IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF NATIONS' REPLY IN SUPPORT OF MOTION TO DISMISS DEFENDANT CHAIRMAN SHOTTON'S COUNTERCLAIM

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INTRODUCTION

Defendant Chairman Shotton's counterclaim should be dismissed. His attempt to sidestep the tribal sovereign immunity of the Cherokee Nation, Chickasaw Nation, Choctaw Nation, and Citizen Potawatomi Nation (collectively, "Plaintiff Nations"), *see* Def. Chairman Shotton's Opp'n. to Pltfs.' Mot. to Dismiss Countercl., ECF No. 123 ("Resp."), fails because this Circuit's law on tribal sovereign immunity from counterclaims is rock solid, and the case law from other circuits on which he relies is either contrary to the law of the Circuit, unpersuasive on its own terms, or contradicts the proposition for which it is offered. His argument that the counterclaim serves a useful purpose offers nothing because the counterclaim is duplicative of Plaintiff Nations' claims, which afford Defendant Chairman Shotton a full and fair opportunity to present his position. Accordingly, his counterclaim would waste, not conserve, judicial resources. And if Plaintiff Nations' claims succeed, the counterclaim would be moot. Under this Circuit's law, that warrants dismissal of the counterclaim. Defendant Chairman Shotton's final volley is simply his speculation that if Plaintiff Nations' claims against other Defendants were dismissed and if the Court then *sua sponte* dismissed Plaintiff Nations' claims against him, his counterclaim would allow the Court to resolve the issue of whether the Otoe-Missouria Agreement is valid under the Indian Gaming Regulatory Act ("IGRA"). In fact, if Plaintiff Nations' claims were dismissed, Defendant Chairman Shotton's argument for waiver would collapse, leaving no avenue for relief on his counterclaim.

For these reasons, set forth in detail below, and those earlier advanced in the Memorandum in Support of Plaintiff Nations' Motion to Dismiss Defendant Chairman Shotton's Counterclaim, ECF No. 113-1 ("Mem."), Defendant Chairman Shotton's counterclaim must be dismissed.

ARGUMENT

I. This Circuit's Tribal Sovereign Immunity Law Protects Plaintiff Nations From Defendant Chairman Shotton's Counterclaim.

Defendant Chairman Shotton fails to show that Plaintiff Nations waived their sovereign immunity from his counterclaim by filing this action. His attack on the rulings that acknowledge the immunity of Indian tribes in these very circumstances falls flat. And his affirmative case that Plaintiff Nations lack immunity under other authorities is equally flawed. Dismissal under Rule 12(b)(1) is therefore warranted for the reasons Plaintiff Nations described in their Motion to Dismiss and for those described here.

A. Defendant Chairman Shotton's Attack on Plaintiff Nations' Immunity Fails.

Defendant Chairman Shotton tries to unsettle Plaintiff Nations' reliance on this Circuit's pathmarking decision in *Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765 (D.C. Cir. 1986), by arguing it only recognized immunity from crossclaims that have "the potential to financially harm the tribe in a way that deviates from the *status quo* and which involves issues outside the original complaint." Resp. 8.[1] Defendant Chairman Shotton relies here on the *Wichita & Affiliated* court referring to "the risk of a tribe 'losing what it already has'" and the fact that the crossclaim from which the court found the Wichita and Affiliated Tribes were immune had "raised

[1] Defendant Chairman Shotton's assertion that tribal immunity is not co-extensive with the United States', Resp. 5-6, is barred by *Wichita & Affiliated*'s plain statement, relying on the Supreme Court's own plain statement, that "[a]n Indian tribe's immunity is co-extensive with the United States' immunity." *See* 788 F.2d at 773-74 (citing *United States v. U.S. Fidelity & Guar. Co.*, 309 U.S. 506, 514 (1940)). His offering of cases where a tribe is sued by the United States, Resp. 5-6, is not to the contrary, because tribes have a unique relationship with the United States that is not shared with others. The *Wichita & Affiliated* and *U.S. Fidelity* courts' statements, and Plaintiff Nations' reliance on them, were clearly describing the extent of tribal sovereign immunity from claims by non-federal parties, not claims by the United States against tribes (which are not at issue here).

the prospect of diminishing the Wichitas' financial share of income derived from certain plots of land." *Id.*

The court's reasoning and its holding reject this effort. "[W]e throw our hat in with our sister circuits, and an approach that emphasizes tribal autonomy in the courts. In holding that a tribe may consent to be sued, it is imperative to caution, however, that such consent 'cannot be implied but must be unequivocally expressed.'" *Wichita & Affiliated*, 788 F.2d at 773 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). That holding cannot be conceived to mean that a tribe *only* has immunity from the threat of future financial loss—rather, its immunity is lost only when a tribe unequivocally expresses its intention to waive immunity.

Under the standard correctly understood, a tribe waives its immunity from crossclaims *when it intervenes as a defendant* because it "fully realizes that it might lose that which it already has" as a result of the existing litigation and "preserving its *status quo* is the whole point of the intervention." *Id*. Applying that same standard, the court held that the Wichita and Affiliated Tribes, plaintiff in the district court, had *not* waived sovereign immunity from a crossclaim regarding their share of income from a piece of land. That was because the Tribes had *not* intervened as defendant to preserve the status quo but rather filed a complaint seeking resolution of a particular claim. That holding applies foursquare to Plaintiff Nations' conduct. By contrast, the Caddo Nation and Delaware Tribe of Indians, who *had* intervened as defendants to preserve the status quo in the distribution of income from that land, *did* waive immunity. *Id.* In short, Plaintiff Nations stand in the shoes of the Wichita and Affiliated Tribes in *Wichita & Affiliated*,

not in those of the Caddo Nation and Delaware Tribe. Therefore the Plaintiff Nations have not waived immunity by filing this action.[2]

Defendant Chairman Shotton also contests Plaintiff Nations' citation to *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011 (9th Cir. 2016), on the basis that *Bodi* acknowledged both that some litigation conduct may constitute clear waiver and that filing a lawsuit "'invites the court to resolve a specific issue.'" Resp. 7-8 (first citing *In re Greektown Holdings, LLC*, 917 F.3d 451, 464 (6th Cir. 2019); and then quoting *Bodi*, 832 F.3d at 1018). Neither point is in dispute here, however, and as Plaintiff Nations already showed—and Defendant Chairman Shotton does not dispute—*Bodi*'s statement on the latter point describes neither the scope of the invitation to resolve a specific issue nor "whether it opens the tribe to 'mirror image' counterclaims in all cases." Mem. 18 n.8. Rather, *Bodi* stands for the simple proposition that a tribal waiver of immunity must "manifest the tribe's intent to surrender immunity in 'clear' and unmistakable terms," and cannot be implied. Mem. 17-18 (quoting *Bodi*, 832 F.3d at 1016). *Bodi* thus provides persuasive support for Plaintiff Nations' position that they only expressly

[2] Courts routinely "go out of their way" to note when a future Supreme Court Justice or prominent judge authored an opinion, so Defendant Chairman Shotton's criticism of Plaintiff Nations' note that then-Judge Scalia joined the *Wichita & Affiliated* opinion lacks force. *Compare* Resp. 8 n.4 *with, e.g.*, *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 988 (D.C. Cir. 2021); *Am. Wild Horse Campaign v. Bernhardt*, 442 F. Supp. 3d 127, 138 (D.D.C. 2020); *Angel v. Fed. Home Loan Mortg. Corp.*, No. 18-1142, 2019 WL 11320986, at *1 (D.D.C. May 24, 2019); *Ellipso, Inc. v. Mann*, No. 05-1186 (RCL), 2008 WL 11492748, at *1 (D.D.C. Sept. 30, 2008). Defendant Chairman Shotton's assertion that Justice Scalia's dissent in *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 814 (2014) (Scalia, J., dissenting), "disavow[ed]" principles of sovereign immunity, Resp. 8 n.4, is hyperbole. In that dissent, Justice Scalia stated he joined in Justice Thomas's dissent on the particular question of whether *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), properly decided whether "the judge-invented doctrine of tribal immunity . . . cover[s] off-reservation commercial activities." *Bay Mills*, 572 U.S. at 814 (Scalia, J., dissenting); *see id.* at 815 (Thomas, J., dissenting). Furthermore, the question in *Bay Mills* was whether a state could sue a tribe for conducting commercial gaming outside of "Indian lands" as that term is defined in IGRA. *Id.* at 785. That question was not posed in *Wichita & Affiliated*, nor is it presented by the allegations of Defendant Chairman Shotton's complaint.

surrendered their immunity to adjudicate the claims they brought, not counterclaims that *Wichita & Affiliated* makes clear are barred.

B. Defendant Chairman Shotton's Affirmative Argument Also Fails.

Defendant Chairman Shotton's affirmative argument relies on the basic principle that litigation conduct can waive tribal sovereign immunity. But that principle on its own—which Plaintiff Nations do not dispute—provides no justification for his argument that Plaintiff Nations are not immune from his counterclaim, and he does not provide such justification. Simply because some litigation conduct waives tribal sovereign immunity does not mean any litigation conduct does so. And as Plaintiff Nations' litigation conduct has not waived their immunity from Defendant Chairman Shotton's counterclaim, the counterclaim should be dismissed.

Defendant Chairman Shotton's reliance on *Greektown*, Resp. 3, 7-8, fails because the Sixth Circuit[3] there determined only that an Indian tribe may waive tribal sovereign immunity by litigation conduct, including by filing a lawsuit, and in so doing noted that most courts to consider the issue have held "that certain types of litigation conduct by tribes constitute a sufficiently clear waiver of tribal sovereign immunity." *Greektown*, 917 F.3d at 464. None of the cases it considered—all of which have been briefed by Plaintiff Nations in their motion to dismiss—show that Plaintiff Nations have waived immunity in this case. *Id.*[4] Furthermore, *Greektown* merely

[3] Defendant Chairman Shotton's attack on Plaintiff Nations for setting out the applicable standard for whether this Court should follow out-of-circuit decisions—which he evidently recognizes is correct, *see* Resp. 6—is a smokescreen, as is his point that Plaintiff Nations rely on out of circuit authorities. *Id.* at 6 n.2. As the Plaintiff Nations have shown, a court can bolster is reliance on in-circuit precedents by citing to well-reasoned decisions outside of this Circuit that are consistent with in-circuit precedent, while decisions that are poorly-reasoned or inconsistent with binding precedent provide no reason to depart from in-circuit precedent. *See* Mem. 13.

[4] Citing *Wichita & Affiliated*; *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981); *Bodi*; *Contour Spa at Hard Rock, Inc. v. Seminole Tribe*, 692 F.3d 1200 (11th Cir. 2012); *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241 (8th Cir. 1995); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324 (10th Cir. 1982).

determined on review of these cases 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" and so "Indian tribes can waive their tribal sovereign immunity through sufficiently clear litigation conduct, including by filing a lawsuit." *Id.* As Plaintiff Nations have explained, by bringing this suit they "assume[d] the risk that the court will make an adverse determination" on their claims—but that did not waive their immunity from counterclaims under the law of this Circuit, set forth in *Wichita & Affiliated*. *Greektown* then applied that principle to determine whether an alter ego of a tribe could, by filing for bankruptcy, waive tribal sovereign immunity from an adversarial fraudulent transfer claim. Neither of these issues is posed here, and so *Greektown* is unhelpful to Defendant Chairman Shotton.

He then relies on *United States v. Oregon* as, in his view, the paradigmatic example of "how the waiver-by-litigation exception applies." Resp. 3. That effort backfires because Plaintiff Nations have already explained why *Oregon* is inapplicable here. *Oregon* concerned a tribe's intervention into a case that was "analogous to an equitable action in rem," the tribe had repeatedly submitted to the court's jurisdiction to adjudicate disposition of the *res*, and it expressly consented to the court's jurisdiction in a settlement agreement. Mem. 15-16. None of these elements is present here, which makes *Oregon* inapplicable, as is readily confirmed by *Bodi* and *Quinault Indian Nation v. Pearson ex rel. Estate of Comenout*, 868 F.3d 1093, 1099 (9th Cir. 2017). Mem. 16-18.

While Defendant Chairman Shotton labels "these features of the *Oregon* litigation . . . entirely immaterial," Resp. 6-7, the Ninth Circuit cited these elements to characterize *Oregon* in *McClendon v. United States*, 885 F.2d 627, 631 (9th Cir. 1989), which Defendant Chairman Shotton never acknowledges and thus cannot dispute. In *McClendon*, the Ninth Circuit found that

a tribe did *not* waive tribal sovereign immunity by litigation conduct where those elements were *not* present. And *Quinault* later made plain the narrowness of *Oregon*'s holding. Although Defendant Chairman Shotton tries to distinguish the facts of *Quinault*, Resp. 7, he does not challenge its conclusions that: first, *Oregon* "tests the outer limits of [the Supreme Court]'s admonition against implied waivers," 868 F.3d at 1099 (quoting *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 420 (9th Cir. 1989)) (alteration in original), and second, that a counterclaim mirroring the merits of the Quinault Nation's claim did not come within the Nation's consent to adjudication of the Nation's claim, *id.* at 1098.

Defendant Chairman Shotton then tries in vain to show *Oregon* helps his case. First, he says that "*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 . . . ." Resp. 7. This contention turns *Oregon* upside down. As *McClendon* explained, one of the reasons that *Oregon* was a strong case for waiver of tribal sovereign immunity was that it effectively involved distribution of a tangible asset—a *res*. The absence of that element—this case does not involve a tangible asset—therefore distinguishes *Oregon* and favors tribal sovereign immunity to the extent *Oregon* is considered. And, as Plaintiff Nations have explained, the competition they face—which is only one of several injuries, *see* Pltfs.' Mem. Pts. & Auths. Opp'n to Mot. Dismiss at 7-43, ECF No. 114—is not hypothetical, because the Otoe-Missouria Tribe and Comanche Nation are currently engaged in the conduct of gaming under their Agreements, and those tribes, as well as the United Keetoowah Band and Kialegee Tribal Town, are implementing the future concurrence provisions of their agreements. More fundamentally, Defendant Chairman Shotton's argument fails because its core contention—that the nature of the alleged harm

determines whether a tribe waived its sovereign immunity by litigation conduct—is neither supported by his brief, nor by the cases on which he relies.

Second, Defendant Chairman Shotton says that, like the tribe in *Oregon*, Plaintiff Nations have consented to jurisdiction, citing Plaintiff Nations' commitment to be bound by the Court's judgment. Resp. 7. That effort plays hopscotch with Plaintiff Nations' consent, which is limited to the adjudication of *their claims*, not more. And the limited consent to adjudication that a tribe makes by filing a lawsuit is fundamentally different from the fact-specific and expressly given consent to claims which the plaintiff tribe gave in *Oregon*, as *McClendon*'s examination of *Oregon* makes plain.

Defendant Chairman Shotton then says that the Court should rely on *Oneida Tribe of Indians of Wisconsin v. Village of Hobart*, 500 F. Supp. 2d 1143 (E.D. Wis. 2007), and *Tohono O'odham Nation v. Ducey*, 174 F. Supp. 3d 1194 (D. Ariz. 2016), to find Plaintiff Nations waived their sovereign immunity. Resp. 4, 8-9. Plaintiff Nations already explained why those cases are not persuasive, Mem. 19-22, but Defendant Chairman Shotton nevertheless argues that they are. He first says that Plaintiff Nations cannot distinguish them for the same reasons that they cannot distinguish *Oregon*. Resp. 8. Plaintiff Nations have already explained *supra* why *Oregon* is not persuasive authority here. And as *Oregon* also involved unique and starkly different facts than *Hobart* and *Ducey*, it cannot be relied on to establish those two cases' applicability here or vice versa.

Defendant Chairman Shotton then says that *Ducey* and *Hobart* are persuasive because some cases on which those decisions rely, *Rupp*; *United States v. Tsosie*, 92 F.3d 1037 (10th Cir. 1996), are not distinguishable from this case. Resp. 9. But they are distinguishable, as we now show. *Rupp* has no application here because the tribe in that case did *not* simply file a claim; it

affirmatively asked the court to order opposing parties to file their own claims against the tribe and conceded to the court that it had consented to those other parties' claims. Mem. 20 (citing *Rupp*, 45 F.3d at 1244, 1264). Defendant Chairman Shotton, perhaps misunderstanding the scope of Plaintiff Nations' argument as to why *Rupp* is different from this case, responds that "*Rupp*'s status as a quiet title case is . . . inapposite." Resp. 9. Yet *Rupp* is distinguishable because the waiving tribe in that case requested that claims be brought against it and conceded its waiver, not only because it was a quiet title action. (Although *Rupp*'s adjudication of a *res* also weighs against analogizing it to this case, as *Oregon* and *McClendon* make plain.) Notably, although the District of Arizona recently acknowledged the limitations of *Rupp* in *Ak-Chin Indian Community v. Maricopa-Stanfield Irrigation & Drainage District*, No. CV-20-00489-PHX-JJT, 2021 WL 2805609, at *5 (D. Ariz. July 6, 2021), Defendant Chairman Shotton makes no effort to distinguish it, much less to square the reasoning in *Ak-Chin* with the District of Arizona's earlier reliance on *Rupp*.

Nor is *Ducey* apt because it relied on *Tsosie*. Defendant Chairman Shotton asserts *Tsosie* was not necessary to the result in *Ducey* and disputes that *Tsosie* involved an analogy to recoupment. Resp. 9. These contentions flop. As Plaintiff Nations have shown, *Ducey* is not apt both because it relies on an analogy to recoupment *and* because it relies on the principle, limited to quiet title actions, that the United States does not have sovereign immunity from counterclaims in a quiet title action filed on behalf of individual Indians because "[t]he real plaintiff is not the United States." Mem. 21 (quoting *Tsosie*, 92 F.3d at 1043 (quoting *United States v. Taunah*, 730 F.2d 1360, 1362 (10th Cir. 1984))) (alteration in *Tsosie*). Defendant Chairman Shotton ignores the second basis for distinction, which gores the ox. Moreover, the fact that *Tsosie* analogized the case to one for recoupment cannot be seriously disputed. The *Tsosie* court cited authorities "that

happen to mention recoupment," Resp. 9, *because* they mentioned recoupment, to support the principle that "defendant may assert by way of recoupment" certain claims against the United States in quiet title actions. *See Tsosie*, 92 F.3d at 1043 (quoting 6 Charles A. Wright, et al., *Federal Practice and Procedure* § 1427, at 197 (2d ed. 1990) and citing *FDIC v. Hulsey*, 22 F.3d 1472, 1486-87 (10th Cir. 1994)). As that principle does not properly apply here, *Ducey*'s reliance on *Tsosie* makes *Ducey* unpersuasive.

II. The Counterclaim Does Not Serve a Useful Purpose.

Defendant Chairman Shotton argues that his counterclaim serves a useful purpose based on the convoluted assertion that, if the Court were to dismiss the claims against him *sua sponte*, his counterclaim would remain live and give the Court a chance to "bring finality to the issue" of whether the Otoe-Missouria Agreement is a valid IGRA compact "and affirm that the Tribe is able to conduct lawful gaming" under the Agreement. Resp. 11-12. In other words, his counterclaim is an insurance policy, offering protection against imagined events. A counterclaim cannot be justified by events that, with respect to a different claim, have not and may not occur. Even if it could be, there is no need for such an insurance policy because Defendant Chairman Shotton could, if this case is dismissed, bring an *Ex parte Young* action.[5] The availability of an alternate remedy counsels against keeping this counterclaim in the case. *Hanes Corp. v. Millard*, 531 F.2d 585, 591 n.4 (D.C. Cir. 1976) (court may decline to hear claim for declaratory relief where other remedies are available), *superseded by statute on other grounds as recognized in Nat'l R.R. Passenger Corp. v. Consol. Rail Corp.*, 892 F.2d 1066, 1071-72 (D.C. Cir. 1990).

[5] Which, again, might fail for reasons particular to Defendant Chairman Shotton's claims or his pleading. Mem. 31 n.12.

Defendant Chairman Shotton does not contest the applicability of *Hanes Corp.*, but responds that bringing a *Young* action would be too complicated, as it might require litigation by the "same group of attorneys" as well as "a new complaint, service thereof, redundant motion practice, etc." and would take up judicial and litigants' resources. Resp. 14 n.6. Defendant Chairman Shotton's position on complexity, though now explained, is still a *non sequitur*. When he filed his counterclaim, he created these problems save service of a new complaint, so keeping the counterclaim in the case does not avoid complexity—it ensures it. And if Plaintiff Nations' claims against him were dismissed, there would be no claims competing with his hypothetical *Young* counterclaim, which would eliminate most of the supposed issues he cites as counseling against a *Young* action. All of this shows why speculation furnishes sand, not substance, for argument.

The likelihood of the claims against Defendant Chairman Shotton being dismissed *sua sponte* while his claims remain is conjecture, as Defendant Chairman Shotton has himself offered no basis for dismissal. Even if conjecture were argument, that possibility is de minimis here because, as Plaintiff Nations explained in their briefing on the Federal Defendants' and Defendant Chairman Woommavovah's motions to dismiss, Plaintiff Nations have standing and a cause of action. Thus, the standards for dismissal *sua sponte* are not met. *See* Mem. 29-30.[6]

[6] Defendant Chairman Shotton criticizes Plaintiff Nations for citing *Best v. Kelly*, 39 F.3d 328 (D.C. Cir. 1994), as providing the standard for dismissal *sua sponte* under Rule 12(b)(1). Resp. 12-13. This appears to stem from another misunderstanding of the scope of Plaintiff Nations' argument. Plaintiff Nations cited *Best* as one of the *two* bases for *sua sponte* dismissal for lack of subject matter jurisdiction provided in Rule 12. Mem. 30. Plaintiff Nations also noted a court may dismiss under Rule 12(h)(3), *see* Mem. 30, which provides that "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." To be clear, if it were not already, Plaintiff Nations' point is that dismissal of their complaint for lack of jurisdiction is neither justified under Rule 12(h)(3) nor under Rule 12(b)(1) as applied by *Best*. Since Defendant Chairman Shotton endorses the Rule 12(h)(3) approach in substance, even if he

As for the likelihood of his own counterclaim's dismissal, Defendant Chairman Shotton reverses field, now asserting that "it is by no means certain" that if Plaintiff Nations' claims were dismissed for "jurisdictional" reasons, Defendant Chairman Shotton's counterclaim would also be dismissed for jurisdictional reasons. Resp. 12. Even if it were "by no means certain," that would provide no basis for the Court to hear a counterclaim that is duplicative of both a plaintiff's claims and a defendant's affirmative defenses. As Plaintiff Nations have explained, a ruling on the merits of the existing claims or Defendant Chairman Shotton's affirmative defense would render his counterclaim moot. Mem. 28-29. That makes his counterclaim duplicative: "[W]hen the request for declaratory relief brings into question issues that already have been presented in plaintiff's complaint and defendant's answer to the original claim, courts often exercise their discretion to dismiss the counterclaim on the ground that it is redundant *and a decision on the merits of plaintiff's claim* will render the request for a declaratory judgment moot." *Malibu Media, LLC v. Parsons*, No. 12-1331 (BAH), 2013 WL 12324463, at *10 (D.D.C. May 31, 2013) (quoting *Waller v. DB3 Holdings, Inc.*, No. 07-491, 2008 WL 373155, at *3 (N.D. Tex. Feb. 12, 2008)) (alteration in original) (emphasis added); *accord Bello v. Howard Univ.*, 898 F. Supp. 2d 213, 226 (D.D.C. 2012); *Boone v. MountainMade Found.*, 684 F. Supp. 2d 1, 12 (D.D.C. 2010). Thus, Defendant Chairman Shotton's counterclaim is superfluous and should be dismissed.

Moreover, as Plaintiff Nations have noted, the possible dismissal of their claim does not justify keeping Defendant Chairman Shotton's counterclaim in the case. Dismissal of Plaintiff Nations' case would eliminate any basis for Defendant Chairman Shotton's claim that Plaintiff Nations have waived sovereign immunity and would therefore bar the Court from exercising

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does not cite directly to Rule 12(h)(3), *see* Resp. 13, Plaintiff Nations have already shown why his argument for an insurance policy against *sua sponte* dismissal does not succeed.

jurisdiction over the counterclaim. Defendant Chairman Shotton argues against that point, asserting that "the cases acknowledging that a sovereign can waive immunity by filing a complaint . . . do not suggest whatsoever that such a waiver can be subsequently annulled," and that "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." Resp. 13. But the Supreme Court has long held that sovereigns can "prescribe the terms and conditions" on which they waive sovereign immunity from suit, and a waiver may be withdrawn "whenever [a sovereign] may suppose that justice to the public requires it." *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857); *accord Iowa Tribe of Kan. & Neb. v. Salazar*, 607 F.3d 1225, 1234 (10th Cir. 2010); *Mackinac Tribe v. Jewell*, 87 F. Supp. 3d 127, 136 (D.D.C. 2015); *see United States v. Tohono O'odham Nation*, 563 U.S. 307, 317 (2011) (the right to sue a sovereign is "available by grace and not by right"). And of course, tribal sovereign immunity can only be waived expressly, not by implication. *See Santa Clara Pueblo*, 436 U.S. at 58-59.

Plaintiff Nations only submitted their dispute to the Court based on the express allegation that the Court had jurisdiction over their claims and only expressly did so for the purpose of obtaining relief resolving the claims Plaintiff Nations raised in their Complaint. *See* Second Amended Compl. ¶¶ 20, 232-268, Prayer for Relief ¶¶ 1-2, ECF No. 104. If the Court were to determine there is no jurisdiction and dismissed the Complaint (and that conclusion were to become final), then the conditions on which Plaintiff Nations expressly submitted their dispute for the Court's adjudication and waived immunity would no longer be satisfied.

Defendant Chairman Shotton forges deeper into the thicket in asserting that allowing tribes to withdraw consent to suit by litigation conduct would also allow tribes to avoid ever losing a lawsuit. Resp. 13. Not so: Plaintiff Nations have already consented to the adjudication *of their*

claims and have agreed to be bound by the resolution *of those claims*, even if they lose. Under Defendant Chairman Shotton's formulation, once a tribe brought a suit, even if the case was disposed of on non-merits grounds, the tribe would thereafter be subject to any allegedly "duplicative" lawsuit by anyone else in the same court until the statute of limitations lapsed. That makes a mockery of the Supreme Court's precedents on express waivers of tribal sovereign immunity discussed *supra*. And as no court has agreed to do so—much less the Supreme Court—that argument too must be rejected.

CONCLUSION

For the foregoing reasons, the Court should dismiss Defendant Chairman Shotton's counterclaim under Rule 12(b)(1).

Respectfully submitted,

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By: */s/ Colin C. Hampson*

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CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2021, I electronically filed the above and foregoing document and attachments with the Clerk of Court via the ECF System for filing.

/s/ Colin C. Hampson
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