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

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

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INTRODUCTION AND BACKGROUND

Plaintiff's Complaint seeks a declaration that would, in effect, compel the Cherokee Nation District Court to assume jurisdiction of the child custody and visitation aspects of his now-concluded divorce action in Idaho. *See* Compl., ECF No. 1 ¶¶ 2, 41.7. Plaintiff did not obtain the outcome he desired from the Idaho court, and his Complaint is but the latest in a series of efforts to usurp that court's authority.

Plaintiff and his wife were married on August 6, 2011, in Arapahoe County, Colorado.[1] While residing in Colorado, their first child, AMH, was born. The family moved to Bonneville County, Idaho, in 2015, where their second child, GDH, was born. The family resided continuously in Idaho until Plaintiff's separation from his wife on December 5, 2020. Neither of Plaintiff's minor children have ever resided in Oklahoma, much less within the bounds of the Cherokee Nation Reservation.

Plaintiff initially (and properly) filed for divorce in Bonneville County, Idaho on December 24, 2020.[2] His wife responded and counterclaimed, and on June 16, 2021, the Idaho court issued temporary orders awarding the parties joint legal custody and alternating-week periods of physical custody of the minor children. The case was set for trial of all issues to begin September 1, 2021.

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[1] This and all other facts discussed in this section are not subject to dispute and are judicially noticeable because they are described in court records in related cases, *see Baker v. Henderson*, 150 F. Supp. 2d 13, 15 (D.D.C. 2001) (citing *Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993)), and can be considered on a Rule 12(b)(1) and (6) motion.

[2] *Hess v. Hess*, CV10-20-7925. Copies of dockets for the cases discussed in this section are attached as Exhibit A to this Motion.

Plaintiff began exercising a week-long period of physical custody of the children on August 15, 2021 and brought them to Oklahoma. On August 19, 2021, with Plaintiff's express consent, Plaintiff's father, James Hess, filed an action for guardianship of the children in the Cherokee Nation District Court, along with an ex parte emergency motion for temporary custody. An ex parte order appointing him temporary emergency guardian was entered by the court that day and the case was set for a show cause hearing to take place on September 3, 2021. On August 20, 2021, Plaintiff advised his wife that he would not return the children as required by the Idaho court's temporary order and informed her of the ex parte emergency custody order issued by the Cherokee Nation District Court.

The trial scheduled by the Idaho court for September 1, 2021, did not occur. Instead, all issues except custody and visitation of the minor children were settled by agreement. Custody and visitation issues were reserved for trial at a later date.

On September 3, 2021, the Cherokee Nation District Court held the scheduled show cause hearing in the guardianship action. The court, being apprised of the children's Idaho residency and the pendency of the Idaho divorce proceeding, dismissed the guardianship action.[3] Unsurprisingly, ten days later on September 13, 2021, the Idaho court entered an order granting Plaintiff's wife's ex parte emergency request for temporary sole legal and physical custody of the children.

[3] James Hess sought reconsideration of the decision, which was denied, and appealed the district court's ruling to the Cherokee Nation Supreme Court in Case No. SC-2022-06. His appeal was dismissed by Order dated October 24, 2022.

On November 17, 2021, Plaintiff filed motions with the Idaho court seeking to set aside the ex parte custody order and to obtain sole custody of the children himself.[4] On December 2, 2021, he filed notice that he was withdrawing his petition for divorce, together with a motion to dismiss his wife's counterclaim—and thus, the case in its entirety. The Idaho court held a pre-trial conference on January 24, 2022, and the custody and visitation issues were re-set for trial to begin on February 25, 2022.

On February 14, 2022, with trial fast approaching, Plaintiff filed a petition for divorce in the District Court of Cherokee County, Oklahoma.[5] The next day, February 15, 2022, Plaintiff filed a paternity action in the Cherokee Nation District Court seeking sole custody of the children.[6]

Despite Plaintiff's machinations, the Idaho custody trial proceeded as scheduled on February 25, 2022. On March 23, 2022, the Idaho court issued judgment awarding Plaintiff's wife full custody of the children.

Thereafter, on June 2, 2022, the Cherokee Nation District Court dismissed Plaintiff's paternity action, finding that it lacked jurisdiction because the children were permanent residents of the State of Idaho and the Idaho court had rendered a lawful custody determination involving the same parties and subject matter. The Oklahoma state court followed on June 15, 2022, dismissing Plaintiff's divorce filing

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[4] On the same date, Plaintiff also filed six separate motions to have his wife incarcerated for perceived violations of a litany of laws, and a motion seeking reversal of a November 3, 2021, order allowing Plaintiff's attorney in the Idaho case to withdraw.

[5] *In re the Marriage of Isaac William Hess v. Lisa Ann Hess*, FD-2022-18.

[6] *In re AMH*, CVPAT-2022-0085.

on grounds of forum non conveniens. Plaintiff failed to appeal either of those dismissals.

Plaintiff's appeal of the Idaho court's judgment remains pending, with oral argument scheduled for January 11, 2023.

STATEMENT OF THE CASE

In an effort to undo this Gordian knot of his own making, Plaintiff now contends that the Cherokee Nation District Court possesses sole and exclusive jurisdiction of all custody and visitation issues arising in any divorce action involving Cherokee children, without regard to where said children might reside. *See* Compl., ECF No. 1 ¶¶ 2, 15-38, 41.7. He further argues that the Cherokee Nation District Court has no discretion or authority to decline to exercise jurisdiction in such cases and can thus be compelled to hear and rule upon all such child-related issues arising from divorce filings across the entire United States. *See* Compl., ECF No. 1 ¶¶ 36-39. He seeks a declaratory judgment from this Court "that the Cherokee Nation District Court has jurisdiction over all tribal members for all civil matters not limited by Congress regardless of where they live, including CVPAT-22-85." Compl., ECF No. 1 ¶ 41.7.

STANDARD OF REVIEW

To survive a motion to dismiss under Rule 12(b)(1), Plaintiff bears the burden of demonstrating the court's subject-matter jurisdiction over the claims asserted. *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015). When considering a Motion to Dismiss under Rule 12(b)(1), the Court must "'construe the complaint liberally, granting plaintiff the benefit of all inferences that can be derived from the facts

alleged, and upon such facts determine jurisdictional questions." *Am. Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011) (quoting *Thomas v. Principi*, 394 F.3d 970, 972 (D.C. Cir. 2005)). However, the Court is not obligated to accept plaintiff's inferences if they are unsupported by facts as alleged in the complaint or amount to nothing more than assertions of legal conclusions. *See Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). "In determining whether there is jurisdiction, the Court may 'consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts.'" *Kialegee Tribal Town v. Zinke*, 330 F. Supp. 3d 255, 262 (D.D.C. 2018) (quoting *Coal. for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003); citing *Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005)). Absent subject matter jurisdiction over a case, the court must dismiss it. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506-07 (2006).

A Rule 12(b)(6) motion tests a complaint's legal sufficiency. To survive a Rule 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 556. A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555 (citations omitted). Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.* at 557.

On a Rule 12(b)(6) motion, the court can consider, in addition to the materials in the complaint and any materials incorporated into it or attached to it, matters of public record and other materials that are subject to judicial notice. *N. Am. Butterfly Ass'n v. Wolf*, 977 F.3d 1244, 1249 (D.C. Cir. 2020); *Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1059 (D.C. Cir. 2007); *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997). The court may also consider "'documents upon which the plaintiff's complaint necessarily relies even if the document is produced not by the plaintiff in the complaint but by the defendant in a motion to dismiss.'" *In re Domestic Airline Travel Antitrust Litig.*, 221 F. Supp. 3d 46, 54-55 (D.D.C. 2016) (quoting *Ward v. D.C. Dep't of Youth Rehab. Servs.*, 768 F. Supp. 2d 117, 119 (D.D.C. 2011)).

ARGUMENT AND AUTHORITIES

Plaintiff's claims are legally flawed. His requested relief, if granted, would create a practical nightmare in the Cherokee Nation District Court and in courts across the nation presented with divorce actions involving custody and visitation issues impacting Cherokee children. Moreover, it would undermine the intent and nullify the provisions of the Uniform Child Custody Jurisdiction and Enforcement Act[7] in all such cases.

However, this Court need not address the merits of Plaintiff's claims. Plaintiff is barred from proceeding against the Cherokee Nation or its Principal Chief, Chuck Hoskin, Jr. (collectively, the Cherokee Nation Defendants) by the doctrine of

[7] Codified federally at 28 U.S.C. § 1738A.

sovereign immunity. Plaintiff cites no express waiver of sovereign immunity that might allow this action to proceed against the Cherokee Nation Defendants. Further, Plaintiff has failed to properly plead any action against the Nation's Principal Chief that might allow circumvention of the sovereign immunity doctrine. Plaintiff also failed to exhaust tribal remedies before filing suit in this Court and has failed to state a claim that can be granted. Accordingly, this action must be dismissed.

I. Plaintiffs' claims must be dismissed for lack of subject matter jurisdiction.

A. Sovereign immunity bars Plaintiffs' claims against the Cherokee Nation Defendants.

The sovereign immunity of the Cherokee Nation (hereinafter "Nation") and its Principal Chief, Chuck Hoskin, Jr. (hereinafter "Principal Chief"), bars Plaintiffs' claims, and they must be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction.

As sovereigns, Indian tribes enjoy immunity against suits. *Vann v. Kempthorne*, 534 F.3d 741, 746 (D.C. Cir. 2008) (citing *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58–59 (1978); *Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 172 (1977); *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940); *Wichita & Affiliated Tribes v. Hodel*, 788 F.2d 765, 771 (D.C. Cir. 1986)). Sovereign immunity of tribes is a threshold matter of subject matter jurisdiction, "which may be challenged by a motion to dismiss under Fed. R. Civ. P. 12(b)(1)." *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1009 (10th Cir. 2007) (citing *E.F.W. v. St. Stephen's Indian High Sch.*,

264 F.3d 1297, 1302-03 (10th Cir. 2001)); *see also Saucier v. Katz*, 533 U.S. 194, 201 (2001), receded from on other grounds by *Pearson v. Callahan*, 555 U.S. 223 (2009). Under the doctrine of tribal sovereign immunity, an Indian tribe is immune from suit unless Congress has specifically authorized suit or the tribe has expressly waived its immunity. *Kiowa*, 523 U.S. at 754. The U.S. Supreme Court has "time and again treated the 'doctrine of tribal immunity [as] settled law' and dismissed any suit against a tribe absent congressional authorization (or a waiver)." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 789 (2014) (alteration in original) (quoting *Kiowa*, 523 U.S. at 756). Accordingly, any waiver of a tribe's sovereign immunity, whether by Congress or by the tribe itself, "cannot be implied but must be unequivocally expressed." *Santa Clara*, 436 U.S. at 58.

Plaintiff never alleges that Congress abrogated the Nation's tribal sovereign immunity from this suit, nor that the Nation waived its own immunity. There has never been such a waiver or abrogation–and as we now explain, the only exception to tribal sovereign immunity that Plaintiff alleges in his complaint is unavailable to him. Thus, Plaintiff's Complaint must be dismissed as a matter of law.

B. The *Ex Parte Young* doctrine does not extend to the Nation's Principal Chief in the context of this case.

Plaintiff attempts to circumvent the Nation's immunity by naming the Nation's Principal Chief as a defendant, citing as a basis *Vann v. Kempthorne*, 534 F.3d 741 (D.C. Cir. 2008). Compl., ECF No. 1, ¶8. However, the circumstances and underlying rationale of *Vann* render its holding inapplicable in the context of this case.

The plaintiffs in *Vann* filed suit in federal court to challenge the Nation's decision to exclude them from eligibility to vote in tribal elections. In their amended complaint, they named federal officials, the Nation, and tribal officers in those officers' official capacities, and argued that their exclusion from tribal voting violated federal law. 534 F.3d at 744. On appeal, the D.C. Circuit first determined that (as here) the tribe itself was protected from suit by sovereign immunity, then reviewed whether sovereign immunity also served to protect tribal officers, *Id.* at 746-749. It concluded that they were not under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908).

The court explained that "[t]he basic doctrine of *Ex parte Young* can be simply stated. A federal court is not barred by the Eleventh Amendment from enjoining state officers from acting unconstitutionally, either because their action is alleged to violate the Constitution directly or because it is contrary to a federal statute or regulation that is the supreme law of the land." 534 F.3d at 749 (quoting 17A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 4232 (3d ed. 2007)). The court concluded "it [is] clear that tribal sovereign immunity does not bar suit against tribal officers" brought under *Young*, because the Supreme Court had concluded in *Santa Clara Pueblo* that such suits could be brought against tribal officers. *Id.*

To determine whether a complaint properly relies on *Young* to avoid the "[sovereign immunity] bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Md., Inc. v. Pub. Serv.*

Comm'n, 535 U.S. 635, 646 (2002) (quoting *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring in part & concurring in judgment) and citing *id.* at 298-99 (Souter, J., dissenting)).[8] However, *Young* requires that the named officer "must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party." *Young*, 209 U.S. at 157.

> The fact that the state officer, by virtue of his office, has some connection with the enforcement of the act, is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists.

Id.

In this case, *Young* will not preserve Plaintiff's claim against the Principal Chief for two reasons. First, Plaintiff has not alleged an ongoing violation of federal law inherent in the Cherokee Nation District Court's decision not to take jurisdiction over the custody issues of his divorce case—nor could he, as we explain further *infra*, because no federal law establishes that the Nation has exclusive jurisdiction over off-reservation cases, or that it must exercise jurisdiction over such cases. Second, Plaintiff has not alleged any action or continuing inaction *by the Principal Chief* that violates federal law.

Plaintiff seeks relief that would, as a practical matter, compel the Cherokee Nation District Court to exercise jurisdiction over child custody and visitation issues

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[8] *Young* does not authorize claims against sovereign governments or their agencies, "regardless of the relief sought." *See P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (citing *Cory v. White*, 457 U.S. 85 (1982)), and is therefore entirely unavailable as to Plaintiff's claim against the Nation.

in Plaintiff's divorce case, to the exclusion of the Idaho court in which he originally brought suit. But, crucial to this analysis, the Principal Chief does not control or direct the Cherokee Nation District Court and is not responsible for its determinations. The Cherokee Nation Constitution[9], Articles V, VII, and VIII, establishes a tripartite government with distinct executive, legislative, and judicial branches, similar to the United States federal government. The Nation's judiciary is as a wholly separate and independent branch of the Nation's government, *see* art. VIII, which is not answerable to the executive branch, of which the Principal Chief is the head, *id.* art. VII, § 1. The Principal Chief cannot direct the Nation's courts to do anything, and relief against him would have no effect on the tribal courts. Thus, even assuming Plaintiff had properly alleged claims under the doctrine of *Ex Parte Young*, which he has not, those claims would fail.

In sum, Plaintiff has failed to properly plead any claim that would overcome the Cherokee Nation Defendants' sovereign immunity protection here. Because *Young* is unavailable, this suit against the Principal Chief is barred by tribal sovereign immunity. Accordingly, Plaintiffs' claims against the Principal Chief must be dismissed for lack of subject matter jurisdiction.

[9] *Available at* https://www.cherokee.org/media/lsufapj1/constitution-of-the-cherokee-nation-1999-online.pdf.

II. Plaintiff's claims must be dismissed for failure to state a claim upon which relief can be granted.

Additionally, Plaintiff has failed to state a claim on which relief can be granted by failing to exhaust his tribal remedies and by raising a claim with no merit. His Complaint must be dismissed under Rule 12(b)(6) for those reasons, as well.

A. Plaintiff failed to exhaust tribal remedies.

Plaintiff failed to exhaust available tribal remedies before instituting this suit. "Motions to dismiss for failure to exhaust tribal remedies are considered under Federal Rule of Civil Procedure 12(b)(6)." *Muscogee Creek Indian Freedmen Band, Inc. v. Bernhardt*, 385 F. Supp. 3d 16, 20 (D.D.C. 2019) (citing *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985)). In *National Farmers Union*, despite finding that a tribal court's adjudicative jurisdiction over a case was a federal question supporting federal court jurisdiction under 28 U.S.C. § 1331, the Court required that the issue of tribal jurisdiction first be litigated in tribal court. 471 U.S. at 852. Acknowledging Congress' policy of supporting tribal self-government and self-determination, the court reasoned that "the first opportunity to evaluate the factual and *legal bases*" of challenges to tribal jurisdiction properly rests with the tribal courts, so that other courts may "benefit from their expertise." *Id.* at 856 (emphasis added). And that door swings both ways, giving the tribal court first opportunity to determine whether it should accept jurisdiction, as "[e]xhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the

benefit of their expertise in such matters in the event of further judicial review." *Id.* at 857.

Iowa Mutual Ins. Co. v. LaPlante extended the exhaustion requirement, noting that the ability to unconditionally circumvent tribal jurisdiction in favor of federal jurisdiction would "infringe upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law." 480 U.S. 9, 16 (1987). Thus, "[a]t a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts." *Id.* at 17. "Until appellate review is complete, the [tribal courts] have not had a full opportunity to evaluate the claim and federal courts should not intervene." *Id.*

Here, Plaintiff filed a paternity action in the Cherokee Nation District Court seeking full custody of his children on February 15, 2022. The court dismissed that case on June 2, 2022, concluding that it lacked jurisdiction because the Idaho state courts were properly exercising jurisdiction over the custody dispute. Plaintiff had the opportunity to appeal that dismissal. He failed to do so. Thus, even assuming Plaintiff could properly establish a waiver of sovereign immunity (he cannot), the Cherokee Nation District Court has concluded that it lacks jurisdiction to hear Plaintiff's child custody issues. That judicial determination became the law of the case when Plaintiff failed to appeal.

Now, Plaintiff seeks to use this Court as a makeshift appellate forum to "correct" the tribal district court's decision instead of relying on the Nation's own Supreme Court to litigate his arguments as tribal appellate procedure requires. *See*

Cherokee Nation Code Annotated tit. 20, App. 1, Rule 50 *et seq*. Allowing that gambit would undermine tribal self-government, and weighs heavily in favor of dismissal of this action. *See Muscogee Creek Indian Freedmen*, 385 F. Supp. 3d at 21; *accord LECG, LLC v. Seneca Nation of Indians*, 518 F. Supp. 2d 274, 277 (D.D.C. 2007).

Plaintiff's failure to exhaust tribal remedies is fatal to his suit in this Court. His Complaint should be dismissed.

B. Plaintiff's claims fail as a matter of law.

Additionally, Plaintiff's claims must be dismissed because they fail as a matter of law. Plaintiff alleges that the Cherokee Nation's courts have exclusive jurisdiction that they must exercise over disputes involving Nation citizens wherever they arise, *see* Compl., ECF No. 1 ¶¶ 21, 28, 35, based on the 1866 Treaty of Washington with the Cherokee, July 19, 1866, 14 Stat. 799 ("1866 Treaty"), *see* Compl., ECF No. 1 ¶ 36. That argument is simply wrong.

Plaintiff points to no authority establishing that the Nation's courts must exercise jurisdiction where they might be able to exercise it, even if that would be contrary to tribal law. He makes only a conclusory assertion that the Cherokee Nation District Court is "obligated" to exercise jurisdiction over every case "which properly comes before it." Compl., ECF No. 1 ¶ 37. These legal conclusions are unsupported by any authorities or facts. The court is not obligated to accept them and should not. *See Browning*, 292 F.3d at 242.

As to his allegation that the Nation's courts have exclusive jurisdiction over off-reservation disputes involving Nation citizens, Plaintiff cites only to Article 13 of the 1866 Treaty, which provides that "the judicial tribunals of the nation shall be

allowed to retain exclusive jurisdiction in all civil and criminal cases *arising within their country* in which members of the nation, by nativity or adoption, *shall be the only parties, or where the cause of action shall arise in the Cherokee Nation*, except as otherwise provided in this treaty." *Id.* (emphasis added). Plainly—and contrary to Plaintiff's assertion that the Nation's jurisdiction is based only on citizenship, not territory, *see* Compl., ECF No. 1 ¶ 23—this language only applies to causes of action arising "within" the Cherokee Nation's "country." That "country" is the Cherokee Nation Reservation. *See Hogner v. State*, 2021 OK CR 4, ¶¶ 9-11, 18, 500 P.3d 629, 631-34; *Spears v. State*, 2021 OK CR 7, ¶¶ 11-15, 485 P.3d 873, 876-77, *cert. denied* 142 S. Ct. 934 (2022). The boundaries of the Reservation are those described in the 1835 Treaty of New Echota, art. 2, Dec. 29, 1835, 7 Stat. 478, as modified by the 1866 Treaty itself, *see* 1866 Treaty arts. 17, 21, and the Act of March 3, 1893, § 10, ch. 209, 27 Stat. 612, 640-43. *See* Cherokee Nation Const. art. II (describing the Nation's territorial jurisdiction). Idaho is not within those boundaries, and so Article 13 has no application to Plaintiff's dispute there.

Plaintiff points to some other federal law authorities which he alleges did not diminish the Nation's jurisdiction, but he never alleges that those authorities conferred exclusive jurisdiction on the Nation, and so they cannot serve to support his allegation of exclusive tribal jurisdiction off the Reservation. And although Plaintiff alleges that the Cherokee Nation Constitution vests tribal courts with off-reservation jurisdiction, nothing in Article VIII of the Constitution establishes that tribal courts have *exclusive* off-reservation jurisdiction. And in any event, a *Young*

action cannot be used to award retroactive relief, such as Plaintiff seeks here by attempting to force a tribal court to take jurisdiction over a case that he himself abandoned and allowed to be dismissed. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105-06 (1984) ("[A]n award of retroactive relief necessarily 'fall[s] afoul of the Eleventh Amendment if that basic constitutional provision is to be conceived of as having any present force.' (quoting *Rothstein v. Wyman*, 467 F.2d 226, 237 (2d Cir. 1972) (McGowan, J., sitting by designation), *cert. denied*, 411 U.S. 921 (1973)).

CONCLUSION

For the foregoing reasons, 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: January 6, 2023

By: */s/ Frank S. Holleman*

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CERTIFICATE OF SERVICE

I hereby certify that on January 6, 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
Frank S. Holleman