Quapaw Nation in any alleged copyright infringement, Berrey still would not be the correct party to sue in an *Ex parte Young* style suit. The Business Committee makes laws and policies for the tribe by enactments of the Business Committee as a whole, and Berrey does not have the authority to make laws for the Nation. (Ex. A ¶¶ 15.) Accordingly, because Berrey lacks the ability to establish the governmental policy of the Nation, an officer suit against Berrey in his official capacity as chairman of the Business Committee would have to be dismissed.

MBA has not pleaded—and it cannot establish—that the chairman of the Nation had the authority to enact a policy or custom of the tribal government giving rise to a continuing violation

of federal copyright law. Accordingly, MBA cannot sustain a claim against Berrey under *Ex parte Young*, as a matter of law.

B. MBA Has Not Alleged That Berrey, as Chairman of the Nation, Committed Any Actual Violation of Federal Copyright Law

Under another fundamental requirement, the *Ex parte Young* doctrine "cannot be applied to an action against any random [tribal] official." *Pennington Seed, Inc. v. Produce Exch. No. 299*, 457 F.3d 1334, 1342 (Fed. Cir. 2006). Rather, "there must be a connection between the [tribal] officer and the enforcement of the act or else the suit will merely make him a representative of the [tribe] and therefore improperly make the [tribe] a party to the suit." *Id.* (citing *Ex parte Young*, 209 U.S. at 157). Thus, "[a] nexus between the violation of federal law and the individual accused of violating that law requires more than simply a broad general obligation to prevent a violation." *Id.* (citing *Shell Oil Co. v. Noel*, 608 F.2d 208, 211 (1st Cir. 1979) (holding the governor or attorney general of a state are not proper defendants in every action attacking the constitutionality of a state statute merely because they have a general obligation to enforce state laws)).

Instead, an official must have a particular duty regarding the ongoing violation and demonstrate a willingness to exercise that duty. *See Peterson v. Martinez*, 707 F.3d 1197, 1205 (10th Cir. 2013). The mere "fact that the [tribal] officer, by virtue of his office, has some connection with the enforcement of the act, is the important and material fact." *Ex parte Young*, 209 U.S. at 157, 28 S. Ct. at 453. Accordingly, "[w]hen a violation of federal law is alleged . . . the state official whose actions violate that law is the rightful party to the suit and prospective injunctive relief can only be had against him." *Id.*

The *Pennington Seed* decision, even though it arises in the patent context, provides a relevant application of these principles. *See* 457 F.3d 1334 (Fed. Cir. 2006). The plaintiff alleged

that officials of the University of Arkansas were "engaged in marketing the patented product" and argued that they "were liable for infringement because, due to their positions at the University, they supervised intellectual property activity." *Id.* at 1342. The plaintiff argued that there was a "sufficient nexus" because the evidence showed a causal connection between the officials who were responsible for overseeing the university's patent policy and the patent infringement. *Id.* The court rejected the plaintiff's argument, reasoning as follows:

> "Allegations that a state official directs a University's patent policy are insufficient to causally connect that state official to a violation of federal patent law—i.e., patent infringement. A nexus between the violation of federal law and the individual accused of violating that law requires more than simply a broad general obligation to prevent a violation; it requires an actual violation of federal law by that individual. The fact that a University Official has a general, state-law obligation to oversee a University's patent policy does not give rise to a violation of federal patent law."

Id. at 1342-43. In view of the lack of a sufficient nexus between any particular action of the individual officer sued and the alleged violation of federal law, the court affirmed the dismissal of the claims for injunctive relief against the state officers. *See id.* at 1343.

In this case, there are no allegations concerning any particular act performed by Berrey as Chairman of the Nation's Business Committee that would constitute an ongoing violation of federal copyright law. The general allegation that "[i]n his official capacity, Berrey is responsible for management of tribal government and oversight of tribal business, among other things," is simply not enough to state a claim for injunctive relief against a tribal officer under the *Ex parte Young* doctrine. (Complaint ¶ 5.) Instead, to support an application of *Young* the law requires an allegation that Berrey performed some specific act as Chairman of the Nation in violation of federal law, which MBA cannot make.

The Saracen Casino Resort project was and is a development undertaken in its initial stage by the Downstream Development Authority, an autonomous entity—not the Nation. The resort

being developed is solely owned and is being operated by a subsidiary of Downstream, Saracen Development, LLC, an Arkansas company, the gaming licensee. (Ex. A ¶¶ 4.) Neither Berrey nor the other members of the Nation's Business Committee were or are, in such capacities, responsible for or involved in the project. (Ex. A ¶¶ 17.) MBA is thus attempting without legal justification to sue the tribal government, when the project at issue was the sole responsibility of other entities.

Under the circumstances of this case, MBA cannot identify a violation of federal law committed by Berrey as Chairman of the Nation's Business Committee, because the alleged copyright infringement related to a development not under Berrey's authority as chairman. Because the allegations in this case relate to activities of entities other than the Nation itself, the *Young* exception cannot apply as a matter of law as a means of avoiding the bar of sovereign immunity.

CONCLUSION

MBA cannot pursue an officer suit against Berrey because it cannot satisfy the requirements for invoking the *Ex parte Young* doctrine. For the foregoing reasons, the claims against Berrey asserted in the Complaint should be dismissed for lack of subject matter jurisdiction and pursuant to the doctrine of tribal sovereign immunity.

Respectfully submitted,

s/ Ronald A. Hope

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CERTIFICATE OF SERVICE

I hereby certify that on this the 6th day of February, 2020, I electronically transmitted a full, true, and correct copy of the above and foregoing instrument, the "BRIEF OF DEFENDANT JOHN L. BERREY IN SUPPORT OF MOTION TO DISMISS," to the Clerk of Court using the Electronic Case Filing System (the "ECF System") for filing and transmittal of a Notice of Electronic Filing to the filing following ECF registrants (names only):

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APPENDIX OF EXHIBITS

The following exhibits are hereby submitted in support of the "BRIEF OF DEFENDANT JOHN L. BERREY IN SUPPORT OF MOTION TO DISMISS."

Exhibit No.	**Title/Description**
A.	Declaration of John L. Berrey, Chairman, Quapaw Nation Business Committee (Feb. 6, 2020).