IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THLOPTHLOCCO TRIBAL TOWN, a federally recognized Indian Tribe,	)	
Plaintiff,	)	
vs.	)	Case No. 4:09-CV-527-JCG-CDL
ROGER WILEY, et al.,	)	
Defendants.	)	

DEFENDANTS-APPELLEES' COMBINED MOTION AND OPENING BRIEF IN SUPPORT OF DISMISSAL FOR LACK OF JURISDICTION

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DEFENDANTS-APPELLEES' COMBINED MOTION AND OPENING BRIEF IN SUPPORT OF DISMISSAL FOR LACK OF JURISDICTION

Pursuant to the Court's January 20, 2023 Scheduling Order, Dkt. 172, and Local Civil Rule 7, Defendants Roger Wiley, Chief Judge of the District Court of the Muscogee (Creek) Nation ("MCN"); Richard C. Lerblance, Chief Justice of the MCN Supreme Court; Amos McNac, Vice-Chief Justice of the MCN Supreme Court; and Andrew Adams, III, Kathleen R. Supernaw, Montie R. Deer, George Thompson, Jr., and Leah Harjo-Ware, Justices of the MCN Supreme Court (collectively "MCN Judicial Officers"),[1] respectfully move to dismiss this case for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).

INTRODUCTION

"[W]hen a federal court … lacks subject-matter jurisdiction, the complaint must be dismissed in its entirety." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 502 (2006). That is the case here. The Thlopthlocco Tribal Town ("Town" or "Tribal Town") brought this federal action against the MCN Judicial Officers while claims were pending against it in two cases in the MCN District Court. It sought declaratory relief from this Court that it enjoyed sovereign immunity from suit in the MCN courts and that the unconsented exercise of jurisdiction over it by MCN courts accordingly constituted an ongoing violation of federal law. It also sought an injunction requiring the MCN courts to dismiss the pending actions and to prohibit them from ever exercising unconsented jurisdiction over it. *See* Second Am. Compl., Dkt. 47 ("Complaint"), Prayer for Relief ¶¶ 1–5.

On February 28, 2022, the MCN Supreme Court issued a decision adopting the Town's position as to its sovereign immunity and the jurisdiction of the MCN courts. It granted the

[1] Pursuant to Fed. R. Civ. P. 25(d), the MCN Judicial Officers are substituted for their previously named predecessors.

Town full relief, remanding one of the two pending cases with orders to dismiss (which the Tribal District Court did) and affirming the lower court's dismissal of the other. The Court squarely held that the Town "is entitled to sovereign immunity in the Courts of the Muscogee (Creek) Nation." MCN Supreme Court Order and Op., Dkt. 168-4 ("Order"), at 22. That decision is binding precedent in the MCN courts. *See* MCN Const. art. VII, § 5. Accordingly, no MCN court is presently exercising unconsented jurisdiction over the Town and, pursuant to the MCN Supreme Court's decision, none may do so again.

Three independent conclusions follow. First, the Town has attained in full the very outcomes it sought in the filing of this suit, and thus a constitutional case or controversy no longer exists, rendering this action moot. Second, given that the Town cannot gain any meaningful relief from this Court, continuation of this case will unnecessarily strain tribal comity and public resources. This Court should therefore hold this case prudentially moot. Third, because the Town can no longer allege an ongoing violation of federal law, the MCN Judicial Officers enjoy sovereign immunity to this action.

Separately and together, these conclusions deprive this Court of subject-matter jurisdiction. *See Wyoming v. U.S. Dep't of Interior*, 587 F.3d 1245, 1254 (10th Cir. 2009) (Gorsuch, J.) ("[O]ur general practice is to … remand with instructions to dismiss the [moot] case for lack of jurisdiction."); *Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1215 (10th Cir. 2012) (Gorsuch, J.) (applying this "general practice when finding a case moot (prudentially or otherwise)" (citing *id.*)); *Normandy Apartments, Ltd. v. U.S. Dep't of Hous. & Urban Dev.*, 554 F.3d 1290, 1295 (10th Cir. 2009) ("[S]overeign immunity is jurisdictional in nature, depriving courts of subject-matter jurisdiction where applicable."). And when a federal

court "determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3). This Court should do so here.

FACTUAL AND PROCEDURAL BACKGROUND

I. The 2007 and 2011 Election Disputes and Ensuing Tribal Court Cases.

In 2007, Thlopthlocco Tribal Town, a federally recognized band of the Muscogee (Creek) Nation, became embroiled in an election dispute within its government. Complaint ¶¶ 28, 59–64. As a result, a contingent of the Town's governmental officials filed suit in MCN District Court against others involved in the dispute (the "Anderson Defendants"). *Id*. ¶ 65. That matter—Case No. CV-2007-39, *id.* ¶ 35—is one of two MCN District Court suits relevant here.

In conjunction with its filing, the Town promulgated a limited waiver of its sovereign immunity with respect to its claims in the action, thus consenting to the MCN District Court's jurisdiction to adjudicate those claims. *Id*. ¶¶ 65–66. The Anderson Defendants challenged the MCN District Court's jurisdiction, and the matter eventually reached the MCN Supreme Court, which ruled in the Town's favor that the MCN District Court possessed jurisdiction to adjudicate the case. *Id*. ¶¶ 68–69.

The Anderson Defendants then filed crossclaims against the Town's officials in the MCN District Court raising allegations related to the election dispute. *Id*. ¶ 73. The Town moved to dismiss the crossclaims for lack of jurisdiction, asserting sovereign immunity to those claims. *Id*. ¶ 77 & n.23. The MCN District Court denied the motion. *Id*. ¶ 77. In response, the Town withdrew its waiver of sovereign immunity and filed another motion to dismiss the crossclaims. *Id.* ¶¶ 94–95. The District Court denied that motion, too, *id.* ¶ 97, and on August 3, 2009, the Town filed an interlocutory appeal to the MCN Supreme Court, *id.* ¶ 99.

About two weeks later, on August 18, 2009, the Town filed this federal action against the MCN Judicial Officers to enjoin them from exercising jurisdiction over it. *Id.* ¶¶ 4, 8. After

several filings, this Court stayed the case "pending a decision by the Muscogee (Creek) Nation in" Case No. CV-2007-39. *See* Minute Order, Dkt. 33.

While those proceedings were pending, in 2011, the Anderson Defendants filed a new action in the MCN District Court regarding another election dispute. They raised new election-related claims and sought injunctive relief against the Town's officials. Complaint ¶¶ 100–05. This new matter was Case No. CV-2011-08, *id.* ¶ 36, and it is the second of the two MCN District Court cases relevant to the matters before this Court.

The Town's officials responded to the new suit by invoking its sovereign immunity and moving to dismiss the suit for lack of subject-matter jurisdiction. *Id.* ¶ 108. The MCN District Court denied the motion and granted injunctive relief to the Anderson Defendants related to the 2011 election dispute. *Id.* ¶¶ 109–10.

II. This Federal Court Litigation.

After the MCN Supreme Court did not enter a decision "either accepting jurisdiction [on interlocutory appeal] or soliciting a response" in No. CV-2011-08, the Town requested that this Court lift its stay of this matter, *id.* ¶¶ 12, 113, and this Court eventually did so, *see* Minute Sheet, Dkt. 50. In 2012, the Town filed the operative complaint here—its Second Amended Complaint—in which it alleged that the assertion of jurisdiction over it by MCN courts absent its consent constituted an ongoing violation of federal law due to its sovereign immunity. It sought declaratory relief to that effect. Complaint, Prayer for Relief ¶¶ 3–4. And it sought preliminary and permanent injunctions against the MCN Judicial Officers from exercising any unconsented jurisdiction over it. *Id.*, Prayer for Relief ¶¶ 2, 5.

This Court denied the requested relief and instead granted the MCN Judicial Officers' motion to dismiss the action. The Court reasoned that: it lacked subject-matter jurisdiction; the MCN Judicial Officers were entitled to sovereign immunity; the Town had failed to join

indispensable parties; and the Town had not exhausted its tribal court remedies. *See Thlopthlocco Tribal Town v. Stidham*, No. 09-CV-527-JHP-FHM, 2013 WL 65234, at *8–14 (N.D. Okla. Jan. 3, 2013).

On appeal, the United States Court of Appeals for the Tenth Circuit found that federal jurisdiction exists and that none of the MCN Judicial Officers' other claims required dismissal. At the same time, the Court held that the Town had failed to exhaust its tribal court remedies. The Tenth Circuit accordingly remanded the matter to this Court with instructions to consider the feasibility of joining any necessary parties and to abate further proceedings pending exhaustion of tribal court remedies. *See Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1242 (10th Cir. 2014). On remand, this Court granted a joint motion to stay the case and directed the parties to file consistent status reports on the MCN court proceedings. Minute Order, Dkt. 89.

III. The MCN Supreme Court Recognizes the Tribal Town's Sovereign Immunity, and the Pending Cases Are Dismissed.

On May 24, 2021, the MCN District Court issued a decision pertaining to both Case No. CV-2007-39 (the Town's initial 2007 MCN District Court action with crossclaims by the Anderson Defendants) and Case No. CV-2011-08 (the Anderson Defendants' 2011 action against the Town), dismissing the former and retaining jurisdiction over the latter. *See* Order and Decision of District Ct., Dkt. 159-1, at 2 ("[T]his Court hereby dismisses CV 2007-39 but retains jurisdiction over CV 2011-08[.]"). As to Case No. CV-2007-39, the MCN District Court held that it originally possessed jurisdiction over the claims, as well as any crossclaims within the scope of the initial case. *See id.* at 19. But the Court dismissed both the claims and crossclaims as "no longer justiciable as a practical matter" due to the significant passage of time and the fact that the Anderson Defendants were "no longer a credible threat" to the Town. *Id.* As to Case No. CV-2011-08, the MCN District Court ruled that it continued to possess jurisdiction and

ordered further injunctive relief against the Town in favor of the Anderson Defendants related to the 2011 election dispute. *See id*. at 19–20.

The Tribal Town appealed both matters to the MCN Supreme Court, which issued its final Order on February 28, 2022. *See* Order. In that Order, the MCN Supreme Court affirmed the MCN District Court's dismissal of Case No. CV-2007-39, thus closing the case and terminating jurisdiction over the Town in that matter. *Id*. at 23. And it reversed the MCN District Court's ruling in Case No. CV-2011-08. *Id.* at 23–25. In so doing, the Court recognized without qualification that the Tribal Town "is entitled to sovereign immunity in the Courts of the Muscogee (Creek) Nation," *id*. at 22. It further found that "[n]o waiver of sovereign immunity was granted by the Thlopthlocco Tribal Town with respect to" Case No. CV-2011-08 and that

> a finding of jurisdiction would not be proper absent a waiver of sovereign immunity by [the Town]. As such, the Court reverses the May 24, 2021, Order of the MCN District Court with respect to CV-2011-08, [and] remands the matter back to the MCN District Court with orders to dismiss the action for lack of jurisdiction.

Id. at 25.

Following the MCN Supreme Court's Order, on March 7, 2022, the MCN District Court issued an Order of Dismissal in Case No. CV-2011-08. Order of Dismissal, Dkt. 168-5 ("Dismissal"). As a result, and because the MCN Supreme Court affirmed the District Court's dismissal of Case No. CV-2007-39, no MCN court is currently exercising unconsented jurisdiction over the Tribal Town.

STANDARD OF REVIEW

Because the MCN Judicial Officers' motion to dismiss is based on facts that post-date the filing of the Town's Complaint, it constitutes a factual rather than facial challenge to this Court's subject-matter jurisdiction. A facial challenge "assumes the allegations in the complaint are true and argues they fail to establish jurisdiction," while a factual challenge "goes beyond the

allegations in the complaint and adduces evidence to contest jurisdiction." *Laufer v. Looper*, 22 F.4th 871, 875 (10th Cir. 2022) (citations omitted). A factual challenge "does not allow a reviewing court to presume the truthfulness of the complaint's factual allegations. Instead, it gives the court wide discretion" to consider extrinsic documents "to resolve disputed jurisdictional facts." *Pueblo of Jemez v. United States*, 790 F.3d 1143, 1148 n.4 (10th Cir. 2015) (quotation marks and citation omitted).[2]

ARGUMENT

I. This Matter Is Moot.

The Tribal Town is no longer subject to the unconsented jurisdiction of the MCN courts. Accordingly, an Article III case or controversy no longer exists, rendering this case constitutionally moot. And because the Town's requested remedy would result in no real-world benefits and would impose significant burdens on tribal comity and public resources, this matter is prudentially moot as well. Under either mootness doctrine, this matter must be dismissed for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(h)(3).

A. There Is No Longer Any Case or Controversy.

A live case or controversy is a constitutional prerequisite to federal court jurisdiction. U.S. Const. art. III, § 2. Accordingly, "[a] federal court must order dismissal for mootness if the controversy ends prior to a decision even if a justiciable controversy existed when the suit began." *Citizen Ctr. v. Gessler*, 770 F.3d 900, 906 (10th Cir. 2014). That is precisely what has happened here.

[2] The only extrinsic documents relied on by the MCN Judicial Officers in support of this motion are the Order and Decision of District Court, Dkt. 159-1; the Order, Dkt. 168-4; and the Dismissal, Dkt. 168-5. To provide this case's factual background, the MCN Judicial Officers cite this Court's Minute Orders at Dkt. 33, 50, and 89.

When the Town filed its Second Amended Complaint in 2012, claims were pending against it in the MCN District Court, which had rejected the Town's assertion of sovereign immunity and ruled that it possessed jurisdiction over the Town. *See* Complaint ¶¶ 109, 113. The Town sought relief from this Court in the form of a declaration

> that Thlopthlocco's rights of sovereign immunity under its own nation status and as a federally recognized Indian Tribe, are supreme over any court decision, legislative act, rule, or practice of the MCN and that continuing to subject Thlopthlocco to the jurisdiction of Defendants is a violation of federal law in derogation of Thlopthlocco sovereign immunity.

Id., Prayer for Relief ¶ 3. It also sought a declaration that any MCN court orders in excess of their jurisdiction over the Town "in the Tribal Court action are null and void[.]" *Id*., Prayer for Relief ¶ 4. And the Town likewise requested "prospective injunctive relief" enjoining the MCN courts "from the exercise of any jurisdiction … over Plaintiff Thlopthlocco without [its] explicit and specific consent[.]" *Id*., Prayer for Relief ¶ 5. As of the filing of that Complaint, the MCN Supreme Court had not yet issued its "final answer to the question of [the Town's] sovereign immunity," as the Tenth Circuit recognized in its 2014 opinion. 762 F.3d at 1238.

Now, though, the MCN Supreme Court has spoken clearly on that issue. It has pronounced, without caveat or qualification, that the Tribal Town "is entitled to sovereign immunity in the Courts of the Muscogee (Creek) Nation," Order at 22 (quotation marks omitted). The Court stated this was so not only as a matter of MCN law, but as a matter of the Town's "federal rights" and "the rights associated with federal recognition." *Id*. The Court explained, too, that MCN statutory law expressly limits MCN court jurisdiction to that permissible under federal law. *See id*. (discussing M(C)NCA tit. 26, § 1-103 (extending personal and subject-matter jurisdiction of MCN courts to matters permitted by the MCN Constitution and laws and "not prohibited by federal law")). The Court's Order affirmed the dismissal of Case No. CV-

2007-39, *see id.* at 23, and instructed the MCN District Court to dismiss Case No. CV-2011-08, which it promptly did the following week, *see* Dismissal. Thus, both cases are closed, and unconsented jurisdiction over the Town has concluded.

Accordingly, the MCN courts and the Town are now in agreement as to the Town's sovereign immunity and current legal rights under MCN and federal law. As the Tenth Circuit has explained, "the case is moot if the dispute is no longer embedded in any actual controversy about the plaintiffs' particular legal rights." *Smith v. Becerra*, 44 F.4th 1238, 1247 (10th Cir. 2022) (citation omitted); *see also, e.g.*, *Phelps v. Hamilton*, 122 F.3d 1309, 1326 (10th Cir. 1997) (holding that challenge to state law was "now moot due to the Kansas Supreme Court's ruling" changing the disputed law); *Am. Charities for Reasonable Fundraising Regulation, Inc. v. O'Bannon*, 909 F.3d 329, 331 (10th Cir. 2018) ("Utah substantially revised its law, prompting officials to concede that the new restrictions do not apply to [plaintiff]. This change in the law renders the appeal moot."); *Powder River Basin Res. Council. v. Babbitt*, 54 F.3d 1477, 1485 (10th Cir. 1995) ("[P]laintiff originally had standing but lost it after the Wyoming Supreme Court's decision deprived it of an injury in fact[.]"). Under these controlling principles, the Town's claims for declaratory and injunctive relief are moot.

As to declaratory relief, "a declaratory relief claim is moot if the relief would not affect the behavior of the defendant toward the plaintiff." *Smith*, 44 F.4th at 1247 (quotation marks omitted). Here, the MCN courts have ceased unconsented jurisdiction over the Town and are prohibited from resuming it by a final order of the MCN Supreme Court declaring the sovereign immunity of the Town under MCN and federal law. Even if granted, the Town's requested declarations would change none of this. Indeed, "[w]ithout a redressable injury, such a declaration would be nothing more than an advisory opinion." *Id.* at 1249; *see also, e.g.*, *Hewitt*

v. Helms, 482 U.S. 755, 761 (1987) ("[W]hat makes [a judicial pronouncement] a proper judicial resolution of a 'case or controversy' rather than an advisory opinion … is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff*." (emphasis in original)); *Fleming v. Gutierrez*, 785 F.3d 442, 445 (10th Cir. 2015) ("[I]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party, we must dismiss the case, rather than issue an advisory opinion." (citation omitted)).

For the same reasons, the Town's request for prospective injunctive relief is moot. The claims pending against it in Case Nos. CV-2007-39 and CV-2011-08 were irreversibly terminated as a result of the MCN Supreme Court's Order affirming the dismissal of the former and mandating dismissal of the latter. Since then, no MCN court has exercised unconsented jurisdiction over the Town, and this remains true today. Moreover, as enshrined in the MCN Constitution, the word of the MCN Supreme Court "shall be final." MCN Const. art. VII, § 5. Accordingly, no MCN court can assert unconsented jurisdiction over the Town going forward. This is precisely the outcome the Town sought in its request for a prospective injunction from this Court. Such an injunction now would thus result in no changes at all in the MCN Judicial Officers' behavior toward the Town. As the Tenth Circuit has made clear,

> if a defendant has carried out the action that a plaintiff sought to compel through an injunction, then the claim for injunctive relief is moot because there is no point in ordering an action that has already taken place. In other words, a claim for injunctive relief is moot if there is no reasonable likelihood that the injunction would result in any changes.

Church v. Polis, No. 20-1391, 2022 WL 200661, at *4 (10th Cir. Jan. 24, 2022) (quotation marks, brackets, and citation omitted); *see also, e.g.*, *McKesson Corp. v. Hembree*, Case No. 17-CV-323-TCK -FHM, 2018 WL 4621833, at *3 (N.D. Okla. Sept. 26, 2018) ("[A] plaintiff lacks

standing to challenge tribal jurisdiction unless there is a tribal court action *currently pending*." (emphasis in original)); *Charles v. Ute Indian Tribe of the Uintah & Ouray Reservation*, Case No. 2:17-cv-00321-DN, 2018 WL 611469, at *1 (D. Utah Jan. 29, 2018) ("Because [Plaintiff's] case in Ute [Tribal] Court has been dismissed … no case or controversy exists on which to decide the action. [The] complaint must be dismissed on this basis."); *Sitton v. Native Vill. of Northway*, No. A03-0134-CV (HRH), 2005 WL 2704992, at *3 (D. Alaska Oct. 13, 2005) (where "tribal court terminated its jurisdiction," federal court claims challenging that jurisdiction were "moot" because "there is no ongoing, live dispute"); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 898 F. Supp. 1549, 1559 (S.D. Fla. 1994) (dismissal of tribal court case "rendered moot" "the issue of the tribal court's jurisdiction"), *aff'd in part, dismissed in part*, 63 F.3d 1030 (11th Cir. 1995).

In sum, the Town's claims for both declaratory and injunctive relief are moot. A live case or controversy no longer exists under Article III. This Court therefore lacks subject-matter jurisdiction, and "the complaint must be dismissed in its entirety." *Arbaugh*, 546 U.S. at 502.

B. This Case Is No Longer an Appropriate Subject for This Court's Remedial Discretion and Is Thus Prudentially Moot.

Even were this matter not constitutionally moot, it would warrant dismissal as prudentially moot.[3] When a party seeks declaratory or injunctive relief, a court acting on its "remedial discretion" may deny this relief and dismiss the case as prudentially moot. *Winzler*, 681 F.3d at 1210; *see also Jordan v. Sosa*, 654 F.3d 1012, 1024 (10th Cir. 2011) ("[P]rudential mootness doctrine only applies where, as here, a plaintiff seeks injunctive or declaratory relief."). Prudential mootness rests on the premise that when "events so overtake a lawsuit that the

[3] Courts may evaluate prudential mootness prior to constitutional mootness. *See Winzler*, 681 F.3d at 1215. Or they may consider both simultaneously. *See S. Utah Wilderness All. v. Smith*, 110 F.3d 724, 728 (10th Cir. 1997) ("[W]e find this suit is mooted under either doctrine.").

anticipated benefits of a remedial decree no longer justify the trouble of deciding the case on the merits, equity may demand not decision but dismissal." *Winzler*, 681 F.3d at 1210. This is especially so when the suit is against a governmental entity; in such cases, "considerations of prudence and comity for coordinate branches of government counsel the court to stay its hand[.]" *S. Utah Wilderness All. v. Smith*, 110 F.3d 724, 727 (10th Cir. 1997) (citation omitted). In that vein, the Tenth Circuit has extended comity to other sovereigns. *See, e.g.*, *Seay v. Okla. Bd. of Dentistry*, No. 21-6054, 2022 WL 2046511, at *2–4 (10th Cir. June 7, 2022) (prudentially mooting a suit against a state agency); *Great Divide Wind Farm 2 LLC v. Aguilar*, No. 19-2214, 2021 WL 2690477, at *2–3 (10th Cir. Mar. 30, 2021) (same); *Hines v. Allbaugh*, Case No. CIV-15-901-R, 2017 WL 3315273, at *9 (W.D. Okla. Aug. 3, 2017) (prudentially mooting injunctive relief against state prison officials).

These principles apply with full force here to moot the Tribal Town's claims. "Under both Article III and prudential mootness doctrines, the central inquiry is essentially the same: have circumstances changed since the beginning of litigation that forestall any occasion for meaningful relief." *S. Utah Wilderness All.*, 110 F.3d at 727. As explained, *supra* at 7–11, circumstances have so changed here that neither a declaration nor an injunction can provide the Town any meaningful relief—the MCN courts have recognized the Town's sovereign immunity and are no longer exercising unconsented jurisdiction over it. Even "promises of reform" can often suffice for prudential mootness, *Winzler*, 681 F.3d at 1210, and the decisions of the MCN courts go far beyond the promissory. Their immunity holdings should moot the case, for "[t]here is no point in ordering an action that has already taken place." *S. Utah Wilderness All.*, 110 F.3d at 728.

And there is more. Further percolation of this case risks needless interference in tribal self-governance and "the duplicative expenditure of finite public resources." *Winzler*, 681 F.3d at 1211. Indeed, when the Tenth Circuit earlier stayed this case and compelled tribal exhaustion, it recognized that "[p]rinciples of comity require federal courts to dismiss or to abstain from deciding claims over which tribal court jurisdiction is 'colorable'" and that tribal exhaustion "is grounded in the federal policy supporting tribal self-government." *Thlopthlocco Tribal Town*, 762 F.3d at 1240 (citations omitted). Continuation of this case threatens to bulldoze that comity. And it would extend litigation that is over a decade old, further drawing on the resources of the federal courts and two federally recognized Indian tribes. *See Winzler*, 681 F.3d at 1211 ("Our intervention would … surely add new transaction costs for [the Defendant] … all while offering not even a sliver of additional relief for [the Plaintiff.]"); *Jordan*, 654 F.3d at 1033 n.19 ("We do not see the wisdom of starting down a path that would invariably result in the passage of a considerable amount of time and the consumption of a good deal more judicial resources[.]"). The Tribal Town asks the Court to ignore these consequences—all for an order that would merely "duplicate [the] efforts" of the MCN courts. *Winzler*, 681 F.3d at 1211. The equitable concerns here far outweigh the lack of any potential benefit to the Town.

Because continuation of this case offers the Town no meaningful relief, risks unnecessary federal court intrusion into tribal sovereignty, and portends the wasteful expenditure of public resources, the Court should exercise its discretion to dismiss this case as moot.

C. The Town's Arguments Do Not Salvage Its Claims from Mootness.

In the parties' April 7, 2022 Supplemental Status Report Regarding Tribal Court Remedies, Dkt. 171 ("Status Report"), the Town previewed several arguments purporting to show that live issues remain to be resolved in this case. None has merit.

1. No Joinder Issues Are Live.

The Tribal Town first asserts that joinder motions concerning the Anderson Defendants remain to be decided because this Court found them to be necessary parties and the Tenth Circuit directed this Court to "consider the feasibility of joining" them on remand, *Thlopthlocco Tribal Town*, 762 F.3d at 1236. Status Report ¶ 9(A). The Town further contends that "there are additional judicial officers who are not joined and who should be." *Id*.

These assertions do not operate to defeat mootness. As demonstrated above, no live controversy remains between the Town and the MCN courts, and "federal courts may only adjudicate live controversies … *between the parties*," *Fischbach v. N.M. Activities Ass'n*, 38 F.3d 1159, 1160 (10th Cir. 1994) (emphasis added); *see also, e.g.*, *Schell v. OXY USA Inc.*, 814 F.3d 1107, 1114 (10th Cir. 2016) ("[A]n actual case or controversy between the parties must exist."). That a *non*-party may have had some interest in the parties' dispute when it was live does not suffice to revive this Court's jurisdiction when the dispute—and hence the constitutional prerequisite for this Court's authority to adjudicate it—has ceased to exist. *See, e.g.*, *Delgado v. Gonzales*, 428 F.3d 916, 921 (10th Cir. 2005) (affirming denial of motion for leave to add a party because the complaint could "not withstand a jurisdictional challenge"); *Shaw v. AAA Eng'g & Drafting Inc.*, 138 F. App'x 62, 66–72 (10th Cir. 2005) (affirming denial of joinder motion because movant "overlooked the critical threshold issue of whether the district court had subject matter jurisdiction to join parties," 138 F. App'x at 67); *Owens v. Whitten*, Case No. 22-CV-0192-GKF-CDL, 2022 WL 14678728, at *1 (N.D. Okla. Oct. 25, 2022) ("As a result of the dismissal [for lack of jurisdiction and the passage of the statute of limitations], the Court dismisses as moot all pending motions."), *petition for cert. filed* (U.S. Feb. 16, 2023) (No. 22-6796). Rule 19's text also cuts against the Town: It provides that adding a necessary party is "feasible" when it "will not deprive the court of subject-matter jurisdiction[.]" Fed. R. Civ. P.

19(a)(1). This language presupposes the existence of an Article III case or controversy over which the court *has* subject-matter jurisdiction in the first instance. That is not the case here. The issue of joinder is as moot as the original dispute.

2. The Town's Withdrawal of Its Immunity Waiver in the MCN District Court Is Not a Live issue.

In the MCN District Court proceedings, the Town waived its sovereign immunity in Case No. CV-2007-39 and later withdrew that waiver. Complaint ¶¶ 65–66, 94–95. In its remand order, the Tenth Circuit "decline[d] to address, at this stage of the litigation, the question of whether the Muscogee court may exercise jurisdiction despite the Tribal Town's withdrawal of its immunity waiver." *Thlopthlocco Tribal Town*, 762 F.3d at 1237. It noted that MCN tribal law may differ "significantly from federal law" on that point. *Id.* at 1240. The MCN Supreme Court did not expressly analyze the question and affirmed the MCN District Court's dismissal of the case as effectively moot. *See* Order at 23.

The Town asserts that "none of the Tribal Courts ruled on this specific issue remanded by the Tenth Circuit," and that this Court "must now determine the status of this specific question in light of the decision of the MCN Supreme Court." Status Report ¶ 9(B). That is incorrect. The question, while certainly interesting, is moot, and addressing it would, again, amount to an unconstitutional advisory opinion. Case No. CV-2007-39 has been dismissed and tribal court jurisdiction terminated. There is no pending MCN court case in which the court is asserting, or threatening to assert, jurisdiction over the Town despite a withdrawn immunity waiver. The issue, then, is purely academic because any pronouncement by this Court in the Town's favor would change nothing as a practical matter. "Under Article III, federal courts do not adjudicate hypothetical or abstract disputes." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021); *Wyoming*, 587 F.3d at 1247 (Article III does not permit courts to resolve "interesting academic

questions" the resolution of which would have no "actual effect in the real world"). Instead, "[a] federal court must order dismissal for mootness if," as happened here, "the controversy ends prior to a decision even if a justiciable controversy existed when the suit began…. [P]ast exposure to illegal conduct would not establish a live controversy in the absence of continuing ill effects." *Citizen Ctr.*, 770 F.3d at 906.

3. The Tenth Circuit Mandate Does Not Call for Resolving Moot Issues.

The Tribal Town next asserts that

> an entry of judgment is necessary in this Court to create a binding precedent consistent with the Tenth Circuit's decision recognizing Thlopthlocco's immunity to suit in the Creek Nation Courts. Otherwise, the issue will remain unresolved and the mandate of the Tenth Circuit will remain unimplemented and not binding on all the parties by *res judicata* in federal court.

Status Report ¶ 9(C). This argument is meritless for several reasons. To start, it rests on a patently incorrect premise. The Tenth Circuit did not "recogniz[e] Thlopthlocco's immunity to suit in the Creek Nation Courts." *Id*. Instead, the Tenth Circuit simply found that the Town "has sufficiently *pleaded* that it is a separate and independent Indian tribe beyond the reach of Muscogee court jurisdiction." *Thlopthlocco Tribal Town*, 762 F.3d at 1234 (emphasis added).

Beyond its misreading of the Tenth Circuit's opinion, the Town is wrong that "the mandate of the Tenth Circuit will remain unimplemented," Status Report ¶ 9(C), if this Court dismisses this case as moot. The mandate is simply the Court of Appeals' "instructions to the district court at the conclusion of the opinion, and the entire opinion that preceded those instructions." *United States v. Dutch*, 978 F.3d 1341, 1345 (10th Cir. 2020) (citation omitted). Here, the Tenth Circuit instructed that: (1) the MCN Judicial Officers were not entitled to sovereign immunity because the Town sought "prospective relief from the Muscogee courts' allegedly unlawful exercise of jurisdiction," which was then ongoing, *Thlopthlocco Tribal Town*, 762 F.3d at 1235; (2) the Town's allegations presented a federal question, *id*. at 1234–35; (3)

"the district court should consider the feasibility of joining certain necessary parties," *id*. at 1242; and (4) this Court should "abate its proceedings until [the Town] has exhausted its claims in tribal court," *id*. at 1237. The first two elements of this mandate are binding on the parties by res judicata. The third is readily accomplished by this Court's consideration of the feasibility of adding parties to a moot case over which it lacks jurisdiction, *see supra* at 14–15. And the fourth has been satisfied, leading to the MCN Supreme Court decision and the dismissals of Case Nos. CV-2007-39 and CV-2011-08. The dismissals have halted the Town's alleged injury, and under Article III, the federal courts can no longer reach the merits of its claim. *See, e.g.*, *Wyoming*, 587 F.3d at 1250 (federal courts may not adjudicate moot issue "even if all the parties before us still wish us to render an opinion to satisfy their demand for vindication or curiosity about who's in the right and who's in the wrong"). No aspect of the Tenth Circuit's mandate will "remain unimplemented," Status Report ¶ 9(C), if this Court were to dismiss this matter as moot.

Finally, the Town errs by insisting that this Court must "create a binding precedent," Status Report ¶ 9(C). Because the case or controversy requirement continues "through all stages of federal judicial proceedings," *Schell*, 814 F.3d at 1114, the Tenth Circuit could not have mandated that this Court retain and exercise jurisdiction over a moot matter in violation of Article III. After all, "[t]he Supreme Court has made it clear that a court's threshold determination of its jurisdiction is a prerequisite to any judicial action: 'Without jurisdiction the court cannot proceed at all in any cause,' and thus, 'when [jurisdiction] ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'" *In re Lang*, 414 F.3d 1191, 1195 (10th Cir. 2005) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998)).

4. Hypothetical Future Disputes Cannot Unmoot a Moot Case.

The Town further argues that "other parties from Thlopthlocco in future disputes could still bring litigation in the MCN tribal courts with an eventual action in this Court regarding the jurisdiction of the tribal courts." Status Report ¶ 9(C). But this future possibility in no way warrants the issuance of anticipatory rulings in a case that is moot. The Tenth Circuit has flatly rejected such reasoning:

> Seeking to litigate this ostensible controversy now over unfiled, potential future damages claims is "the very sort of speculative, 'hypothetical' factual scenario that would render such a [declaratory] judgment a prohibited advisory opinion." *Jordan*, 654 F.3d at 1026. Concerns … relating to a hypothetical unfiled suit are not cognizable reasons for continuing litigation that is otherwise moot.

Schell, 814 F.3d at 1115 (brackets in original). The Supreme Court agrees. *See United States v. Juvenile Male*, 564 U.S. 932, 937 (2011) (per curiam) ("True, a favorable decision in this case might serve as a useful precedent for respondent in a hypothetical lawsuit …. But this possible, indirect benefit in a future lawsuit cannot save *this* case from mootness."); *see also, e.g.*, *Casad v. U.S. Dep't of Health & Hum. Servs.*, 301 F.3d 1247, 1254 (10th Cir. 2002) ("Speculation about future court cases is insufficient" to defeat mootness).

5. The Town's Asserted "Election Case" Exception to the Mootness Doctrine Does Not Apply.

The Tribal Town next asserts that the Supreme Court "routinely invokes" an exception to the mootness doctrine "in election cases, and it 'applies where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.'" Status Report ¶ 9(C) (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 735 (2008)). The argument fails for numerous reasons.

As a threshold matter, this is not an "election" case. That assertion confuses the merits of the matters previously before the MCN courts with the merits of *this* dispute, which is about tribal court jurisdiction. Nor is the exception applied "routinely." Instead, "[t]his exception is 'narrow' and 'only to be used in exceptional situations.'" *Marks v. Colo. Dep't of Corr.*, 976 F.3d 1087, 1093 (10th Cir. 2020) (quoting *Jordan*, 654 F.3d at 1034–35).

In any event, the Town "bears the burden of establishing *both* elements of this two-prong test," *Jordan*, 654 F.3d at 1035 (emphasis in original), and it cannot meet either of them. As to the first, it must establish that assertions of tribal court jurisdiction are "by [their] very nature short in duration," *id*. at 1036 (quotation marks omitted); *id*. ("*necessarily* of short duration" (emphasis in original)), such that there would be "insufficient time for [it] to obtain review of [its] claim in federal court," *Ind v. Colo. Dep't of Corr.*, 801 F.3d 1209, 1215 (10th Cir. 2015). But assertions of tribal court jurisdiction are not inherently fleeting, and challenges are routinely litigated to completion in federal court. *See, e.g.*, *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140 (10th Cir. 2011) (involving a similar challenge to MCN court jurisdiction). Nor did the assertion of tribal jurisdiction challenged here "end[] too quickly to be fully litigated" in federal court. *Marks*, 976 F.3d at 1094 (stating that plaintiff invoking exception "must establish" same). It, in fact, continued for *thirteen years* after the Town withdrew its immunity waiver. And when it ended—upon issuance of the MCN Supreme Court's opinion affirming and ordering the final dismissals of the two cases involving the Town—this matter had been pending in the federal courts for nearly a decade, where it remains today.

The Tribal Town likewise cannot meet the second element of the test, under which it "must establish" that "a reasonable expectation exists for [the Town] to again experience" the same injury. *Id*. (quotation marks omitted). It cannot meet this element because the MCN

Supreme Court has issued a decision confirming—without qualification and as a matter of MCN and federal law—that the Town "is entitled to sovereign immunity in the Courts of the Muscogee (Creek) Nation," Order at 22. That decision is "final," MCN Const. art. VII, § 5, and is therefore binding on all MCN courts. *See, e.g.*, *Graham v. Muscogee (Creek) Nation Citizenship Bd.*, Case No. SC 2020-01, 2020 Muscogee Creek Nation Supreme LEXIS 1, at *12–13 (M(C)N Sup. Ct. Sept. 17, 2020) ("[T]he court … consistently looks to its own, binding case-law precedent in an effort to resolve similar matters in a consistent fashion."); *Ellis v. Checotah Muscogee Creek Indian Cmty.*, Appeal Case No. SC-10-01, 2011 Muscogee Creek Nation Supreme LEXIS 4, at *7 (M(C)N Sup. Ct. July 20, 2011) ("[T]he case is part of our case law and is binding precedent."); *Ellis v. Muscogee (Creek) Nation Nat'l Council*, Case No. SC-09-06, 2009 Muscogee Creek Nation Supreme LEXIS 1, at *1 (M(C)N Sup. Ct. July 31, 2009) ("[T]he holdings discussed below have been duly considered by this Court … and are thus binding.").

No "reasonable expectation" exists that the MCN courts will flout that ruling. Indeed, the bar for such a showing is high. A government's withdrawal of challenged policy moots a case when "the government does not openly express intent to reenact it," *Citizen Ctr.*, 770 F.3d at 908, and if there are no "*clear showings* of reluctant submission [by government actors] and a desire to return to the old ways," *id.* (emphasis and brackets in original) (citation omitted). Here, there has been no "statement expressing intent," *Rio Grande Found. v. Oliver*, 57 F.4th 1147, 1166 (10th Cir. 2023), by any MCN Judicial Officer to disobey the MCN Supreme Court's ruling. Nothing in the record remotely suggests that any of the Judicial Officers have "credibly claimed" unconsented jurisdiction over the Town in violation of binding MCN Supreme Court precedent, or "insist[ed] that they will" assert such jurisdiction, or have "a credible plan" to do so, *id.* at 1166–67 (citation omitted). *See Ghailani v. Sessions*, 859 F.3d 1295, 1302 (10th Cir.

2017) ("[C]ourts are more apt to trust public officials than private defendants to desist from future violations. Accordingly, we have indicated that government self-correction provides a secure foundation for mootness so long as it seems genuine." (quotation marks and citations omitted)).

Not only is there no reasonable likelihood that the MCN courts would flout the MCN Supreme Court's ruling, it is equally unlikely that any future litigant would file an unconsented suit against the Town in the MCN courts given that ruling. *See, e.g.*, *Glacier Cty. v. Arrowtop*, CV-14-27-GF-BMM, 2014 WL 12899871, at *3 (D. Mont. Aug. 26, 2014) (finding second element of exception not met and challenge to tribal court jurisdiction moot because the "Tribal Appellate Court [ruled] that the Tribal Court lacked jurisdiction"). To be sure, the theoretical possibility exists that the MCN Supreme Court could revisit its ruling in a future case, but mere possibilities cannot defeat mootness. *See, e.g.*, *Smith*, 44 F.4th at 1250 ("[T]he mere possibility that an agency might rescind amendments to its actions or regulations does not enliven a moot controversy." (quotation marks omitted)); *Winzler*, 681 F.3d at 1212 (to revive a prudentially moot case, "a plaintiff must point us to something more than the mere possibility" of a resumption of injurious conduct by the defendant (quotation marks omitted)). Indeed, if the possibility of a future change in law were "enough to skirt mootness … then no suit against the government would ever be moot." *Church*, 2022 WL 200661, at *6 (citation omitted).

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In sum, this case is both constitutionally and prudentially moot. The Town's alleged injury—the MCN courts' unconsented jurisdiction over it in two cases—ended upon the MCN Supreme Court's ruling in its favor and the dismissals of those cases. And the Town's

counterarguments fail because they urge this Court to assume jurisdiction it does not have. The Court should therefore dismiss the Complaint for lack of subject-matter jurisdiction.

II. Sovereign Immunity Bars the Town's Claims Because the Alleged Violations of Federal Law Are No Longer Ongoing.

In addition to mootness, sovereign immunity bars the Town's claims. "[A] tribe's immunity generally immunizes tribal officials from claims made against them in their official capacities." *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1296 (10th Cir. 2008); *accord Burrell v. Armijo*, 603 F.3d 825, 832 (10th Cir. 2010) ("Tribal sovereign immunity generally extends to tribal officials acting within the scope of their official authority."); *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1180 n.6 (10th Cir. 2010) (same). Whether a tribal official is being sued in her official capacity—that is, "whether the sovereign is the real, substantial party in interest"—"turns on the relief sought by the plaintiffs." *Native Am. Distrib.*, 546 F.3d at 1296–97 (quotation marks and citation omitted). "The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Id.* (brackets omitted) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984)).

Here, the MCN Judicial Officers are indisputably being sued in their official capacities. The Tribal Town has said so, making clear that its claims "for purposes of injunctive relief" are against "the Defendant judicial officers of the Tribal Courts of the MCN … in their official capacit[ies.]" Complaint ¶ 2; *see also Thlopthlocco Tribal Town*, 762 F.3d at 1236 ("[T]he Tribal Town seeks prospective relief in the form of an order directing Muscogee judges to decline to exercise jurisdiction over the Tribal Town."). To sidestep sovereign immunity, however, the Town includes claims against the Judicial Officers in their personal capacities. *See* Complaint ¶ 2; *id.*, Prayer for Relief ¶¶ 2, 5. But labeling a claim as personal does not make it

so. *See Pride v. Does*, 997 F.2d 712, 715 (10th Cir. 1993) ("In discerning whether a lawsuit is against a defendant personally or in his official capacity, the caption may be informative but clearly is not dispositive.").

Rather, by the "the substance of the pleadings," *Trujillo v. Williams*, 465 F.3d 1210, 1218 n.9 (10th Cir. 2006) (quoting *id.*), and on "a close reading of the plaintiff's complaint," *Native Am. Distrib.*, 546 F.3d at 1297, the Town's claims run against the MCN as the real party in interest. First, the Town has repeatedly stated that it seeks to preclude "*any* exercise of jurisdiction by the MCN judiciary" over it. Complaint ¶ 2 (emphasis added); *see also id.*, Prayer for Relief ¶¶ 2, 5. Second, it has identified the MCN Judicial Officers as "individuals who exercise [the] judicial authority of the Muscogee (Creek) Nation judiciary." *Id.* ¶ 26. And third, it has requested that this Court declare as "null and void" "any and all such orders of the MCN District or Supreme Courts in excess of their jurisdiction[.]" *Id.*, Prayer for Relief ¶ 4. In sum, by its own admission, the Town's sought-for relief runs against all those who exercise "[t]he judicial power" that the MCN Constitution vests "in one Supreme Court and in … inferior courts," MCN Const. art. VII, § 1. In other words, the Town sought prospective relief against the MCN Judicial Officers "because the powers they possess in [their official] capacities enable them to grant the plaintiff[] relief *on behalf of the tribe*." *Native Am. Distrib.*, 546 F.3d at 1296 (emphasis added). No matter the label, then, the Town's claims are against the MCN Judicial Officers in their official capacities. They are accordingly cloaked in the MCN's sovereign immunity, depriving this Court of subject-matter jurisdiction, *see E.F.W. v. St. Stephen's Indian High Sch.*, 264 F.3d 1297, 1302 (10th Cir. 2001).

The Town cannot bypass the MCN's sovereign immunity by invoking the *Ex parte Young* doctrine. *See Chilcoat v. San Juan Cty.*, 41 F.4th 1196, 1214 (10th Cir. 2022) ("*Ex parte*

Young applies to both injunctive and declaratory relief."), *petition for cert. filed* (U.S. Feb. 2, 2023) (No. 22-724). This is because "*Ex parte Young* 'may not be used to obtain a declaration that a [tribal] officer has violated a plaintiff's federal rights *in the past*.'" *Id.* at 1215 (emphasis added) (quoting *Collins v. Daniels*, 916 F.3d 1302, 1316 (10th Cir. 2019)); *accord Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) ("[T]he [*Ex parte Young*] exception is narrow: It applies only to prospective relief [and] does not permit judgments against state officers declaring that they violated federal law in the past[.]"); *Papasan v. Allan*, 478 U.S. 265, 277–78 (1986) (explaining that *Ex parte Young* "has been focused on cases in which a violation of federal law by a[n] … official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past"). Instead, the Town must allege an "*ongoing* violation of federal law." *Crowe & Dunleavy*, 640 F.3d at 1155 (emphasis added) (citation omitted).[4]

The Tribal Town cannot meet the "ongoing violation" requirement. The MCN courts are no longer exercising jurisdiction over it, full stop. *Supra* at 7–11. Because any alleged unlawful actions are consigned to the past, *Ex parte Young* and sovereign immunity preclude the Town's claims for prospective relief. They must be dismissed for lack of subject-matter jurisdiction.

[4] The relationship between mootness and the "ongoing" violation inquiry under *Ex parte Young* is subject to a circuit split on which the Tenth Circuit has yet to weigh in. *Compare Allen v. Cooper*, 895 F.3d 337, 355 (4th Cir. 2018) (holding that the two inquiries are separate) *with Russell v. Lundergran-Grimes*, 784 F.3d 1037, 1047 (6th Cir. 2015) (holding that they are coincident). Nonetheless, both sides of this debate recognize that claims to remedy *past* harms, such as the Town's, cannot satisfy *Ex parte Young*. *See Allen*, 895 F.3d at 355 (explaining that *Ex parte Young* "does not apply when the alleged violation occurred entirely in the past" (ellipsis and citation omitted)); *Gean v. Hattaway*, 330 F.3d 758, 776 (6th Cir. 2003) ("Their complaint is … based entirely upon past acts and not continuing conduct … and it therefore does not come under the doctrine of *Ex parte Young*[.]").

CONCLUSION

The Tribal Town's Complaint must be dismissed for three independent reasons. First, no MCN court is currently exercising unconsented jurisdiction over the Town, and thus an Article III case or controversy no longer exists, rendering this action moot. Second, because the Town cannot gain any meaningful relief from this Court, continuation of this case will unnecessarily strain tribal comity and public resources. Thus, this Court should hold that this case is prudentially moot. Third, sovereign immunity bars the Town's claims because it can no longer allege an ongoing violation of federal law. Each of these grounds deprives this Court of subject-matter jurisdiction, and accordingly, the MCN Judicial Officers respectfully request that this Court dismiss the Tribal Town's Complaint for lack of subject-matter jurisdiction. *See* Fed. R. Civ. P. 12(h)(3) (when a federal court "determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action").

Dated: March 6, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 6th day of March 2023, I electronically transmitted the above and foregoing document with attached exhibit(s) (if any) to the Clerk of the United States District Court for the Northern District of Oklahoma using the ECF System for filing and transmittal of a Notice of Electronic Filing to:

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