UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

Amber Brooks, *et al.*	*	
Plaintiffs	*	
v.	*	Civil Action No. 6:22-cv-00033-NKM
Kenneth Branham, *et al*.	*	
Defendants	*	

* * * * * * * * * * * * *

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT

Introduction

This Court should dismiss the Amended Complaint for lack of subject matter jurisdiction and failure to state a claim under Rule 12(b) of the Federal Rules of Civil Procedure. First, the Amended Complaint should be dismissed for lack of subject matter jurisdiction because the true party-in-interest is the Monacan Indian Nation, a sovereign federally recognized Indian tribe entitled to sovereign immunity from suit. The Amended Complaint should also be dismissed for lack of subject matter jurisdiction because it fails to present a federal question. Finally, the Amended Complaint should be dismissed for failure to state a claim upon which relief can be granted.

Plaintiffs effectively request this Court overturn 191 years of U.S. Supreme Court precedent and settled law on the doctrine of sovereignty and attendant immunity of tribal governments. And yet Plaintiffs fail even to mention tribal sovereign immunity, and instead would keep the Court in the dark about the jurisprudential cliff over which Plaintiffs are inviting the Court

to walk. Furthermore, Plaintiffs provide neither factual nor legal support sufficient to establish federal jurisdiction over their claims. Finally, Plaintiffs fail to cite to any specific provisions of law Defendants have allegedly violated beyond conclusory statements. Plaintiffs address none of these deficits in the Amended Complaint. Therefore, the Court should dismiss the Complaint with prejudice.

Procedural Posture

On June 3, 2022 Plaintiffs filed their original Complaint with this Court. Dkt. 1. Defendants filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim on June 27, 2022. Dkt. 8, 9. On July 12, 2022, Plaintiffs filed a Motion to Amend/Correct the Complaint, and filed their First Amended Complaint on July 18, 2022. Dkt. 12, 19. Defendants now submit this Motion and Supporting Memorandum to Dismiss the Plaintiff's Amended Complaint for lack of subject matter jurisdiction and failure to state a claim.

Statement of Facts

For the purposes of Section I, *infra*, Defendants put forward the following clarifying facts relevant to the Court's jurisdiction, or lack thereof, over this case. The Monacan Indian Nation ("Nation" or "Tribe") is a federally recognized Indian tribe whose peoples occupied large swaths of what is now Virginia for thousands of years prior to the formation of the Commonwealth and the United States. The Tribe, now headquartered in Amherst County, Virginia, is an independent sovereign nation within the United States, with its own government that provides services and opportunities to its citizens. Although the Tribe's sovereignty predates that of the United States, the United States government affirmed the Tribe's sovereignty and right to self-govern in 2018 through the Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act (hereinafter, "Thomasina Jordan Act"). Pub. L. No. 115-121, 132 Stat. 40 (2018).

As a sovereign tribal nation, the Monacan Indian Nation is governed by its own internal tribal laws. Pursuant to these laws, the Monacan citizens elected Kenneth Branham as Chief in 2019 for a term set to end in 2023, at which point another election will be held in accordance with the Nation's laws. Chief Branham's election was—and remains—recognized by the United States Department of Interior's Bureau of Indian Affairs (BIA), the federal agency charged with maintaining the formal record of federally recognized tribal governments and their elected officials. As recently as June 7, 2022, the BIA reconfirmed that Chief Branham is official leader of the Tribe. *See* Letter from Bureau of Indian Affairs dated June 7, 2022 ("BIA Letter"), Exhibit 1.

Pursuant to the Nation's laws and internal policies, the Chief and duly elected Tribal Council hired Adrian Compton to serve as Tribal Administrator on January 27, 2020, and appointed Amber Fink as Secretary and Treasurer on December 7, 2021. Mr. Branham remains Tribal Chief, Ms. Fink remains Secretary and Treasurer, and Mr. Compton remains Tribal Administrator, as of this filing. *See* Declaration of Adrian Compton ("Compton Decl."), Exhibit 2.

ARGUMENT

I. THE AMENDED COMPLAINT SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION.

a. Legal standard.

As courts of limited jurisdiction, federal courts exercise jurisdiction only when authorized by the Constitution or a statute. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citing *Willy* v. *Coastal Corp.*, 503 U.S. 131, 136-137 (1992); *Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986)). Federal courts presume that a cause of action lies outside a federal court's limited jurisdiction. The burden of overcoming that presumption lies with the

party asserting jurisdiction, here, the Plaintiffs. *Id.* (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182-183 (1936); *Turner* v. *Bank of North-America*, 4 U.S. 8 (1799)). Further, the Court is not required to find jurisdiction where the Plaintiffs fail to assert it, and may dismiss the case where the face of the complaint fails to establish jurisdiction. *See, e.g., Hyre v. Pitten*, 2021 U.S. Dist. LEXIS 106497, 7 (S.D. Ala. 2021) ("the Court should not have to guess at the jurisdictional basis for [the plaintiff's] complaint"); *Laws v. Franklin County Child Services,* 2021 WL 1401431, 3 (S.D. Ohio 2022) ("when the face of the complaint provides no basis for federal jurisdiction, the Court may dismiss an action as frivolous and for subject matter jurisdiction[.]").

As a threshold matter, the suit is barred by sovereign immunity, something the Amended Complaint fails to address entirely. Even if sovereign immunity did not bar the claims here, the Amended Complaint fails to set forth any basis for this Court to exercise jurisdiction because the Amended Complaint fails to identify a sufficient basis for federal question jurisdiction.

b. The Court does not have subject matter jurisdiction because the Monacan Indian Nation, the true party-in-interest, has sovereign immunity.

i. Federal courts have long recognized the sovereign immunity of Indian tribes.

The Nation's sovereign immunity is a threshold question that determines the Court's subject matter jurisdiction in this case. *See, e.g., Puyallup Tribe v. Dept. of Game of State of Wash.*, 433 U.S. 165, 172 (1977) ("Absent an effective waiver or consent," a court "may not exercise jurisdiction over a recognized Indian tribe"); *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 684-85 (8th Cir. 2011) ("We have held that tribal sovereign immunity is a threshold jurisdictional question."); *see also Pan Am. Co. v. Sycuan Band of Mission Indians,* 884 F.2d 416, 418 (9th Cir. 1989) ("the issue of tribal sovereign immunity is jurisdictional in nature"). Furthermore, federal courts have consistently recognized, with very limited exceptions, the

sovereign immunity of federally recognized Indian tribes, and barred suits under the doctrine. *See, e.g., Lewis v. Clarke*, 137 S. Ct. 1285, 1289 (2017) ("Indian tribes are generally entitled to immunity from suit."); *see also Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991).

The Monacan Indian Nation is a federally recognized tribe, the fact of which the Court may take judicial notice. Pub. L. No. 115-121, 132 Stat. 40 (2018). As such, the Nation possesses "inherent sovereign authority." *Okla. Tax Comm'n*., 498 U.S. at 509 (citing *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831)). By granting federal recognition to the Nation, the United States acknowledged that the Nation is a sovereign entity with inherent rights that predate this United States and its Constitution; indeed, the United States and the Nation cooperate in a government-to-government relationship. *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-59 (1978); *see also Worcester v. Georgia*, 31 U.S. 515, 559 (1832). Only express Congressional fiat can overcome tribal sovereign immunity: "[T]he doctrine of tribal immunity [is] settled law" that requires "dismiss[al of] any suit against a tribe absent congressional authorization (or a waiver)." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 810 (2014).

Because of its sovereign immunity, the Nation is protected from suit in most instances from both private parties and states unless it explicitly consents. *See Bay Mills*, 572 U.S. at 788. ("Among the core aspects of sovereignty that tribes possess … is the 'common-law immunity from suit traditionally enjoyed by sovereign powers'" (quoting *Santa Clara Pueblo*, 436 U.S. at 58)); *Demontiney v. U.S. ex rel. Dept. of Interior, Bureau of Indian Affairs*, 255 F.3d 801, 813 (9th Cir. 2001) (dismissing plaintiff's claim based on the Chippewa Cree Tribe's sovereign immunity from suit). That federally recognized tribes are generally protected against unconsented suit is well-

established at common law, with few limited exceptions. *Haile v. Saunooke*, 246 F.2d 293, 297 (4th Cir. 1957). *See also* Cohen's Handbook on Federal Indian Law, § 7.05[1] 636 (Nell Jessup Newton ed. 2012) (hereinafter, Cohen's Handbook) (describing the origins and evolution of Supreme Court caselaw surrounding tribal sovereign immunity). The Nation is immune from suit in this instance and the Amended Complaint must be dismissed.

Furthermore, where the true claim before the court involves interpretation of a Tribe's own laws and policies, federal courts have consistently found that they do not have jurisdiction to decide such a case. *Crowe v. Eastern Band of Cherokee Indians, Inc.,* 506 F.2d 1231, 1233 (4th Cir. 1974) (stating it is "well established that a federal court has no jurisdiction over an intra-tribal controversy.").

ii. Sovereign immunity applies when the Tribe is the true party-in-interest.

Tribal officials conducting the work of the Tribal government are protected by sovereign immunity. In this case the Defendants are Tribal officials conducting governmental business. The Supreme Court has found that "courts should look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit." *Lewis v. Clarke*, 137 S. Ct. 1285, 1291 (citing *Hafer* v. *Melo*, 502 U. S. 21, 25 (1991)). "In making this assessment, courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign." *Id.* Furthermore, "a plaintiff cannot circumvent tribal immunity by the simple expedient of naming an officer of the Tribe as a defendant, rather than the sovereign entity." *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718 (9th Cir. 2002) (quoting *Snow v. Quinalt Indian Nation*, 709 F.2d 1319, 1322 (9th Cir. 1983)).

On the face of the Amended Complaint, the Nation is the real party-in-interest, not the individual Defendants. Plaintiffs' claims and request for relief could only be brought against Tribal

officials serving in a governmental capacity. For example, in paragraphs 18-26 of the Amended Complaint, Plaintiffs claim that they are owed funds under several federal programs. The federal government has delegated to Tribal governments control over decisions related to disbursement of program funds. *See, e.g.* Am. Compl. ¶¶ 11-13 (stating that various federal funds have been "received by the tribe"). Tribal governments distribute those funds in accordance with agency regulations. *See, e.g.,* 87 Fed. Reg. 4339 (Jan. 27, 2022) ("The interim final rule provided state, local, and Tribal governments substantial flexibility to determine how best to use payments from the SLFRF program to meet the needs of their communities . . .. The final rule provides [even] broader flexibility."). Disbursement of funds by Tribal governments such as the Nation is a wholly governmental activity, conducted by those acting on behalf of the Tribe itself. Furthermore, Plaintiffs complain of Defendants' decisions regarding budget development, Tribal meeting logistics, and recordkeeping, all of which are part and parcel of Defendants' duties as Chief, Tribal Administrator, and Secretary and Treasurer of the Nation's government. Am. Compl. ¶¶ 42-43. While Plaintiffs may assert that they do not recognize the Defendants as Tribal officials and therefore do not bring this suit against the Nation,[1] their allegations plainly show otherwise.

Furthermore, Plaintiffs do not contend that they are owed damages by the individual Defendants or request any relief that a private individual could provide. The Amended Complaint, for example, requests injunctive relief in the form of payment of federal funds and states that no remedy at law is available. Am. Compl. ¶ 72-73. Defendants would only have access to those federal funds as a function of their respective positions in the Nation's government. If, for example, the Defendants were to leave their positions in the government, the various requested relief would

[1] Whether Plaintiffs' claims and disputes over the Nation's governance are legitimate would require interpretation of Tribal law—in this case the Nation's own bylaws and policies regarding elections and administration of program funds—-and is outside the purview of federal courts. *See infra* Section I.c. *See also Crowe v. Eastern Band of Cherokee Indians, Inc.,* 506 F.2d 1231, 1233 (4th Cir.1974).

be impossible for any Defendant, as an individual private person, to provide. It follows, then, that the real party-in-interest in this case is the Nation as a sovereign tribal government, not the Defendants in their private individual capacities. *See, e.g., Chayoon v. Chao,* 355 F.3d 141, 143 (2d Cir. 2004) (finding that the plaintiff "cannot circumvent tribal immunity by merely naming officers or employees of the Tribe when the complaint concerns actions taken in defendants' official or representative capacities and the complaint does not allege they acted outside the scope of their authority."). Plaintiffs have clearly tried to "circumvent tribal immunity by the simple expedient of naming an officer of the Tribe as a defendant," when in fact their dispute is with the sovereign, not the individuals, and nothing alleged in the Amended Complaint falls outside the scope of a Tribal government's authority. *Cook v. AVI Casino Enters., Inc.*, 548 F.3d at 492 (quoting *Snow v. Quinalt Indian Nation*, 709 F.2d at 1322). Sovereign immunity therefore applies to the Defendants as Tribal officers working in their governmental capacities.

iii. Sovereign immunity may only be waived explicitly by the Nation or through Congressional abrogation.

The Nation has not waived and Congress has not abrogated the Nation's sovereign immunity with regard to the issues in the Amended Complaint. The Supreme Court has recognized that an Indian tribe is subject to suit "only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe v. Manufacturing Techs*, 523 U.S. 751, 754 (1998). A tribe's "waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Santa Clara Pueblo* 436 U.S. at 59. Plaintiff has not alleged that the Nation has abrogated or waived its sovereign immunity, nor can it do so. *SunTrust Bank v. Village at Fair Oaks Owner*, 766 F. Supp. 2d 688 (2011); *see also Amerind Risk Mgmt. Corp.* 633 F.3d at 685-86 ("The plaintiffs bear the burden of proving that either Congress or [the Tribe] has expressly and unequivocally waived tribal sovereign immunity.").

Nothing in the Thomasina Jordan Act, or any other law referenced in the Amended Complaint, abrogates the Nation's sovereign immunity. In *Santa Clara Pueblo v. Martinez,* the Supreme Court found that "[i]t is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo* 436 U.S. at 58. The Court goes on to state that sovereign immunity must be upheld "[i]n the absence . . . of any unequivocal expression of contrary legislative intent . . . ." *Id.* No such unequivocal expression of legislative intent exists in the case of the Thomasina Jordan Act. The Thomasina Jordan Act was enacted by Congress to bestow federal recognition on six specific Tribal Nations for the purpose of granting rights to those tribes. In fact, it is the Act itself that recognizes the Nation's sovereignty, so the notion that Congress would simultaneously acknowledge sovereignty and its attendant immunity and abrogate it in the same Act is illogical. Because sovereign immunity applies to Defendants, who were acting in their official capacities with regard to the matters alleged in the Amended Complaint, and Plaintiffs have failed to plead any waiver, sovereign immunity bars suit here.

iv. *This case is distinguishable from the Fourth Circuit's decision in* Hengle v. Treppa.

The very limited exception to sovereign immunity that allows courts to issue prospective injunctive relief to prevent tribal officials, acting as individuals in commercial activity off-reservation, from ongoing violations of federal and state law does not apply here. This case is easily distinguished from the facts in *Hengle v. Treppa*. 19 F.4th 324 (4th Cir. 2021), in which the Fourth Circuit held that sovereign immunity did not bar suit against tribal officials who, acting in their individual capacities, allegedly violated state and federal usury laws during off-reservation commercial activities. *Id.* at 345. The plaintiffs in that case were attempting to stop an ongoing violation of state law codified in defendants' own tribal laws and contracts. *Id.* The Fourth Circuit's opinion referred to a very narrow exception to sovereign immunity in which plaintiffs may sue

regarding a tribal official's alleged ongoing state and federal law violations only if the relief sought is (1) prospective and (2) injunctive. *Id.* at 345.

By contrast, in this case, the Nation's Tribal officials were acting squarely within their official governmental capacities, not as individuals and not in a commercial environment. Moreover, Plaintiffs have failed to allege any ongoing violations of law. Furthermore, the relief Plaintiffs seek is neither prospective nor truly injunctive in nature. Plaintiffs seek an injunction for payment of federal funds they claim the Tribe should have paid to them. Am. Compl. ¶¶ 18-26. Such a request is retroactive because Plaintiffs seek redress for previous actions, not future or ongoing actions. Additionally, while Plaintiffs ask the Court to enjoin Defendants from preventing Plaintiffs from exercising their rights as "citizens of the Nation," Am. Compl. at 15, this request for relief is barred by the Nation's sovereign immunity, as it relates to the Nation's own internal governance and laws. *See Crowe* 506 F.2d at 1233. Finally, although Plaintiffs claim they seek injunctive relief, their true request is for financial payments, which is in effect a request for damages disguised as injunctive relief for pleading purposes. *See, e.g., Rego v. Westvaco Corp.,* 319 F.3d 140, 145 (4th Cir. 2003) (finding that despite the complaint's plain language, a plaintiff was in fact seeking remedies at law in a case alleging withheld benefits).

c. The Court does not have subject matter jurisdiction because the Amended Complaint fails to state a federal question.

Even if sovereign immunity did not warrant dismissal, the Amended Complaint fails to raise a federal question. District courts exercise original jurisdiction over cases involving "actions arising under the Constitution, laws, or treaties of the United States" pursuant to 28 U.S.C. § 1331.

Under the "well-pleaded complaint doctrine," a federal question must be presented on the face of a plaintiff's properly pleaded complaint for a court to exercise federal question jurisdiction. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Furthermore, merely citing to federal

law does not on its own create a federal question. Both the Supreme Court and the Fourth Circuit have held that "[t]here is no 'single, precise definition' of what it means for an action to 'arise under' federal law." *Verizon Md., Inc. v. Global NAPS, Inc*., 377 F.3d 355, 362 (4th Cir. 2004) (quoting *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 808, (1986)). The Fourth Circuit, however, clarified by saying "the various Supreme Court statements boil down to the principle that federal jurisdiction exists when a plaintiff has 'a substantial claim founded 'directly' upon federal law.'" *Verizon Md., Inc.*, 377 F.3d at 362 (quoting Paul J. Mishkin, *The Federal 'Question' in the District Courts*, 53 Colum. L. Rev. 157, 165 (1953)). Plaintiffs' claims in the Amended Complaint are neither substantial nor properly founded upon federal law. Any reference to federal law in the Amended Complaint is "collateral, peripheral, or remote" and therefore does not establish federal question jurisdiction. *Textile Workers v. Lincoln Mills,* 353 U.S. 448, 470 (1957) (Frankfurter, J., dissenting) (defining inquiry as "the degree to which federal law must be in the forefront of the case and not collateral, peripheral or remote").

Plaintiffs fail to properly assert a federal question in the Amended Complaint, and the case should therefore be dismissed. *See, e.g., Hyre,* 2021 U.S. Dist. LEXIS 106497 at 7 ("the Court should not have to guess at the jurisdictional basis for [the plaintiff's] complaint); *Laws* 2021 WL 1401431 at 3 ("when the face of the complaint provides no basis for federal jurisdiction, the Court may dismiss an action as frivolous and for subject matter jurisdiction"). According to the well-pleaded complaint doctrine, the federal question must be presented on the face of the complaint. *See Caterpillar Inc.*, 482 U.S. at 392. Furthermore, if a claim is supported by an alternative, nonfederal legal theory that would not establish jurisdiction on its own, "then federal subject matter jurisdiction does not exist." *Mulcahey v. Columbia Organic Chems. Co*., 29 F.3d 148, 153 (4th Cir. 1994), citing *Christianson v. Colt Indus. Operating Corp*., 486 U.S. 800 (1988).

As a threshold matter, where Plaintiffs' claims are based on intra-tribal disputes, such claims are insufficient to establish federal question jurisdiction. It is "well established that a federal court has no jurisdiction over an intra-tribal controversy." *Crowe,* 506 F.2d at 1233*,* citing *Pinnow v. Shoshone Tribal Council*, 314 F. Supp. 1157, *aff'd*, 453 F.2d 278 (10th Cir. 1971); *Motah v. United States*, 402 F.2d 1 (10th Cir. 1968). Plaintiffs take a large portion of the Amended Complaint to describe the Nation's bylaws and policies and purported disagreements arising thereunder. Am. Compl. ¶¶ 29-35, 55. Such disagreements implicate Tribal law, not federal law. Consequently, although Defendants reject Plaintiffs' allegations and dispute the facts on which they are based, such disputes are outside the purview of federal courts. The Plaintiffs' claims concerning the Nation's internal laws and policies, therefore, are properly decided within the Nation's own processes, and the Fourth Circuit has held that intra-tribal disputes may not be decided by federal courts. *Crowe*, 506 F.2d at 1233. In addition, because Plaintiffs' claims are based on intra-tribal disputes about Tribal laws and policies, rather than on any violations of federal law, federal jurisdiction does not exist. *Mulcahey* 29 F.3d at 153. Thus, all claims in Plaintiffs' Amended Complaint that originate in disagreements over Tribal law and policies do not satisfy the standard for federal question jurisdiction.

Plaintiffs allege that this matter is properly before the Court under federal question jurisdiction because of alleged violations of the Thomasina Jordan Act, Am. Compl. ¶¶ 62-64, 70, a law that conveyed federal recognition to Tribal governments and is immaterial to the monies Plaintiffs seek. Indeed, Plaintiffs claim that the Nation withheld benefits, but fail to provide any basis, factual or legal, for how such action was improper or unlawful under the Thomasina Jordan Act. The Amended Complaint thus fails to properly describe any true controversy arising under federal law. For federal question jurisdiction to apply, the claim must be "founded directly upon

federal law." *Verizon Md., Inc.* 377 F.3d at 362 (quoting Paul J. Mishkin, *The Federal 'Question' in the District Courts*, 53 Colum. L. Rev. 157, 165 (1953)).

Moreover, Plaintiffs' vague assertions that Defendants violated the Thomasina Jordan Act appear to derive from disagreements over Tribal government decisions and policies, which would require the Court to interpret internal Tribal laws and policy. Because federal courts do not have jurisdiction over Tribal laws and intra-tribal disputes, and the claims rest on those facts, Plaintiffs' claim does not provide for a claim arising out of federal law.

Finally, to the extent that the Amended Complaint invokes other federal laws, Plaintiffs do no more than make conclusory statements alleging that Defendants have violated those laws. The Amended Complaint fails to elaborate on which provisions of the laws apply to this case or what federal case or controversy the Court must decide. *See e.g.,* Am. Compl. ¶¶ 11 (describing NAHASDA, but citing no specific provision at issue), 12 (describing the formation of the Indian Health Service, but failing to provide any specific law at issue), 12 (naming the CARES and ARP Acts without identifying a specific provision at issue), 14 (describing 638 Contract funding without describing which provisions are at issue), 17 (describing the Indian Self Determination Act without citing any provision at issue). The Amended Complaint also cites vaguely to "good faith," "fair dealing," and "waste of funds" without providing any reference to specific federal statutes. Am. Compl. ¶¶ 74, 77. Vague references to federal funds absent a clear controversy do not sufficiently establish a claim founded on federal law. *Verizon Md., Inc.* 377 F.3d at 362.

In addition, the Amended Complaint cites to 18 U.S.C. §§ 648, 652, 653 without any further explanation as to why those statutes apply to the allegations in the Amended Complaint. Am. Compl. ¶ 68. Even if the Amended Complaint did properly describe claims arising under those statutes, any potential claims would not provide a right of action because 18 U.S.C. is a

criminal code, which courts have consistently found does not provide private rights of action. *See Cent. Bank of Denver v. First Interstate Bank of Denver,* 511 U.S. 164, 190 (1994) ("We have been quite reluctant to infer a private right of action from a criminal prohibition alone"). *See also* Caroline Bermeo Newcombe, *Implied Private Rights of Action: Definition, and Factors to Determine Whether a Private Action Will Be Implied from a Federal Statute*, 49 Loy. U. Chi. L. J. 117 (2017). ("Not only will courts refuse to imply a private right of action from a jurisdictional statute, courts are also reluctant, but not always opposed, to imply a private right of action from a criminal statute.")

None of the claims referenced in the Amended Complaint are particular or substantial enough to show a claim founded substantially and directly on federal law, and therefore the Amended Complaint fails to establish federal question jurisdiction.

d. Conclusion.

For the reasons stated above, the Plaintiffs fail to meet their burden to establish subject matter jurisdiction, and the Defendants move to dismiss with prejudice the Amended Complaint under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction.

II. THE AMENDED COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM.

a. Legal Standard.

Fed. R. Civ. P. 12(b)(6) provides for dismissal of an action for "failure to state a claim upon which relief can be granted." *See* Fed. R. Civ. P. 12(b)(6). A well-pleaded complaint must include factual allegations sufficient to "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007). The complaint must also "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Facial plausibility is established once the factual content of a

complaint allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc*., 591 F.3d 250, 256 (4th Cir. 2009). "[M]ere conclusory statements" are not enough to demonstrate facial plausibility. *Id*. at 258. "Such conclusory statements are insufficient as a matter of law to demonstrate [a plaintiff's] entitlement to relief" and such complaints should therefore be dismissed. *Id*. at 260.

In ruling on a 12(b)(6) motion, courts must treat the allegations as true and draw inferences in favor the non-moving party. *Robinson v. Am. Honda Motor Co.,* 551 F.3d 218, 222 (4th Cir. 2009). However, such inferences cannot overcome a plaintiff's failure to provide sufficient factual information. *See, e.g., Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985) ("[caselaw] does not require [the] courts to conjure up questions never squarely presented to them. District judges are not mind readers") (discussing the doctrine's limitations even in light of the lowered standard for pleadings from *pro se* litigants); *Wells v. Brown*, 891 F.2d 591, 594 (6th Cir. 1989) ("a court does not have to guess at the nature of the claim asserted"). Furthermore, the Court "need not accept as true 'legal conclusions, elements of a cause of action, . . . bare assertions devoid of further factual enhancement, . . . unwarranted inferences, unreasonable conclusions, or arguments." *Richardson v. Shapiro & Brown*, LLP, 751 Fed. Appx. 346, 348 (4th Cir. 2018).

b. The Amended Complaint does not contain sufficient factual support to state a claim for relief.

The Amended Complaint fails to advance a claim upon which relief can be granted. Complaints must contain sufficient factual allegations that rise above a speculative level. *Iqbal*, 556 U.S. at 678; *Twombly,* 550 U.S. 544. Further, conclusory statements that Defendants violated the law, without any factual basis to support those conclusory claims, are insufficient. *Nemet Chevrolet, Ltd.* 591 F.3d at 256.

Here, the Amended Complaint does not allege factual information sufficient to state a claim for relief. The Amended Complaint instead describes activity carried out by the Nation or its officials in their official capacity as a sovereign government and then either provides conclusory statements alleging violations of federal law, or else describes intra-tribal controversies for which the Court lacks jurisdiction to grant relief.

For example, the Amended Complaint describes expenditures made by the Defendants, acting as the officials of Tribal government, for food bank vehicles, Am. Compl. ¶ 58, housing assistance, Am. Compl. ¶ 59, and buildings for government activity, Am. Compl. ¶ 42. These activities, all performed in the course of Tribal government business, are insufficient to establish a cause of action on their face. The only references Plaintiffs make to violations of federal law are conclusory statements in which they summarily state that Defendants have violated a law without providing any factual basis. *See e.g.,* Am. Compl. ¶ 53 (stating the Defendants took actions to declare Plaintiffs ineligible "for reasons which violate federal law" without describing what federal laws were violated).

Furthermore, the Amended Complaint cites to federal laws without providing any factual basis for a violation of those laws, and therefore does not state any claim upon which this Court can grant relief for the following reasons:

First, Plaintiffs allege several violations of law without providing any relevant statute in reference to those supposed violations. *See* Am. Compl. ¶¶ 12 (in which the Plaintiffs cite 23 U.S.C. § 13, a code provision *that does not exist*), 74 (in which Plaintiffs allege violations of good faith and fair dealing without any reference to any law violated), 77 (in which Plaintiffs claim Defendants' actions constitute waste of Treasury funds, without reference to a specific law violated). Furthermore, the Amended Complaint provides generic citations to entire chapters of

laws providing benefits to Tribes, but fails to affirmatively claim any violations of those laws. *See supra* Section I.c. *See also* Am. Compl. ¶¶ 11-14. Finally, the only law the Amended Complaint cites to with any specificity, the Thomasina Jordan Act, is not accompanied by any facts that give rise to a cause of action beyond conclusory statements. Plaintiffs cite to the Thomasina Jordan Act and follow up with a recitation of conclusory statements about Defendants violating the statute.

Next, although Plaintiffs allege that Defendants have interfered with delivery of federal funds, they provide no facts alleging, for example, what specific benefits Plaintiffs applied for, what funds Plaintiffs were lawfully entitled to, which specific regulations or statutes were violated in the provision of funds, when and how Plaintiffs were denied those benefits, or any other factual background that could lead the Court to infer any claim. The Court is not required to accept "bare assertions devoid of further factual enhancement" as are found here. *Richardson* 751 Fed. Appx. at 348. Moreover, Plaintiffs claim that "there is no sufficient administrative means" for enforcing statutory provisions involved in federal funding. Am. Compl. ¶ 73. The absence of a means of administrative enforcement does not establish a claim or private right to enforce a statute, and further, there are in fact administrative mechanisms that Plaintiffs have failed to use. *See, e.g. Report Fraud, Waste, and Abuse*, Office of Inspector General, https://oig.treasury.gov/report-fraud-waste-and-abuse. Nowhere in the Amended Complaint do Plaintiffs provide sufficient factual basis, above a speculative or conclusory level, for a claim upon which relief can be granted, and for this reason the Amended Complaint should be dismissed under Rule 12. Fed. R. Civ. P. 12(b)(6).

c. The Plaintiffs base their claims on laws with no private cause of action against the Nation or its government officials.

The only identifiable statute cited in the Amended Complaint does not provide Plaintiffs with a private cause of action against the Nation. Plaintiffs allege that "this matter involves the

interference by the Defendants through individual and collective action, with the delivery of Federal funding and benefits granted to Plaintiff[s]" by the Thomasina Jordan Act, an Act which Plaintiffs claim "grants an express and an implied right of action for the members of the tribe." Am. Compl. ¶ 70. Yet the Thomasina Jordan Act does not provide Plaintiffs with rights to bring the claims they purport to allege. The Supreme Court and this Circuit have held that "[t]he existence of a private right of action in a federal statute is a pure question of Congressional intent." *Bauer v. Elrich*, 8 F.4th 291, 299 (4th Cir. 2021) (citing *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001)). "Given this exclusively legislative role, courts may not create a private remedy without evidence of Congress' intent to do so." *Id.*

Nothing in the Thomasina Jordan Act or its legislative history indicates Congressional intent to create a private right of action that would allow Plaintiffs to sue the Monacan Indian Nation or its officials in their personal capacities. The Act provides in part that the Monacan Indian Nation and its members "shall be eligible for all services and benefits provided by the Federal Government to federally recognized Indian tribes without regard to the existence of a reservation for the Tribe." Sec. 503(b)(1). The text of the Act does not create an express right of action. *Cf.* 15 U.S.C. § 15(a) ("any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor[.]").

Nor is there any indication that Congress intended to establish an implied right of action for the type of claims Plaintiffs bring. As a law providing federal recognition for six tribes headquartered in the Commonwealth of Virginia, including the Monacan Indian Nation, the Act makes applicable to the six tribes and their members "all laws that are generally applicable to American Indians and federally recognized Indian tribes." S. Rpt. 114-141, September 10, 2015.

Although not at issue in this case, the text of the Thomasina Jordan Act at most implies that the Monacan Indian Nation and its members could reference the law in arguing that they are "eligible for all services and benefits provided by the Federal Government to federally recognized Indian tribes without regard to the existence of a reservation for the Tribe." Sec. 503(b)(1). Here, however, there is no indication that Congress intended to allow private individuals to sue the Nation. In fact, there is no mention at all in the Act of private individuals—only Tribes, their members, and the federal government—and so Plaintiffs' attempts to make claims against Defendants in their private capacities similarly have no basis in the law. Finally, the central purpose of the Thomasina Jordan Act is a recognition of the Nation's sovereignty, so Plaintiffs' interpretation of the Act as diminishing that sovereignty in any way is clearly contrary to Congress' intent. It would therefore be inconsistent with the underlying purposes of the Thomasina Jordan Act for the Court to infer the right of action Plaintiffs seek. *See Cal. v. Sierra Club*, 451 U.S. 287, 293 (1981).

d. Conclusion

The Plaintiffs have failed to plead specific causes of actions. Therefore, the Amended Complaint does not meet the standard required to survive a motion to dismiss. Defendants move to dismiss the Amended Complaint under Fed. R. Civ. P. 12(b)(6).

CONCLUSION

For the above reasons, this Court should grant Defendants' Motion to Dismiss.

Dated: August 1, 2022

Respectfully Submitted,

Gregory A, Werkheiser (VA Bar #: 45986)
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Counsel for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of August 2022, a copy of the foregoing Memorandum in Support of Defendants' Motion to Dismiss was served via the Court's ECF system on the following:

Joseph A. Sanzone
Sanzone & Baker, L.L.P.
1106 Commerce Street, P.O. Box 1078
Lynchburg, VA 24505
(434) 846-4691
valaw@sanzoneandbaker.com

Counsel for Plaintiffs

Gregory A, Werkheiser

Exhibit 1

For 12(b)(1) purposes only

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
Eastern Regional Office
545 Marriott Drive, Suite 700
Nashville, TN 37214

JUN - 7 2022

The Honorable Kenneth Branham
Chief, Monacan Indian Nation
111 Highway Drive
Madison Heights, Virginia 24572

Dear Chief Branham:

According to our records, Kenneth Branham was elected Tribal Chief of the Monacan Indian Nation in June 2019, and his term will end in June 2023.

If you have any questions regarding the letter, please contact Ms. Rebecca J. Smith, at 615-564-6711 or 615-289-7906, or via email Rebeccaj.Smith@bia.gov.

Sincerely,

Kimberly A. Bouchard
Regional Director

Exhibit 2

For 12(b)(1) purposes only

MONACAN INDIAN NATION

June 9, 2022

RE: Adrian J. Compton
Tribal Administrator

To Whom It May Concern:

This letter is to verify that Adrian J. Compton was hired on January 27, 2020, as the Tribal Administrator of the Monacan Indian Nation located in Amherst County, Virginia. I attest to the fact that Mr. Compton's employment has been continuous since his hire date, and he remains employed as the Tribal Administrator of the Monacan Indian Nation today.

As Chief of the Monacan Nation, Kenneth Branham is over the Executive Branch of our government and is Mr. Compton's supervisor. At no point in time have I, as the Human Resources Representative, been directed by Chief Branham, or any other Monacan Indian Nation official, to terminate Mr. Compton's employment.

If you have further questions, please contact me at Enrollment@MonacanNation.com or by calling 434-363-4877.

Thank you,

Teresa Covington
Program Manager Generalist