UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RHONDA LEONA BROWN FLEMING, et al.	:	
	:	CASE NO. 19-CV-01397(TFH)
PLAINTIFFS,	:	
VS.	:	JUDGE HOGAN
THE CHEROKEE NATION, et al.	:	
DEFENDANTS.	:	

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS AND REPLY TO OPPOSITION TO MOTION FOR RELIEF PENDENTE LITE

I. BACKGROUND

The "so-called" Tribal Defendants and the United States have moved to dismiss this action and oppose injunctive relief pendente lite on the following grounds:

1. This Court lacks subject matter jurisdiction;
2. Plaintiff Harvest Institute Freedmen Federation(hereinafter "HIFF") lacks standing;
3. Plaintiffs have failed to state a claim.

The defendants' arguments are without merit. Their motions to dismiss should therefore be denied and overruled.

Plaintiff, Rhonda Leona Brown Fleming, brought this action as a Class Action under Rules 23(a), (b)(1), (b)(2) and (b)(3) of the Federal Rules of Civil Procedure on behalf of all persons who are descendants of persons listed on the Index and Final Rolls of Citizens and Freedmen of the Cherokee Tribe in Indian Territory approved by Act of Congress dated June 21, 1906 (34 Stat. 35), hereinafter the "Dawes Rolls" and as a

member of the Cherokee Nation, determined in Case No. 13-01313 (TFH) The Cherokee Nation v. Raymond Nash, et al., United States District Court for the District of Columbia under Article 9 of The Treaty with the Cherokee, 1866, U.S. – Cherokee Nation if Indians, Art. 9, July 19, 1866 14 Stat. 799 to be guaranteed a continuing right to Cherokee Nation citizenship that is coextensive with the rights of native or so-called Blood Cherokees.

Notwithstanding the determination that Plaintiff and the putative class have rights of citizenship in the Cherokee Nation coextensive, with Blood Cherokees, the Cherokee Constitution continues to provide in Section 2 Article VII that to be eligible for election as Principal Chief, a candidate must be a so-called blood Cherokee and have been domiciled within the boundaries of the Cherokee nation 270 days prior to the relevant election, or by September 6,2018, in the case of the next Cherokee Nation election, June 1, 2019. Plaintiff Fleming, a resident of California, filed to seek election to the office of Principal Chief. It was known at the time of her filing by Cherokee election officials that Ms Fleming resided in California. Notwithstanding this knowledge these officials accepted her filing fee only to thereafter declare her candidacy unlawful on grounds she did not meet the geographic requirement. Ms. Fleming timely appealed to the Cherokee Supreme Court. Ms. Fleming has exhausted all available administrative courses of action to salvage her candidacy.

Section 2 of Article VII of the Cherokee Constitution is unlawful, for the reason it violates Article 9 of the 1866 Treaty as recently declared by Judge Hogan in Case No. 13-01313. The Cherokee Nation v. Raymond Nash, et al..

Although the Court has previously denied Plaintiffs' request for an immediate order with temporary restraint, Defendants' motions to dismiss are without merit. Accordingly, the motions should be denied and the requested injunctive relief granted. Specifically, the June 1, 2019 election should be enjoined pending amendment of the Cherokee Constitution to eliminate any reference to a "by blood" requirement for the office of Principal Chief and to eliminate confusion concerning whether the geographic requirement will be enforced. A simple reading of the Constitution as it stands requires a potential candidate to divine which provisions the Tribe will enforce. Accordingly, candidates like Ms. Fleming are forced to guess whether or not they are eligible for office. This not only violates the Court's order in Nash, it is a denial of Due Process of Law by reason of the lack of notice.

II. JURISDICTION

Defendants have alleged that the Court lacks subject matter jurisdiction to adjudicate this dispute. Defendants' arguments are baseless.

In Cherokee Nation, et al. v. Nash, et al., Case No. 13-01313(TFH) the final order states:

> 3. This Court retains jurisdiction to enforce this Final Judgment, which addresses whether descendants of Cherokee Freedmen have the same rights as descendants of native Cherokees. Nothing herein however is intended to change or affect the existing rights and remedies available to Cherokee citizens, both Freedmen and native Cherokees, before tribal administrative and judicial bodies, and any requirements for the exhaustion of those remedies.

See, ECF Docket #257, p. 2, Case No. 1:13-cv-01313(TFH).

The United States Supreme Court determined in Kokkonen v. Guardian Life Insurance Company of America, 511 U.S. 375 (1994) where a court specifically retains jurisdiction to enforce an order ,subject jurisdiction exists. The Complaint in this action

is an effort to effectuate the Court's decree in Nash. The exercise of subject matter jurisdiction here is specifically recognized by the rule articulated in Kokkonen. The United States Supreme Court recognizes federal courts' jurisdiction over some matters (otherwise beyond their competence that are incidental to other matters properly before them. As stated in Julian v. Central Trust Co., 193 U.S. 93 (1904): "A bill filed to continue a former litigation in the same court…to obtain and secure the fruits, benefits and advantages of the proceedings and judgment in a former suit in the same court by the same or additional parties…or to obtain any equitable relief in regard to, or connected with, or growing out of, any judgment or proceeding at law rendered in the same court,…is an ancillary suit." Id., at 113-114 (citing 1 C Bates, Federal Equity Procedure §97 (1901)). Jurisdiction over this case is available under this reasoning.

Under Kokkonen subject jurisdiction matter exists here. Accordingly, the subject matter jurisdiction argument is baseless.

III. STANDING OF HARVEST INSTITUTE FREEDMEN FEDERATION

The Harvest Institute Freedmen Federation has standing to bring this action based on the International Union, United Automobile, Aero Space and Agricultural Implement Workers of America, et al. v. Brock, 477 U.S. 274 (1986) where it was held:

> An association has standing to bring suit on behalf of its members when (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Plaintiff Fleming is a member of HIFF. It was HIFF that provided guidance, counsel, and financial support to Plaintiff Fleming. Accordingly, Defendants' standing argument is baseless.

The United States Supreme Court set forth the requirement for Article III standing in Lujan v. Defs. Of Wildlife, 504 U.S. 555, 561 (1962) as follows: 1) injury in fact; 2) causation; and 3) redressability. Id. at 560-61. Injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized…and (b) actual or imminent, not conjectural or hypothetical." Id. at 560. The injury must also be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." Id. Finally, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Id. at 561. Plaintiff Fleming has alleged all elements to establish standing.

III. DISMISSAL STANDARD

A motion to dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a compliant. A complaint need only contain "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the…claim is and the grounds upon which it rests.'" Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (alteration in original) (citation omitted). When evaluating a 12(b)(6) motion to dismiss, a plaintiff's well-pleaded allegations are accepted as true and the complaint is viewed in the light most favorable to the plaintiff. However, conclusory statements or "a formulaic recitation of the elements of a cause of action will not [suffice]." Id. A complaint must allege sufficient facts "to cross 'the line between possibility and plausibility of entitlement to relief.'' Francis v. Giacomelli, 588 F.3d 186, 193 (4th Cir. 2009) (quoting Twombly, 550 U.S. at 557).

Defendants have moved to dismiss the Complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). Plaintiff bears the burden of demonstrating jurisdiction. See, Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994); Rempfer v. Sharfstein, 583 F.3d 860, 868-69 (D.C. Cir. 2009). Federal courts are presumed to lack jurisdiction unless a plaintiff establishes its existence. Kokkonen, 511 U.S. at 377; see also DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342 n.3 (2006). "One 'essential and unchanging' component of federal court jurisdiction is the 'requirement that a litigant have standing to invoke the authority of a federal court.' See Hancock v. Urban Outfitters, Inc., 830 F.3d 511, 513 (D.C. Cir. 2016) (citing DaimlerChrysler Corp., 547 U.S. at 342). Because the Court has "an affirmative obligation ... to ensure that it is acting within the scope of its jurisdictional authority," the Court may "consider matters outside the pleadings" in addressing Defendants' motion to dismiss under Rule 12(b)(1) without converting it to a motion for summary judgment. Jerome Stevens Pharm., Inc. v. Food and Drug Admin., 402 F.3d 1249, 1253 (D.C. Cir. 2005).

If the Court determines that it has jurisdiction, the Defendants have moved to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6). To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citation omitted). Although the Court must accept all well-pleaded factual allegations as true, it need not accept "a legal conclusion couched as a factual allegation." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (citation omitted). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do

not suffice." Iqbal, 556 U.S. at 678. Under this rule, the Court may consider well-pleaded factual allegations, as well as "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." Tellabs, Inc. v. Makor Issues & rights, Ltd., 551 U.S. 308, 322 (2007).

A defendant may move to dismiss a claim "for failure to state a claim upon which relief can be granted" under Federal Rule of Civil Procedure 12(b)(6). When considering a Rule 12(b)(6) motion, the Court must treat all of the well-pleaded allegations of the pleadings as true and construe all of the allegations in the light most favorable to the non-moving party. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Saylor v. Parker Seal Co., 975 F.2d 252, 254 (6th Cir. 1992). However, legal conclusions or unwarranted factual inferences need not be accepted as true. Morgan v. Church's Fried Chicken, 829 F.2d 10, 12 (6th Cir. 1987). To avoid dismissal under Rule 12(b)(6), a complaint must contain either direct or inferential allegations with respect to all material elements of the claim. Wittstock v. Mark a Van Sile, Inc., 330 F.3d 899, 902 (6th Cir. 2003). Under Rule 8 of the Federal Rules of Civil Procedure, a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although this standard does not require "detailed factual allegations," it does require more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." Ashcroft v. Iqbal, 556 U.S. 662, 681 (2009); Bell Altantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). See also, Reilly v. Cadlamudi, 680 F.3d 617, 622 (6th Cir. 2012) (quoting Twombly, 550 U.S. at 555). In order to survive a motion to dismiss, the plaintiff must allege facts that, if accepted as true, are sufficient "to raise a right to relief above the speculative level" and to "state a claim to relief that is plausible

on its face." Twombly, 550 U.S. at 555, 570. "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." Iqbal, 556 U.S. at 678.

Here Plaintiffs have alleged that the continued presence of the "By-Blood" requirement in the Cherokee Constitution's Principal Chief eligibility requirements is an affront to Freedmen, contrary to the Court's order in Nash, and the source of confusion concerning the need for Ms. Fleming to relocate.

The continued presence of the "By-Blood" language renders the racially based injury to the Freedmen, corrected by the Nash order, capable of repetition yet evading review. A clear renunciation of this discriminatory language from the Constitution is due

The presence of this language is the equivalent of retaining the three-fifths person reference in the United States Constitution without the Thirteenth and Fourteenth Amendment.

IV. CONCLUSION

For the above reasons the Defendants' motions should be denied and a preliminary injunction granted.

Respectfully Submitted,

s/Percy Squire, Esq.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent May 28, 2019 via the Court's electronic mailing system upon counsel of record.

s/Percy Squire, Esq.
Percy Squire, Esq. (0022010)