**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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| THE CHEROKEE NATION, *et al.*,, | ) | |
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| Plaintiffs, | ) | |
| | ) | |
| v. | ) | No. 1:20-cv-02167 (TJK) |
| | ) | |
| UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*, | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |

**DEFENDANT CHAIRMAN SHOTTON'S OPPOSITION TO PLAINTIFFS' MOTION TO DISMISS COUNTERCLAIM**

Defendant/Counterplaintiff John R. Shotton, in his official capacity as the Chairman of the Otoe–Missouria Tribe ("Tribe"), hereby opposes Plaintiffs' Motion to Dismiss his counterclaim.

**INTRODUCTION**

Plaintiffs' view of this case boils down to this: they can bring suit against the Otoe–Missouria Tribe, through an *Ex parte Young* action, but when the Tribe attempts to bring a mirror-image counterclaim against the Plaintiffs, it is somehow barred by their sovereign immunity. For his part, Chairman Shotton does not deny that tribal sovereign immunity is a robust defense that can result in the occasional inequity among litigants. *E.g.*, *Three Affiliates Tribes v. Wold Eng'g*, 476 U.S. 877, 893 (1986). But this is not a case where the doctrine calls for such an imbalance. Plaintiffs have put the validity of the Tribe's Compact at issue, and they are now subject to counterclaims that raise that same issue. None of the authorities upon which Plaintiffs rely require otherwise. And while the Chairman's counterclaim is similar to the claims

raised in Plaintiffs' Second Amended Complaint, the counterclaim serves a useful purpose, and thus should not be dismissed. For these reasons, Plaintiffs' Motion to Dismiss should be denied.

## ARGUMENT

### I. Plaintiffs have waived their tribal sovereign immunity through this litigation.

Chairman Shotton's counterclaim concerns an issue that Plaintiffs have put squarely before the Court: the validity of the Tribe's Compact. Because they have put the Compact's validity at issue, they are subject to non-monetary counterclaims that do the same.

It is of course true, as a rule of thumb, that tribes do not broadly waive sovereign immunity against every conceivable counterclaim simply by filing a complaint. *See Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). Chairman Shotton does not dispute this baseline rule; nor does the Chairman assert that Plaintiffs have waived their immunity in their respective gaming compacts; nor does the Chairman asserts that the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et seq.* abrogates their immunity. Plaintiffs' contentions to that effect are simply not in dispute. The doctrine of recoupment is likewise a non-issue here. Plaintiffs' assertion that the counterclaim does not fit within an exception for claims sounding in "recoupment," i.e., counterclaims designed solely to offset liability, is not in dispute. *See* Pls. Br. at 23–25.

Rather, it is Plaintiffs' initiation of this action that waived their immunity. Indeed, it is well-established that "a sovereign's filing of a lawsuit can constitute a limited waiver with respect to issues the sovereign itself has put at issue.' *Tohono O'odham Nation v. Ducey*, 174 F. Supp. 3d 1194, 1204 (D. Ariz. 2016). The analysis of this waiver is unrelated to recoupment.[1]

[1] It appears that some courts have conflated the doctrine of recoupment with the principle that initiation of a lawsuit waives immunity as to certain declaratory judgment counterclaims. *See Tohono O'odham Nation*, 174 F. Supp. 3d at 1203 (noting that some courts have concluded that

*Id.* It is grounded in the bedrock principle, recognized by numerous federal courts, that "a sovereign necessarily consents to a judicial determination of the rights and other legal relations of the parties when it seeks a declaration of those rights and relations." *See Oneida Tribe of Indians of Wisc. v. Vill. of Hobart*, 500 F. Supp. 2d 1143, 1149 (E.D. Wisc. 2007). And while the contours of this waiver-by-litigation exception have not been explicitly defined by the Supreme Court (or courts within this Circuit), the consensus among the lower federal courts makes it clear that immunity does not bar the Chairman's counterclaim. As summarized by the Sixth Circuit in the recent decision of *In re Greektown Holdings, LLC*, those lower courts that have considered the matter (including three circuits) have "largely [held] that certain types of litigation conduct by tribes constitute a sufficiently clear waiver of tribal sovereign immunity." 917 F.3d 451, 464 (6th Cir. 2019).

The Ninth Circuit's decision in *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981), illustrates how the waiver-by-litigation exception applies. It was a long-running dispute that began when the United States brought suit against the State of Oregon to enforce the Yakima Nation's treaty fishing rights. *Id.* at 1011. The Yakima Nation intervened as a co-plaintiff, and eventually prevailed. *Id.* Years later, while the district court retained jurisdiction to oversee enforcement of the decree, the State of Washington (which was not a party to the original proceeding) intervened and sought an injunction against certain Yakima fisheries. *Id.* at 1011–12. The Yakima Nation argued that the injunction was barred by its tribal sovereign immunity, but that argument was rejected. The Ninth Circuit explained that by intervening in the action, the Yakima Nation made itself "vulnerable to complete adjudication by the federal court of the

declaratory judgment counterclaims can proceed under the equitable recoupment exception to immunity and disagreeing with that approach). To be clear, the Chairman's counterclaim is *not* based on the doctrine of recoupment.

issues in litigation." *Id.* at 1014. Since the injunction sought by the State of Washington was based on the same issue raised by the Yakima Nation (its treaty fishing rights), tribal sovereign immunity did not apply. *Id.*

Although the *Oregon* litigation unfolded *before* the Supreme Court issued its decision in *Citizen Band Potawatomi*, *supra*, subsequent decisions have confirmed that the waiver-by-litigation exception remains in force. Take for example the case of *Oneida Tribe of Indians of Wisconsin v. Village of Hobart*, *supra*. There, the Oneida Tribe filed suit against the Village of Hobart seeking a declaratory judgment that it was not subject to the Village's property tax assessments. 500 F. Supp. 2d at 1044. The Village counterclaimed seeking its own declaratory judgment that the Oneidas' land was subject to its land use regulations and property tax. The Oneida Tribe moved to dismiss the counterclaim on the basis that it was barred by sovereign immunity. Similar to the outcome in the *Oregon* litigation, the district court denied the immunity defense. The court found that the relief sought by the Village was the "mirror image" of what the Tribe was seeking. *Id.* at 1145. Because the Oneida Tribe invoked the court's jurisdiction to adjudicate the issue, it was subject to counterclaims for declaratory relief based on that same issue. *Id.* at 1149.

More recent cases prove that *Oneida* was no outlier. One example is *Cayuga Indian Nation v. Seneca County*, 260 F. Supp. 3d 290 (W.D.N.Y. 2017). In that case, involving a similar set of facts, the Cayuga Indian Nation brought an action to challenge Seneca County's imposition of *ad valorem* property taxes on parcels of land owned by the Cayuga Nation on the basis that the land was part of their reservation. The County filed a counterclaim seeking a declaratory judgment that the property was *not* part of a reservation. *Id.* at 293. Like *Oneida*, the district court allowed the counterclaim to go forward on the grounds that it was a "mirror

image" of the Cayuga Nation's claim. *See id.* at 300. The court explained, "where an Indian tribe seeks a declaration that a particular fact is true . . . it necessarily waives its immunity as to a counterclaim seeking the exact opposite declaration." *Id.* at 299.

This case is analogous to *Oneida* and *Cayuga*. In fact, just as those cases characterized the Village of Hobart's and Seneca County's counterclaim as the "mirror image" of what the tribes in those cases sought, Plaintiffs' brief likewise classifies the Chairman's counterclaim as "the mirror image of the declaratory relief Plaintiff Nations seek." Pls. Br. at 28. Of course, Plaintiffs did not waive their sovereign immunity for *every* possible counterclaim, but they did waive their immunity as to the issue that they themselves raised in their claim against the Chairman—the Compact's validity. The issue of the validity of the Compact was squarely raised in their complaint, and as Plaintiffs themselves acknowledge in their Motion, the Chairman's counterclaim is based on the same issue. Because Plaintiffs have put the Compact's validity at issue, they are subject to counterclaims that seek to resolve that issue.

Plaintiffs' argument in opposition begins with an overly broad view of their own sovereign immunity. Of course, as a tribal leader, Chairman Shotton would not dispute that tribal sovereign immunity is a powerful defense. But nonetheless, it would be mistaken to posit that tribal sovereign immunity is quite as broad as Plaintiffs describe. Despite *dicta* from certain federal courts, tribal sovereign immunity is clearly *not* "co-extensive with the United States' immunity"—as Plaintiffs appear to believe. *See* Pls. Br. at 3. Litigation between the two sovereigns proves the point, as "the United States may sue Indian tribes and override tribal sovereign immunity." *United States v. Yakima Tribal Court*, 806 F.2d 853 (9th Cir. 1986). Meanwhile, in order to sue the federal government, a tribe must either (A) identify a federal statute waiving the United States' immunity; or (B) utilize an exemption such as *Ex parte Young*.

Thus, while Plaintiffs try to draw an analogy to the United States' immunity from suit, it is simply irrelevant whether and under what circumstances the federal government is subject to a counterclaim, as the immunities of tribal governments and the United States are not entirely symmetrical. *Contra* Pls. Br. at 13.

As to Plaintiffs' attempts to distinguish the cases previously cited by Chairman Shotton, the distinctions are without a difference. The core principle—that a sovereign can waive its immunity through litigation—withstands all of Plaintiffs' arguments to the contrary.

Notice that Plaintiffs' first line of attack is the fact that the cases cited by Chairman Shotton "are not precedential in this Court." *See* Pls. Br. at 13. Of course, the Chairman has never argued that they are. The point of citing such authorities is for their reasoning—not to imply that this Court is bound by them. After all, many issues before this Court are of first impression, and there may be no binding decision on point. The fact that such authorities are out-of-circuit does nothing to undermine their reasoning. It plainly does not deserve almost an entire page of briefing, and Plaintiffs' reliance on this distinction reveals the weaknesses in their substantive argument.[2]

Consider Plaintiffs' attempt to distinguish the Ninth Circuit's *Oregon* decision. Plaintiffs emphasize that *Oregon* was an *in rem* case, and that the Yakima Nation "(1) submitted to the court's resolution of the ownership of a *res* in the court's continuing equitable possession, (2) repeatedly submitted to the court's continuing equitable jurisdiction to adjudicate the disposition of the *res*, and then (3) expressly agreed to that jurisdiction." Pls. Br. at 15. Yet, these features of the *Oregon* litigation are entirely immaterial. If anything, as compared to the present action,

[2] To that point, Plaintiffs themselves have cited out-of-circuit authorities both in their Motion to Dismiss Chairman Shotton's counterclaims and throughout the briefing in opposition to the other defendants' motions to dismiss.

*Oregon* recognized a waiver-by-litigation on even *weaker* facts, as *Oregon* invoked the tribe's interests in a tangible asset, whereas this case merely involves *hypothetical* gaming competition which might never materialize and will never impact their economic interests. That is, unlike Plaintiffs, the Yakima Nation had an easily identifiable economic interest at stake, and *Oregon* still allowed the claim against them to proceed. And as to the consent to jurisdiction, just as the Yakima Nation agreed to submit the pertinent issues to federal court adjudication, Plaintiffs in this case have agreed to submit the adjudication of the Compact's validity to this Court's resolution. *See* Pls. Br. at 17 (admitting that "Plaintiff Nations will be bound by the Court's determination whether it is in their favor or not.").

Plaintiffs' reliance on *Quinault Indian Nation v. Pearson*, 868 F.3d 1093 (9th Cir. 2017), is likewise misplaced. Though *Quinault* did decline to extend *Oregon* to the counterclaims at issue in that case, the court's reasoning was based on the fact that the counterclaims against the Quinault Nation went "beyond the contours of the Nation's suit, so the Nation cannot be said to have unequivocally consented to their adjudication." *Id.* at 1098. As explained above, that concern is not present here.

Plaintiffs also rely heavily on the Ninth Circuit's decision in *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011 (9th Cir. 2016), which essentially held that an Indian tribe's removal of a suit from state to federal court does not constitute a waiver of immunity against that suit. But despite upholding sovereign immunity in that specific case, *Bodi* nonetheless cannot support the broad proposition that Plaintiffs ascribe to it. Indeed, in *In re Greektown*, *supra*, the Sixth Circuit expressly addressed *Bodi*, stating that *Bodi* represented a "willing[ness] to accept that *some* litigation conduct *may* constitute sufficiently clear waiver." 917 F.3d at 464 (analyzing and distinguishing *Bodi*) (emphasis added). Further distinguishing

*Bodi*, *Greektown* explained that "filing a lawsuit manifests a clear intent to waive tribal sovereign immunity with respect to the claims brought, and to assume the risk that the court will make an adverse determination on those claims." *Id.* Even *Bodi* itself recognized that the filing of a complaint "invites the court to resolve a specific issue." 832 F.3d at 1018.

Even *Wichita & Affiliated Tribes v. Hodel*, 788 F.2d 765 (D.C. Cir. 1986), discussed extensively by Plaintiffs, does not save their argument. To be sure, *Wichita* held that a cross-claim was barred against a tribe that initiated an administrative action. But Plaintiffs ignore the nature of the cross-claim that was at issue. The cross-claim, brought by the Caddo Tribe against the federal government,[3] raised the prospect of diminishing the Wichitas' financial share of income derived from certain plots of land. *Id.* at 769–70. It was thus a claim that could have substantially and negatively impacted the Wichitas' share of a pool of income. *Id.* at 773–74. Accordingly, the cross-claim had the potential to financially impact the Wichitas by changing their *status quo* ante, which is why the court narrowly upheld the Wichitas' immunity. *See id.* at 773 (referring to the risk of a tribe "losing what it already has"). *Wichita* thus cannot be interpreted as a sweeping rule barring *all* counter/cross-claims, but rather only those with the potential to financially harm the tribe in a way that deviates from the *status quo* and which involves issues outside the original complaint.[4]

Plaintiffs' attempts to distinguish *Ducey* and *Hobart* suffer from the same faulty analysis as their attempts to distinguish *Oregon*. The additional points to address involve Plaintiffs'

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[3] Even though the Wichita Tribe was not named as a defendant in the cross-claim, the court held that they were an indispensable party under Federal Rule of Civil Procedure 19, thus requiring the immunity analysis. 788 F.2d at 771–72.

[4] While Plaintiffs go out of their way to point out that *Wichita* was joined by later-Supreme Court Justice Antonin Scalia, they fail to acknowledge that Justice Scalia would later disavow his own tribal immunity jurisprudence. *See Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 814 (2014) (Scalia, J., dissenting). In any event, the makeup of the panel should not be considered a persuasive detail.

attempts to distinguish two cases cited by *Ducey*: *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241 (8th Cir. 1995), and *United States v. Tsosie*, 92 F.3d 1037 (10th Cir. 1996). The first case, *Rupp*, held *inter alia* that a tribe waived its sovereign immunity in a quiet title action by "affirmatively request[ing] the district court to order the defendants to assert any claims in the disputed lands . . . and exercise its equitable powers to [quiet title in the tribe's name]." *See* 45 F.3d at 1244. Plaintiffs assert that they have "made no such affirmative request here." Pls. Br. at 20. For all practical purposes, that is wrong. Plaintiffs allege that the Secretary should have rejected the Tribe's Compact, thus requiring Chairman Shotton (and the federal government) to prove *why* it is valid. The features are symmetrical: while the defendants in *Rupp* were effectively required to prove title to land, the defendants in this case are effectively required to prove that the Compact is valid. *Rupp*'s status as a quiet title case is therefore inapposite. As to *Tsosie*, although the Chairman does not take the position that *Tsosie* was critical to *Ducey*'s analysis, the Chairman *does* dispute Plaintiffs' interpretation of the case. Plaintiffs assert that *Tsosie* drew an analogy to recoupment—this is not true. *See* Pls. Br. at 21. *Tsosie* explicitly reasoned that an exception to sovereign immunity can apply when the counterclaim "[does] not venture outside the subject of the original cause of action." 92 F.3d at 1043. The closest that *Tsosie* comes to analogizing to recoupment is to cite one case and a treatise that happen to mention recoupment. *Id.* (citing Wright, Miller & Kane, *Federal Practice and Procedure*; *FDIC v. Hulsey*, 22 F.3d 1472 (10th Cir. 1994)). Otherwise, recoupment was no part of *Tsosie*'s analysis; there was no discussion of the counterclaim setting off liability for the United States' claim, or any other feature of a typical recoupment action. Recoupment simply was a non-issue in that case.

In short, the waiver-by-litigation exception applies to this case. Because Plaintiffs have put the Compact's validity at issue, they are subject to counterclaims that seek to resolve that issue. Plaintiffs' sovereign immunity does not bar the counterclaim.

## II. The counterclaim serves a useful purpose and thus should not be dismissed.

Plaintiffs' alternative grounds for dismissal—that the counterclaim is "duplicative"—fares no better. Although the counterclaim is similar to Plaintiffs' claim, it serves a useful purpose to this litigation—namely, to make it more likely that the Court may reach the merits of this case. Because it serves a useful purpose, it should not be dismissed.

### *A. The counterclaim is useful because it ensures resolution of the issue at hand.*

Contrary to the Plaintiffs' representations, simply because the counterclaim bears similarities to the claims made in Plaintiffs' complaint does not provide a basis for its dismissal. Indeed, if a counterclaim appears to "serve a useful purpose, then it should not be dismissed solely on the basis that it is similar to an existing claim. *See Medmarc Casualty Ins. Co. v. Pineiro & Byrd PLLC*, 783 F. Sup. 2d 1214, 1217 (S.D. Fla. 2011).

In determining whether a counterclaim serves a useful purpose, courts tend to focus on the procedural nuances of the case. Essentially, the analysis is about ensuring that there will be resolution of the issues raised in the counterclaim. *See id.* Sometimes that could mean closely comparing the relief sought in the plaintiff's complaint with the relief sought in the counterclaim. *E.g.*, *Astral Health & Beauty, Inc. v. Aloette of Mid-Mississippi, Inc.*, 895 F. Supp. 2d 1280, 1284 (N.D. Ga. 2012). If resolution of the plaintiff's claim would necessarily resolve all questions raised in the counterclaim, then the counterclaim would not serve a useful purpose (and vice-versa). *Id.* Other times, the court may focus on the prospect of the plaintiff voluntarily dismissing their complaint. As one federal court put it, the useful purpose of a declaratory

judgment counterclaim is evident when "the plaintiff may withdraw the suit and leave the rights of the parties in uncertainty." *Gregory v. Royal Typewriter Co.*, 27 F. Supp. 808 (S.D.N,Y. 1939); *see also Trico Products Corp. v. Anderson*, 147 F.2d 721 (7th Cir. 1945). This case raises the same fundamental concern—the chance that the issues raised in the counterclaim could go unresolved.

***B. The counterclaim protects against the risk of non-voluntary* sua sponte *dismissal.***

As the Court is aware, several of the other defendants in this litigation have filed motions to dismiss. Those motions rely, in part, on alleged jurisdictional defects, including but not limited to Article III standing. Indeed, Plaintiffs very well might lack standing. After all, as both the United States and Comanche Nation Chairman Woommavovah argue, Plaintiffs' alleged competitive injuries are completely hypothetical and speculative, and the alleged injuries relating to other terms of the Compact have no real effect on Plaintiffs whatsoever, as they concern only the actual compacting parties. *See generally* ECF 106-1, 107-1.

If any of the motions to dismiss are granted, it is possible (albeit uncertain) that the jurisdictional defects would apply across-the-board. That is, for standing purposes, there is little to differentiate Plaintiffs' claims against Chairman Shotton from their claims against the other defendants in this litigation. Thus, although Chairman Shotton has not yet filed a dispositive motion with this Court, there is a possibility that the Court will dismiss Plaintiffs' claims against him *sua sponte*.

If Plaintiffs' claims are dismissed in their entirety, absent a counterclaim, critical issues concerning validity of the Tribe's Compact may remain unresolved. And because Plaintiffs have publicly called into question the validity of the Compact, a declaratory judgment is necessary to bring finality to the issue and affirm that the Tribe is able to conduct lawful gaming under its Compact. Indeed, if merits-based issues raised in this litigation remain unaddressed, it will

adversely impact the Tribe's ability to secure credit, enter into agreements with vendors, and engage in all of the other standard business transactions associated with gaming. Hence, the Tribe wants this matter resolved once and for all, and a declaratory judgment is a means to that end.

In downplaying the possibility of a *sua sponte* dismissal, Plaintiffs have glossed over this Court's inherent power—its Article III *duty*—to ensure that it has subject matter jurisdiction over each and every claim before it. Indeed, Plaintiffs go so far as to complain that "Chairman Shotton provides no support for his assertion that the Court may dismiss the claims against him *sua sponte*." Pls. Br. at 29. Their position ignores a deeply rooted principle of Article III—that "a court must even raise on its own any questions it perceives about its subject matter jurisdiction." *See, e.g.,*, *Amr v. Virginia*, 58 F. Supp. 3d 27, 32–33 (D.D.C. 2014). In this case, it is clear through other parties' briefs that jurisdictional dismissal is a very real possibility, and contrary to Plaintiffs' unexplained allegation, it is by no means certain that a *sua sponte* dismissal of their claim against Chairman Shotton would require dismissal of the counterclaim.

Plaintiffs' argument on this point stems from a flawed premise. Specifically, although Plaintiffs acknowledge that district courts may *sua sponte* dismiss cases for lack of subject matter jurisdiction, they misstate the applicable standard. Plaintiffs contend that their claims must be "patently insubstantial" or "essentially fictitious" before the Court can dismiss them *sua sponte* for lack of subject matter jurisdiction. *See* Pls. Br. at 30. But the case that Plaintiffs cite in support of this proposition, *Best v. Kelly*, 39 F.3d 328 (D.C. Cir. 1994), makes it clear that this standard applies only in the context of an inquiry into the legal and factual sufficiency of a complaint, *not* analysis of subject matter jurisdiction. *Id.* at 330–31. In fact, *Best* affirmed the *sua sponte* jurisdictional dismissal of other claims in that litigation without even mentioning this

"patently insubstantial/essentially fictitious" standard. *See id.* at 330 (affirming the jurisdictional dismissal of the "good time credits" claim). In any event, in more recent years, the D.C. Circuit has recognized that *Best* relied on a "sometimes-criticized doctrine," as it melded the concepts of failure to state a claim and lack of subject matter jurisdiction—which should instead be "treated as distinct." *Robinson–Reeder v. Kearns*, 550 Fed. Appx. 6 (D.C. Cir. 2013).

The appropriate path would be for this Court to independently analyze subject matter jurisdiction—without any deference in Plaintiffs' favor. This mode of analysis would adhere to the Supreme Court's edict that "courts are *obligated* to consider *sua sponte* issues [relating to subject matter jurisdiction]." *See Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) (emphasis added). And as similarly put by the D.C. Circuit, "[w]hen there is a doubt about a party's constitutional standing, the court must resolve the doubt, *sua sponte* if need be." *See Lee's Summit v. Surface Trans. Bd.*, 231 F.3d 39, 41 (D.C. Cir. 2000).

Furthermore, assuming *arguendo* that the other defendants' motions to dismiss were granted and that Plaintiffs' claim against Chairman Shotton is dismissed *sua sponte*, Plaintiffs presume a chain of events that is by no means preordained. Specifically, Plaintiffs claim that a *sua sponte* dismissal of their claims against Chairman Shotton "would eliminate the basis" upon which their immunity has been waived. *See* Pls. Br. at 29. However, Plaintiffs cite zero authority in support of this proposition. Indeed, the cases acknowledging that a sovereign can waive immunity by filing a complaint, *see supra*, do not suggest whatsoever that such a waiver can be subsequently annulled. That is, once an issue has been brought before a court, an adverse decision—even a jurisdictional one—does not mean that the plaintiff can walk back their prior waiver. Otherwise, it would greatly enhance the risk that "tribal immunity might be transformed into a rule that tribes may never lose a lawsuit." *Oregon*, 657 F.3d at 1014.

In short, because the risk of *sua sponte* dismissal of the claims against Chairman Shotton is significant, it was reasonable for the Chairman to file a similar counterclaim, and the Court should allow that counterclaim to proceed.

***C. Chairman Shotton's ability to independently file this claim is no basis for dismissal.***

Plaintiffs dispute the benefit of the counterclaim by apparently conceding that Chairman Shotton could likely bring the same claim against them as a standalone *Ex parte Young* action.[5] This option, they now allege, negates any benefit of Chairman Shotton maintaining the claim in *this* litigation. Their argument is unpersuasive, because even though a separate *Young* action remains available, it is not an adequate substitute for the present counterclaim.

The complexity that would accompany a separate *Young* action is self-evident, and Plaintiffs are mistaken if they doubt that such an action would create unnecessary complexity.[6] It plainly would. It would waste the Tribe's resources (during an ongoing pandemic) as well as judicial resources. As such, the availability of a separate action should not be considered as any equitable basis to dismiss the counterclaim.

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[5] In earlier briefing, Plaintiffs noted that they would be immune from the counterclaim "had [Chairman Shotton] brought it in a complaint as a plaintiff." *See* ECF 71-1, at 12. Chairman Shotton responded that even if the counterclaim was dismissed in *this* case, the Otoe–Missouria Tribe could clearly file an *Ex parte Young* action against Plaintiffs' respective tribal leadership, *or* file the exact same counterclaim as a third-party complaint against those leaders in this same litigation. *See* ECF 77, at 5 n.7. In their most recent briefing, Plaintiffs do not appear to contest the availability of such an action, although they reserve the position that such a claim "might fail for jurisdictional or procedural reasons or on the merits, which would depend on the pleadings and truth and substance of the allegations." *See* Pls. Br. at 31 n.12.

[6] When Chairman Shotton described such an action as "needlessly complicat[ing] this lawsuit," Plaintiffs responded that the Chairman's description "is an unexplained non sequitur." ECF 113-1, at 31 n.11. Respectfully, the complexity speaks for itself. A separate *Young* action would require a new complaint, service thereof, redundant motion practice, etc. Along the way, Plaintiffs (would-be defendants) would almost certainly be represented by the same group of attorneys.

## CONCLUSION

For the reasons stated herein, Plaintiffs' Motion to Dismiss should be denied.

Dated: December 15, 2021

Respectfully submitted,

By: *\/s/ Robert A. Rosette*

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## CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2021, I electronically filed the foregoing document using the Court's CM/ECF system, which sent notification of such filing to all counsel of record.

By: */s/ Scott Funke*

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