IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ISAAC WILLIAM HESS *Plaintiff*, v. UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL., *Defendants*.	)	Case No. 1:22-cv-3385-CJN

REPLY IN SUPPORT OF CHEROKEE NATION DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Pursuant to Local Rule 7(d), Defendants Cherokee Nation (the "Nation") and Chuck Hoskin, Jr., Principal Chief of the Nation (collectively, the "Cherokee Nation Defendants"), by and through their undersigned counsel, offer this Reply Memorandum in support of Cherokee Nation Defendants' Motion to Dismiss Plaintiff's Complaint (ECF No. 9) ("Mot.").

Plaintiff's Amended Response (ECF No. 18) ("Resp.") restates, in some ways, the allegations of his Complaint; however, it fails to establish any basis for subject matter jurisdiction in this matter, or to state any claim upon which relief may be granted against the Cherokee Nation Defendants. Accordingly, Defendants' Motion should be granted.

ARGUMENT

I. Plaintiff offers nothing to diminish the Cherokee Nation Defendants' sovereign immunity from suit and so the case should be dismissed under Rule 12(b)(1).

Plaintiff opines that the Cherokee Nation Defendants "seem to be relying heavily upon sovereign immunity." Resp. at 2. That is arguably the most accurate statement contained in Plaintiff's Response. The Cherokee Nation Defendants have properly asserted tribal sovereign immunity, and the complaint should be dismissed under Rule 12(b)(1).

Like his Complaint, Plaintiff's Response fails to identify any express waiver or abrogation of sovereign immunity as to the Cherokee Nation Defendants. There has been none. Further, Plaintiff's Response fails to offer any argument or authority whatsoever addressed to the Cherokee Nation's assertion of sovereign immunity. Accordingly, the Nation's immunity from suit should be deemed conceded, and the Nation should be dismissed for that reason alone. *See Day v. D.C. Dep't of Consumer & Regulatory Affairs*, 191 F. Supp. 2d 154, 159 (D.D.C. 2002) ("If a party fails to counter an argument that the opposing party makes in a motion, the court may treat that argument as conceded."). Plaintiff's general statement that he "denies all claims unless specifically admitted," Resp. at 5, does not prevent his concession, because "if a party files an opposition to a motion and therein addresses only some of the movant's arguments, the court may treat the unaddressed arguments as conceded." *Wannall v. Honeywell, Inc.*, 775 F.3d 425, 428 (D.C. Cir. 2014) (citing *Hopkins v. Women's Div., Gen. Bd. of Global Ministries*, 284 F. Supp. 2d 15, 25 (D.D.C. 2003)).

As to the claims against the Nation's Principal Chief, Plaintiff again offers no legal authority that would undermine the assertion of sovereign immunity. He directs this Court's attention to *Local 2677, American Federation of Government Employees v. Phillips*, 358 F. Supp. 60 (D.D.C. 1973), in which the plaintiffs sought to enjoin the actions of a federal official which they alleged violated federal law, *id.* at 68. However, that case proceeded under the exception for *federal* sovereign immunity, which "allows suits against *federal officials* who have allegedly acted beyond their statutory powers or have exercised their statutory powers in a constitutionally void manner." *Id.* at 68 (citing *Dugan v. Rank*, 372 U.S. 609, 621-22 (1963); *Larson v. Dom. & Foreign Corp.*, 337 U.S. 682, 689 (1949)) (emphasis added). *Phillips* did not address *Ex parte Young* actions or suits against tribal officers, and so has no relevance to the question of whether the Nation's Principal Chief can be sued.

Moreover, Plaintiff's reliance on *Phillips* relies only on the baseless, conclusory allegation that the Principal Chief has somehow acted outside his authority, Resp. at 2, ignoring that fact that the Principal Chief played no part in the decision to decline to exercise jurisdiction over custody and visitation issues pending in Plaintiff's Idaho divorce case—a decision rendered by the Nation's judiciary, a separate and equal branch of its government. The only new contention contained in Plaintiff's Response on that score is that the Nation's Principal Chief "is responsible for passing a UCCJEA law if the Cherokee Nation desires one." Resp. at 2-3. That statement is also simply wrong. Passage of any such law would be within the purview of the

Cherokee Nation Tribal Council, the Nation's legislative body and the third co-equal branch of its government. *See* Cherokee Nation Const. art. VI, §§ 1 ,7, 10.

Plaintiff's assertion that the Court can exercise jurisdiction after granting his motion for joinder of Cherokee Nation District Court Judge Amy E. Page ("Judge Page"), *see* Resp. at 5, is also incorrect. As the Cherokee Nation Defendants explain in their Response to Plaintiff's motion for joinder, filed today and which they incorporate herein, Plaintiff does not have a cause of action against Judge Page, so he cannot rely on joinder as a hail Mary. And even if he had a cause of action, his claims would fail under Rule 12(b)(6) whether or not the Court granted the joinder motion, *see infra* § II, so the pendency of that motion provides no reason to deny the Cherokee Nation Defendants' motion to dismiss.

In sum, the Cherokee Nation Defendants' sovereign immunity from suit shields them against Plaintiff's Complaint, which must therefore be dismissed under Rule 12(b)(1).

II. Plaintiff's effort to re-cast the relief requested in the Complaint does nothing to shore up his claims, which fail as a matter of law and should be dismissed under Rule 12(b)(6).

Plaintiff does not offer any argument or authority to combat the Cherokee Nation Defendants' argument that Article 13 of the 1866 Treaty does not give the Nation's courts exclusive jurisdiction over off-reservation disputes involving Nation citizens, *see* Mot. at 14-15, and so the Court should deem him to have conceded those arguments. *See Day*, 191 F. Supp. 2d at 159. Plaintiff does cite two Supreme Court cases which he says "inform[] us that the Indian tribes have sovereignty over both their land AND their tribal members." Resp. at 3-4. But that does not establish that

the Nation's courts have exclusive jurisdiction over off-reservation disputes, which is the basis of Plaintiff's claims. Compl., ECF No. 1 ¶¶ 21, 28, 35-36. For that reason, his Complaint should be dismissed under Rule 12(b)(6).

Plaintiff's Response also appears to revise the relief he has requested, but that does not save his Complaint. Plaintiff now contends that he "does not want to force the Cherokee Nation tribal court to do anything." Resp. 2. Rather, he says he

> only wants the Declaratory relief to specifically affirm that if an Indian tribe has adopted the UCCJEA, then it applies to them and the various states must treat them as a state in terms of its applicability. If an Indian tribe has not passed a law to adopt the UCCJEA, then they are not bound by it and retain exclusive jurisdiction over the child custody and visitation decisions for all tribal children regardless of where they reside.

Id. at 2-3. Although this revisionist take may help to clarify what Plaintiff hopes to achieve through this litigation, it falls far short of rehabilitating the insufficiency of his allegations that Article 13 of the 1866 Treaty of Washington with the Cherokee, July 19, 1866, 14 Stat. 799, requires the Nation's courts to exercise exclusive jurisdiction over off-reservation disputes.

Finally, Plaintiff lists no authority that would allow him to circumvent the requirement that he exhaust his tribal remedies before proceeding to federal court, and his supposed "extenuating circumstances" that should excuse exhaustion, *see* Resp. 4, are non sequiturs. His request for abeyance, instead of dismissal, so that he can file a request for reconsideration in the Cherokee Nation District Court "and subsequent appeal, if necessary," Resp. at 5, should be denied. Plaintiff already abandoned his right to seek reconsideration of the Cherokee Nation District Court's

dismissal order by appealing it to the Cherokee Nation Supreme Court and then abandoning the appeal, *see* ECF No. 9-2, at 19, and thus also abandoned any benefits he might obtain by seeking reconsideration rather than an immediate appeal, including abeyances of other proceedings to allow him to seek reconsideration. *See United States v. Reynoso*, 38 F.4th 1083, 1095 (D.C. Cir. 2022) ("waiver is the 'intentional relinquishment or abandonment of a known right'" (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993))).

CONCLUSION

Plaintiff is barred from proceeding against the Cherokee Nation or its Principal Chief, Chuck Hoskin, Jr. by the doctrine of sovereign immunity. He has provided no express waiver of sovereign immunity, nor any applicable legal authority that might allow this action to proceed against the Cherokee Nation Defendants. He has failed to properly plead any action against the Nation's Principal Chief that might circumvent application of the sovereign immunity doctrine. He has failed to exhaust tribal remedies before filing suit in this Court and has failed to state a claim that can be granted. Accordingly, the Cherokee Nation Defendants respectfully request that this Court dismiss Plaintiff's Complaint for lack of subject matter jurisdiction under Rule 12(b)(1) and failure to state a claim under Rule 12(b)(6).

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Respectfully submitted,

Dated: February 17, 2023

By: */s/ Frank S. Holleman*

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Counsel for Defendants Cherokee Nation & Chuck Hoskin, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2023, I electronically filed the above and foregoing document with the Clerk of Court via the ECF System for filing and caused it to be e-mailed to the Plaintiff's e-mail address listed in his signature on the complaint.

/s/ Frank S. Holleman
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