UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARILYN VANN, RONALD MOON, DONALD MOON, CHARLENE WHITE, RALPH THREAT, FAITH RUSSELL, ANGELA SANDERS, SAMUEL E. FORD, and THE FREEDMEN BAND OF THE CHEROKEE NATION OF OKLAHOMA, **Plaintiffs,** **v.** **KEN SALAZAR, Secretary of the United States Department of the Interior;** **UNITED STATES DEPARTMENT OF THE INTERIOR; and** **CHADWICK SMITH, Individually and in His Official Capacity,** **Defendants.**	**Case No: 1:03cv01711 (HHK)** **Judge: Henry H. Kennedy** **Docket Type: Civil Rights (non-employment)**

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR LEAVE TO FILE FIFTH AMENDED COMPLAINT

Plaintiffs, by and through their counsel, submit this memorandum in support of their Motion for Leave to file Fifth Amended Complaint ("Motion to Amend").

The Cherokee Nation has just abused its sovereign immunity and should now be brought back into this action. After intervening in this suit for the limited purpose of asserting its sovereign immunity and having the Court of Appeals confirm its immunity and dismiss it from this action, the Cherokee Nation recently brought a separate action in federal court in Oklahoma. That action, which rests on the same facts as this action and raises the claim that is at the heart of this action, is nothing more than a transparent effort to persuade this Court to dismiss this lawsuit in its entirety. Such effort must fail. The Cherokee Nation has abused its immunity privilege by

attempting to invoke it for unfair tactical advantage, has therefore waived its immunity, and should be added to this action as a defendant.

As set forth in more detail below, the amendment meets the standards of Rule 15 and should be permitted in the interests of justice.

STATEMENT OF FACTS

The Court is familiar with the facts of this case, so Plaintiffs will highlight only those facts relevant to the instant motion. On August 11, 2003, Plaintiffs filed suit in this Court against Gale Norton and the United States Department of Interior. On September 8, 2005, the Cherokee Nation of Oklahoma intervened and filed a Motion to Dismiss this action, asserting that it is immune from suit and that because it is an indispensible party, the entire case must be dismissed. On September 23, 2005, Plaintiffs filed a Motion for Leave to file an Amended Complaint to add the Cherokee Nation of Oklahoma and Principal Chief Chadwick Smith as Defendants, to add causes of action seeking relief under the Constitutional provisions of the 13th and 15th Amendments to the U.S. Constitution, to assert jurisdiction under the Treaty of 1866, and to add other relevant facts.

On December 19, 2006, this Court denied the Cherokee Nation's motion and granted Plaintiffs leave to add the Cherokee Nation Defendants as parties. *Vann v. Kempthorne*, 467 F. Supp. 2d 56 (D.D.C. 2006) ("*Vann I*"). The Court held that the Cherokee Nation was not immune from suit for violations of the Thirteenth Amendment[1] and thus could properly be joined

[1] Specifically, the court held that Congress had demonstrated an "unequivocal intent to limit the Nation's sovereignty as a condition of recognition by the United States" in the Treaty of 1866, which "not only incorporated the principles of the Thirteenth Amendment and the Civil Rights Act of 1866, but it made such principles a *condition* of the Cherokee Nation's existence within the United States." *Vann I* at 68 (emphasis in original).

as a party. The Court also held that Chief Smith was "not immune from suit in these circumstances and may be added to this action." *Id.* at 73.

On July 17, 2007, Plaintiffs filed a motion for leave to file a third amended complaint to add additional Plaintiffs and new factual allegations related to recent actions taken by the Cherokee Nation and the Bureau of Indian Affairs ("BIA") and to assert additional claims for relief.

On September 14, 2007, the Cherokee Nation Defendants filed a Motion to Dismiss, or in the Alternative, to Stay Pending the Resolution of Cherokee Nation's Interlocutory Appeal. On February 7, 2008, this Court granted the Cherokee Nation Defendants' Motion to Stay pending resolution of Defendants' interlocutory appeal to the United States Court of Appeals for the District of Columbia Circuit and deferred ruling on Defendants' Motions to Dismiss.

On July 29, 2008, the Court of Appeals held that the Cherokee Nation is immune from suit but that Plaintiffs' claims against Chief Smith may proceed under *Ex Parte Young*. *Vann v. Kempthorne*, 534 F.3d 741, 749 (D.C. Cir. 2008) ("*Vann II*"). On December 19, 2008, Plaintiffs filed their Fourth Amended Complaint to clarify the relief sought in light of the Court of Appeals decision and to reflect the fact that the Cherokee Nation was no longer a party. On January 30, 2009, Chief Smith and Federal Defendants (i.e, the Secretary of the Interior and the U.S. Department of the Interior) filed separate motions to the dismiss the Fourth Amended Complaint.

On February 3, 2009, the Cherokee Nation filed its own, separate lawsuit in the United States District Court for the Northern District of Oklahoma ("Oklahoma District Court"), requesting a declaratory judgment "that the Five Tribes Act and federal statutes modified the Treaty of 1866 thereby resulting in non-Indian Freedmen descendants, including the individual defendants, no longer, as a matter of federal law, having rights to citizenship of the Cherokee

nation and benefits derived from such citizenship." *The Cherokee Nation v. Nash*, Civil Docket No. 4:09-cv-00052-TCK-PJC ("Oklahoma Action"). The Cherokee Nation in the Oklahoma Action did not sue any of the individual Freedmen who are plaintiffs in this action. Instead, the Cherokee Nation sued five different Freedmen, as well as the Federal Defendants. On February 6, 2009, Chief Smith filed a Supplement to his Memorandum in Support of his Motion to Dismiss ("Supp. Def. Mem."), informing this Court of the Oklahoma Action and asserting that the Oklahoma Action constitutes a "procedurally appropriate avenue . . . for Plaintiffs to judicially resolve their asserted and disputed claim that the Treaty of 1866 between the Cherokee Nation and the United States currently entitles them to rights of Cherokee Nation citizens." Supp. Def. Mem. at 2.

Plaintiffs, through this Motion to Amend, seek to add the Cherokee Nation of Oklahoma as a Defendant and to add the five Freedmen sued by the Cherokee Nation in the Oklahoma Action as additional Plaintiffs.

ARGUMENT

The Cherokee Nation has just engaged in the most blatant sort of forum shopping. After intervening in this action, arguing that the entire action must be dismissed because it is immune from suit, and having its immunity confirmed by the Court of Appeals, the Cherokee Nation brought its own action in Oklahoma. In the Oklahoma Action, the Cherokee Nation raises the same claims, based on the same facts, that are at issue in this case. By doing so, the Cherokee Nation has waived its sovereign immunity and now may be rejoined to this action.

The Freedmen respect the ruling of the Court of Appeals that the Cherokee Nation is immune from the claims the Freedmen bring in this case. *Vann II*, 534 F.3d at 749 ("[b]ecause nothing in the Thirteenth Amendment or the 1866 Treaty amounts to an express and unequivocal

abrogation of tribal sovereign immunity, the Cherokee Nation cannot be joined in the Freedmen's federal court suit without the tribe's consent"). The Freedmen respect as well the principle that a sovereign may waive its immunity in one forum without waiving its immunity in another forum. *Pennhurst State Sch. v. Halderman*, 465 U.S. 89 (1984); *Tegic Communications v. Univ. of Texas System*, 458 F.3d 1335, 1342 (Fed. Cir. 2006).

A sovereign's immunity, however, is not absolute. As general matter, a sovereign should not abuse its immunity by using the privilege to achieve unfair tactical advantage. *Lapides v. Bd. of Regents of the Univ. Sys. of Georgia*, 535 U.S. 613, 621 (2002) (adopting "the State's Eleventh Amendment position would permit States to achieve unfair tactical advantages, if not in this case, in others"); *Vas-Cath, Inc. v. Curators of the Univ. of Missouri*, 473 F.3d 1376, 1383 (Fed. Cir. 2007) ("[t]he principles of federalism are not designed for tactical advantage"). In particular, a sovereign that *initiates* litigation in one forum, thereby waiving its immunity as to the claims it raises, may be deemed to have waived its immunity with respect to those claims in another forum. *See, e.g.*, *Vas-Cath*, 473 F.3d at 1381 ("[T]he state waives its immunity when it voluntarily invokes federal jurisdiction or makes a clear declaration of its intention to submit itself to federal jurisdiction. And when a state voluntarily invokes federal jurisdiction, it is deemed to have waived its objection not only to the cause of action but also to any relevant defenses and counterclaims.") (citing *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd.*, 527 U.S. 666, 675-76 (1999)); *see also Lapides*, 535 U.S. at 620 (the rule governing waiver of immunity by litigation conduct rests on the need to avoid "unfairness" and "inconsistency," as well as to prevent a sovereign from selectively using immunity to achieve a litigation advantage); *Biomedical Patent Management Corp. v. California Dep't of Health Servs.*, 505 F.3d 1328, 1340 (Fed. Cir. 2007) ("[W]e do not mean to draw a bright-line

rule whereby a State's waiver of sovereign immunity can never extend to a re-filed or separate lawsuit.").

Let us be clear about what the Cherokee Nation has done by filing its lawsuit in Oklahoma. It has brought a claim based on the Treaty of 1866, the exact same claim the Freedmen bring in this case. It has brought a claim based on the exact same facts at issue in this case. It has sued the same Federal Defendants as the Freedmen have sued here. The only difference in the two actions concerns the individual Freedmen who are Plaintiffs in this action and Defendants in the Oklahoma Action. The Cherokee Nation has not sued the Freedmen who are Plaintiffs here; instead, it has sued five separate, innocent, and defenseless Freedmen who did nothing more than declare their citizenship rights in the Cherokee Nation, as provided by the plain language of the Treaty of 1866. This distinction ultimately is meaningless, as Chief Smith himself recognized in his pending motion to dismiss when he argued that the Oklahoma Action creates a "procedurally appropriate avenue" for Plaintiffs in this action to resolve the claims they have brought in this action. Supp. Def. Mem. at 2.

By bringing its own suit in a federal forum seeking relief on the facts at the heart of this case, the Cherokee Nation has "made a clear declaration of its intention to submit itself to federal jurisdiction" and has thus waived its right to assert immunity with regard to the subject matter of this case – not only in the Oklahoma court, but in this Court.[2] The Freedmen Plaintiffs therefore

[2] Chief Smith has argued that "a tribe can be sued in one particular federal court on a claim and be protected by sovereign immunity from the claim proceeding forward against it in that court, but waive its sovereign immunity to litigation [*sic*] that very claim in a different federal court." Supp. Def. Mem at n.2 (citing *Tegic*, 458 F.3d at 1342). But the facts in *Tegic* are inapposite, at the very least because of the timing of the Cherokee Nation's actions. In *Tegic,* the state had filed the original patent infringement case in one federal court but was subsequently sued with regard to the relevant patent by a third party in another federal district court. Here, the Cherokee Nation has brought an action in an Oklahoma federal court six years after the Freedmen brought suit on these same facts in this Court. The Cherokee Nation, well aware of

are entitled to amend their complaint to add the Cherokee Nation as a Defendant to this action and to add the individual Freedmen that the Cherokee Nation has sued in the Oklahoma Action as Plaintiffs. *Meyers v. Texas*, 410 F.3d 236, 243 (5th Cir. 2005) ("[t]he Court in *Lapides* observed generally that it is anomalous or inconsistent for a state to both invoke federal jurisdiction and claim immunity from federal suit in the same case"); *New Hampshire v. Ramsey*, 366 F.3d 1, 16-17 (1st Cir. 2004) ("[t]o permit the state to reverse course would contravene the reasons for the doctrine of waiver [of sovereign immunity] by litigation conduct recognized by *Lapides* and *Lapides*'s core concern that a state cannot selectively invoke its Eleventh Amendment immunity to gain litigation advantage"); *Lapides*, 535 U.S. at 620 ("an interpretation of the Eleventh Amendment that finds waiver in the litigation context rests upon the Amendment's presumed recognition of the judicial need to avoid inconsistency, anomaly, and unfairness, and not upon a State's actual preference or desire, which might, after all, favor selective use of 'immunity' to achieve litigation advantages").

Under Fed. R. Civ. P. 15(a), after a responsive pleading has been filed, "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Rule 15(a) is to be liberally construed and motions to amend are to be granted "[i]n the absence of any apparent or declared reason such as undue delay, bad faith or dilatory motive . . . , repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to opposing party . . . , futility of amendment, etc." *Foman v. Davis*, 371 U.S. 178, 182 (1962). In exercising its discretion on whether to grant leave to amend, a District Court should be guided by "Rule 15's mandate that leave is to be 'freely given when justice so requires.'" *Anderson v. USAA Cas. Ins. Co.*, 218

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the action pending in this Court, cannot now claim that it was unaware of the risk it took by bringing suit in another federal forum.

F.R.D. 307, 310 (D.D.C. 2003) (quoting *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996)). As such, "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman*, 371 U.S. at 182.

Given this Court's extensive involvement with this case – and its resultant familiarity with the 150-year history of the issues involving the Freedmen, the Cherokee Nation, and the federal government – judicial economy weighs heavily in favor of this Court, rather than the U.S. District Court for the Northern District of Oklahoma, proceeding to judgment on the merits of the claim that the Cherokee Nation has brought in the Oklahoma Action. Indeed, Plaintiffs, as they have made the Court aware, are prepared to file a motion for summary judgment.[3] By contrast, the Oklahoma Action is still in its initial stages.

The proposed amended complaint is not futile. It is well settled that a claim is deemed futile for the purposes of Rule 15(a) only where it cannot properly survive a motion to dismiss. See *Henderson v. Stanton*, No. 97- 5358, 1998 U.S. App. LEXIS 30884 at * 6 (D.C. Cir. 1998); *M.K. v. Tenet*, 216 F.R.D. 133, 139 (D.D.C. 2002) ("amendment is not futile because it contains facts that support relief."). Plaintiffs have demonstrated a viable basis for the requested relief, and the actions of the Cherokee officials and the Federal Defendants have solidified the fact that Plaintiffs have stated valid causes of action and that the case should not be dismissed.

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[3] The Freedmen Defendants in the Oklahoma action also intend to file a motion to transfer or, in the alternative, stay that case. Similar principles of judicial economy will apply to the transfer or stay decision in that court. *See The Regents of the Univ. of California v. Eli Lilly and Co.* 119 F.3d 1559, 1565 (Fed. Cir. 1997) ("Consideration of the interest of justice, which includes judicial economy, may be determinative to a particular transfer motion, even if the convenience of the parties and witnesses might call for a different result. . . . On the contrary, in a case such as this in which several highly technical factual issues are presented and the other relevant factors are in equipoise, the interest of judicial economy may favor transfer to a court that has become familiar with the issues.") (internal citations omitted).

In addition, the amendment will not unduly prejudice the United States, Chief Smith, or the Cherokee Nation. In order "to show prejudice sufficient to justify denial of leave to amend 'the opposing party must show that it was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the amendments been timely."' *In re: Vitamins*, 217 F.R.D. at 29 (citing and quoting *Dooley v. United Technologies Corp.*, 152 F.R.D. 419, 425 (D.D.C. 1993)). Discovery in this case has yet to begin (and may not be necessary), and allowing Plaintiffs' amendment in no way threatens to disrupt the United States or the tribal officials' ability to obtain evidence or present facts. *See Tenet*, 216 F.R.D. at 141 (noting the appropriateness of granting leave to amend where discovery has yet to fully begin). Finally, the interests of justice favor allowing the Freedmen to amend their complaint.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the court grant leave to file the Fifth Amended Complaint attached to this motion.

Dated: March 14, 2009

Respectfully submitted,

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