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

1. TAYLEUR RAYE PICKUP, *et al.*, Plaintiffs,	)	
vs.	)	Case No. 20-CV-346-JED-FHM
1. THE DISTRICT COURT OF NOWATA COUNTY, OKLAHOMA, *et al.*, Defendants.	)	

REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS FRAUENBERGER, SPITZER, WEAVER, MASON AND WADE'S MOTION TO DISMISS

Defendants April Frauenberger, in her official capacity, Court Clerk of Nowata County, Oklahoma; Jill Spitzer, in her official capacity, Court Clerk of Washington County, Oklahoma; Caroline Weaver, in her official capacity, Court Clerk of Delaware County, Oklahoma; Deborah Mason, in her official capacity, Court Clerk of Craig County, Oklahoma; and Laura Wade, in her official capacity, Court Clerk of Mayes County, Oklahoma (collectively referred to herein as "Defendants"), pursuant to LCvR 7.2(h), submit this Reply to "Plaintiffs' Response to Defendants April Frauenberger, Jill Spitzer, Caroline Weaver, Deborah Mason, and Laura Wade's Motion to Dismiss and Brief in Support (Doc# 70)" [Dkt. 78]. Defendants respectfully request the Court to dismiss all of Plaintiffs' claims against them pursuant to Fed. R. Civ. P. 12(b)(1) and (6) for the reasons stated in the Defendants' Motion to Dismiss [Dkt. 70] and as further discussed below.

STANDARD OF REVIEW

In their Response, Plaintiffs misstate the standard of review and adhere to the long since discarded "no-set-of-facts" standard which was abrogated more than a decade ago by *Bell Atlantic Corp v. Twombly*, 550 U.S. 544 (2007). [Dkt. 78, pp. 10-11]. Plaintiffs suggest, without support, that *Twombly* is limited to claims brought under the Sherman Antitrust Act. [Dkt. 78, p. 11]. However, contrary to their unsupported suggestion, it is well settled Tenth Circuit law that the

Twombly standard applies to all Rule 12(b)(6) motions. *See Ton Services, Inc. v. Qwest Corporation*, 493 F.3d 1225, 1236 (10th Cir. 2007) (noting that *Twombly* "articulated a new 'plausibility' standard under which a complaint must include 'enough facts to state a claim to relief that is plausible on its face.'"); *Alvarado v. KOB-TV*, 493 F.3d 1210, 1215 (10th Cir. 2007) (similarly recognizing the plausibility standard); *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (noting *Twombly's* observation that the previous standard of evaluating motions to dismiss in federal court "has earned its retirement").

I. DEFENDANTS ARE ENTITLED TO ELEVENTH AMENDMENT IMMUNITY

Plaintiffs cite *Scott v. Evans*, 2006 U.S. Dist. LEXIS 11326 (E.D. Mich. 2006), *Snyder v. Nolen*, 380 F.3d 279 (7th Cir. 2004), *Geitz v. Overall*, 62 Fed. Appx. 744 (8th Cir. 2003) and *Smith v. Finch*, 324 F.Supp.3d 1012 (E.D. Mo. 2018) for the proposition that "[a]ctions against state officials (and court clerks), acting in their official capacities, performing ministerial acts, are not barred by the 11th Amendment, judicial or quasi-judicial immunity." [Dkt. 78, p. 13]. However, all of these cases dealt with judicial or quasi-judicial immunity for officials sued in their individual capacities. They did not address the issue of Eleventh Amendment immunity for officers sued in the official capacities and provide no support for Plaintiffs' argument.[1]

Plaintiffs also cite to *Tindal v. Wesley*, 167 U.S. 204 (1897) in support of their argument that the Defendants are not entitled to Eleventh Amendment immunity. However, in *Fla. Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 683-90 (1982), the Supreme Court explained the

[1] Likewise, Plaintiffs cite numerous other cases discussing Eleventh Amendment immunity, state law immunity, prosecutorial immunity, and judicial or quasi-judicial immunity for officers acting in their individual capacities under § 1983. [Dkt. 78, Section V, p. 16; Section VI, pp. 16-18; Section VII, pp. 18-20; Section VIII, p. 20; last two paragraphs of Section IX, pp. 21-22; Section X, p. 22-24]. Additionally, Plaintiffs cite several cases addressing individual liability under § 1983. [Dkt. 78, Section XI, pp. 24-26]. None of these cases support Plaintiffs' argument that the Defendants – who are sued only in their official capacities – are not entitled to Eleventh Amendment immunity.

scope of *Tindal* and its progeny and acknowledged that this line of cases only implicate individual liability against governmental officers – not official capacity liability:

> These cases make clear that the Eleventh Amendment does not bar an action against a state official that is based on a theory that the officer acted beyond the scope of his statutory authority or, if within that authority, that such authority is unconstitutional. In such an action, however, the Amendment places a limit on the relief that may be obtained by the plaintiff. If the action is allowed to proceed against the officer only because he acted without proper authority, the judgment may not compel the State to use its funds to compensate the plaintiff for the injury. In *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662, the Court made clear that "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Id*., at 663, 94 S.Ct., at 1356. *See Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389; *Quern v. Jordan*, 440 U.S., at 337, 99 S.Ct., at 1143.

Id. at 689-90. Here, Plaintiffs only assert claims against the Defendants in their official capacities and it is clear that any award will be paid out of the state treasuries, not by the individual Defendants themselves. Furthermore, Plaintiffs' Complaint is devoid of any factual allegation indicating that the Defendants acted outside of their statutory authority.

Plaintiffs further cite to *Ex parte Young*, 209 U.S. 123, 159-60 (1908); *Lewis v. N.M. Dep't of Health*, 261 F.3d 970, 975 (10th Cir. 2001); and *Bishop v. United States ex. rel. Holder*, 962 F.Supp.2d 1252 (N.D. Okla. 2014) for the proposition that Eleventh Amendment immunity is not applicable to claims for equitable prospective relief from state officials in their official capacities. However, the *Lewis* case demonstrates that Plaintiffs are not seeking prospective equitable relief as contemplated by *Ex parte Young*:

> Under the third element, we must find that the plaintiffs are seeking prospective equitable relief, ***rather than retroactive monetary relief***. As we have recognized, however, in applying this distinction we ask "not whether the relief will require the payment of state funds, but whether the relief will remedy future rather than past wrongs." *Elephant Butte*, 160 F.3d at 611 (internal quotation marks omitted). Because the main question is whether the relief will remedy an ongoing wrong rather than whether it will require payment of state funds, courts may grant prospective relief with "a substantial ancillary effect on a state treasury." *ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178, 1189 (10th Cir. 1998). The plaintiffs in the

> case before us clearly seek prospective equitable relief: they ask that state officials be compelled to comply with federal statutes that allegedly entitle them to the reasonably prompt provision of waiver services. ***They are not, for example, asking to be reimbursed for past home or community-based services***. The relief sought simply requires "that officials conform their future actions to federal law," *Elephant Butte*, 160 F.3d at 611 (internal quotation marks omitted), and any effect on the state treasury is, therefore, "ancillary."

Lewis, 261 F.3d at 977-78 (emphasis added). Here, Plaintiffs only request monetary relief (regardless of whether it is characterized as damages or disgorgement) for past actions – they do not request any prospective injunctive relief. Consequently, the exception to Eleventh Amendment immunity addressed in *Ex parte Young* simply does not apply to Plaintiffs' § 1983 claims and the Defendants are immune from suit for said claims.

II. PLAINTIFFS' PUTATIVE 42 U.S.C. § 1983 CLAIMS AGAINST THE DEFENDANTS SHOULD BE DISMISSED

A. Plaintiffs Have Failed to Allege Sufficient Factual Allegations to State a 42 U.S.C. § 1983 Claim Against the Defendants Which are Plausible on its Face

As set forth in the Defendants' Motion, Plaintiffs' only non-conclusory allegations against them is that the Defendants "collected monies for fines and costs from Tribal members within the borders of the Cherokee Reservation in the form of fees and costs…" [Dkt. 2, ¶ 93]. Plaintiffs do not argue otherwise. However, as collecting judicially imposed fines, fees and costs, the Defendants act as arms of the state, not as county officials, and are thus clothed in Eleventh Amendment immunity with regard to such conduct as discussed above. Accordingly, Plaintiffs have failed to state a § 1983 claim against the Defendants which is plausible on its face and said claims against the Defendants should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

B. Plaintiffs Have Failed to State Any Claim Relating to Nowata, Washington, Delaware, or Craig Counties

Plaintiffs have not been subjected to the payment of any court fines, fees, or costs to Defendants Frauenberger, Spitzer, Weaver or Mason, and Plaintiff Sixkiller has not been subjected to the payment of any court fines, fees, or costs to any of the Defendants. Plaintiffs do not deny this. Rather, they simply assert that "[e]very dollar paid to the court clerk by a member of the class would be a reason that the Plaintiffs and the Plaintiff Class have standing in this case." [Dkt. 78, p. 27]. However, contrary to their unsupported assertion, Plaintiffs cannot rely on unnamed class members in order to create standing. In the Tenth Circuit, "[p]rior to class certification, the named plaintiffs' failure to maintain a live case or controversy is fatal to the case as a whole – that unnamed plaintiffs might have a case or controversy is irrelevant." *Thomas v. Metro. Life Ins. Co.*, 631 F.3d 1153, 1159 (10th Cir. 2011)); *see also Rector v. City and Cnty. of Denver*, 348 F.3d 935, 950 (10th Cir. 2003) (holding that no named plaintiff had standing to bring certain claims and remanding for decertification as to such claims). The Defendants have been unable to find any case law wherein the Tenth Circuit has adopted the "juridical link doctrine" – which Plaintiffs have not invoked in any event – in the context of class certification. Regardless, the doctrine cannot be substituted for standing analysis. *Hunnicutt v. Zeneca, Inc.*, Case No. 10-CV-708TCK-TLW, 2012 WL 4321392, *3 n.3 (N.D. Okla. Sept. 19, 2012).[2] *See also Allee v. Medrano*, 416 U.S. 802, 828-829 (1974) ("Standing cannot be acquired through the back door of a class action.")(citations omitted); 1 *Newberg on Class Actions* § 2:5 (5th ed.) ("In multidefendant class actions, the named plaintiffs must show that each defendant has harmed at least one of them. Generally, class representatives do not have standing to sue defendants who have not injured them even if those defendants have allegedly injured other class members.") (footnotes omitted).

[2] A copy of this unpublished Opinion and Order is attached as Exhibit 4.

Accordingly, Plaintiffs have failed to state a plausible claim against Defendants Frauenberger, Spitzer, Weaver or Mason, and Plaintiff Sixkiller has failed to state a plausible claim against any of the Defendants.

C. Plaintiffs' Putative 42 U.S.C. § 1983 Claims are Barred by the *Rooker-Feldman* and *Heck* Doctrines

Plaintiffs argue that the *Rooker-Feldman* doctrine does not apply to their § 1983 claim because the doctrine only applies to valid judgments. [Dkt. 78, p. 28]. However, Plaintiffs cite to no legal authority which supports their circular argument in this regard. To the contrary, the Tenth Circuit has expressly declined to adopt a "void ab initio exception" to the *Rooker-Feldman* doctrine. *Tso v. Murray,* 822 F.Appx. 697, 701 (10th Cir. 2020).[3] Regardless, the *McGirt* decision simply did not invalidate any of the criminal judgments against the Plaintiffs in this case. Furthermore, Plaintiffs' reliance on *Cowan v. Hunter,* 762 F.App'x 521 (10th Cir. 2019), is misplaced. In *Cowan,* the plaintiff sought money damages, not return of a fine he paid because of a state court conviction. The Tenth Circuit held that the plaintiff's claim for money damages claim was not barred by *Rooker-Feldman*. Here, however, Plaintiffs repeatedly maintain in their Response that they are not seeking money damages but rather an equitable disgorgement of court fines, fees, and costs paid as a result of their allegedly invalid criminal convictions. Such claims are "inextricably intertwined" with Plaintiffs' state court judgments and, thus, barred by *Rooker-Feldman*. *B.J.G. v. Rockwell Automation, Inc.,* No. 11-CV-262-GKF-TLW, 2012 WL 28077 at *2 (N.D. Okla. Jan. 5, 2012) (unpub) (citing *Charenko v. City of Stillwater,* 47 F.3d 981, 983 (8th Cir. 1995)).[4]

[3] A copy of this unpublished Order and Judgment was previously provided at Dkt. 70-1.

[4] A copy of this unpublished Opinion and Order is attached as Exhibit 5.

Moreover, in addition to the *Rooker-Feldman* doctrine, Plaintiffs' putative § 1983 claims against the Defendants in this case are also barred by *Heck v. Humphrey*, 512 U.S. 477 (1994) as discussed in the Defendants' Motion. However, Plaintiffs have wholly failed to respond to the Defendants' argument in this regard and, thus, same should be deemed conceded. Consequently, Plaintiffs have failed to state a § 1983 claim against the Defendants which is a plausible on its face, and said claims should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

III. PLAINTIFFS' CLAIM FOR DECLARATORY RELIEF SHOULD BE DISMISSED

Plaintiffs argue that they are entitled to declarative relief because their request for relief is not "retroactive" in nature. In support of that contention, Plaintiffs state that "[t]he future conduct sought to be modified, is the continued prosecution of Indians on the Cherokee Reservation." [Dkt. 78, p. 28]. However, contrary Plaintiffs' assertion, they have not sought any sort of prospective relief to enjoin such future prosecution in the Complaint. Rather, Plaintiffs only seek the return of court ordered fines, fees, and costs allegedly paid for past prosecutions. Contrary to Plaintiffs' contentions, they seek only relief which is retrospective in nature – requesting the Court to declare the Defendants' past actions were unlawful and without jurisdiction. Consequently, their claims for declaratory judgment are barred by the Eleventh Amendment. *See Johns v. Stewart*, 57 F.3d 1544, 1553 (10th Cir. 1995) ("The Eleventh Amendment does not permit judgments against state officers declaring that they violated federal law in the past.") (citations and quotations omitted).

IV. PLAINTIFFS' STATE LAW CLAIMS AGAINST THE DEFENDANTS SHOULD BE DISMISSED

A. Plaintiffs Have Failed to Allege Sufficient Factual Allegations to State a Claim for Money Had and Received Against the Defendants Which is Plausible on its Face

Plaintiffs provide no substantive response to the Defendants' argument that Plaintiffs have no actionable claim against them for money had and received under Oklahoma law because, under

state law, they are not the actual holders of the court fines, fees or costs allegedly paid by Plaintiffs. Indeed, Plaintiffs admit that "[t]he Court Clerks that collected court costs, fines and other fees are the 'bursars' of the District Courts and deposit the money collected into various accounts maintained for the court by the treasurer." [Dkt. 78, pp. 29-30]. However, despite acknowledging that the Defendants are not the actual holders of the money, Plaintiffs assert that "[t]here is no just reason why the…court clerks should be allowed to retain these funds, regardless of how they are used." [Dkt. 78, p. 30]. As this is not actually responsive to the Defendants' argument, that argument should be deemed conceded and the claim dismissed.

Moreover, Plaintiffs have wholly failed to respond to the Defendants' argument that they have failed to state a plausible claim for money had and received because they failed to allege any amount due in the Complaint. As such, the Defendants' argument in this regard should be deemed conceded and Plaintiffs' claim against them dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

B. Plaintiffs' Claims are an Impermissible Collateral Attack on Their Convictions

Plaintiffs argue that they were not required to seek post-conviction relief prior to commencing this suit because their criminal convictions are void *ab initio* and, thus, there is nothing to overturn through post-conviction relief. However, Plaintiffs do not cite to any legal authority which supports their argument in this regard. Contrary to Plaintiffs' contention, their criminal convictions are still currently valid – they did not somehow become automatically voided with the publication of the *Murphy* or *McGirt* cases. Rather, the *McGirt* decision itself clearly indicates that Plaintiffs must seek appellate or post-conviction review. Responding to the argument that the Court's decision might have disastrous consequences, the Court replied:

> [M]any defendants may choose to finish their state sentences rather than risk reprosecution in federal court where sentences can be graver. Other defendants who

> do try to challenge their state convictions may face significant procedural obstacles, thanks to well-known state and federal limitations on postconviction review in criminal proceedings.

McGirt v. State of Oklahoma, 591 U.S. ___, 140 S.Ct. 2452, 2479 (2020).

Plaintiffs cannot simply skip over those "significant procedural issues." Oklahoma law, for example, provides that a criminal defendant has an "affirmative duty to prove his status as an Indian" in order to show that the court lacks subject matter jurisdiction. *State v. Klindt*, 782 P.2d 401, 403 (Okla. 1989). "Proof of one's status as an Indian under federal Indian law is necessary before one can claim exemption from prosecution under state law." *Id.* Plaintiffs cannot simply ignore applicable law, including procedural prerequisites. Plaintiffs' claims against the Defendants are barred.

C. Plaintiffs' Claims are Barred by the Oklahoma Governmental Tort Claims Act

Plaintiffs rely on *Sholer v. State ex rel. Dept. of Public Safety*, 945 P.2d 469 (Okla. 1995) for the proposition that their state law claims for money had and received are not torts and are not governed by the OGTCA. However, in their Motion, the Defendants anticipated Plaintiffs' reliance on *Sholer* and engaged in detailed analysis regarding why that case was distinguishable and inapplicable to Plaintiffs' claims in this case and why Plaintiffs' claims are more akin to torts than equitable claims under the current version of the OGTCA. [Dkt. 70, pp. 27-29]. Plaintiffs wholly fail to address the Defendants' argument in that regard. As such, it should be deemed conceded and the claim dismissed.

D. Plaintiffs' Claims Should be Dismissed Under the Equitable Principles of Laches, Waiver and Estoppel, and Unclean Hands

Plaintiffs argue that their claims should not be dismissed on any of the Defendants' asserted equitable defenses because those are affirmative defenses and "fact based inquiries that cannot be granted in a 12(b)(6) motion." [Dkt. 78, p. 32]. However, contrary to Plaintiffs'

unsupported assertion, "[t]here is no *per se* rule that affirmative defenses are inappropriate for consideration on a Rule 12(b) motion to dismiss." *Strauss v. Angie's List, Inc.,* No. 17-CV-2560-HLT-TJJ, 2019 WL 399910, *3 (D.Kan. Jan. 31, 2019) ("If the elements of laches appear on the face of the complaint, the defendant may move for – and the court may grant – dismissal under Rule 12(b)(6).")[5]. To the contrary, the Tenth Circuit has repeatedly held that a Rule 12(b)(6) motion can be granted on an affirmative defense "[i]f the defense appears plainly on the face of the complaint itself…" *Miller v. Shell Oil Co.*, 345 F.2d 891, 893 (10th Cir. 1965); *see also Fernandez v. Clean House, LLC*, 883 F.3d 1296, 1299 (10th Cir. 2018). Here, the equitable defenses or laches, waiver and estoppel, and unclean hands arise plainly from the factual allegations on the face of Plaintiffs' Complaint as set forth in the Defendants' Motion, and Plaintiffs do not argue otherwise.

Moreover, the Court should dismiss Plaintiffs' pendent state law claim as all other federal claims are subject to dismissal as discussed above. *See Smith v. City of Enid*, 149 F.3d 1151, 1156 (10th Cir. 1998) ("When all federal claims have been dismissed, the court may, and usually should, decline to exercise jurisdiction over any remaining state claims."); *see also* 28 U.S.C. § 1367(c)(3).

WHEREFORE, premises considered, Defendants April Frauenberger, Jill Spitzer, Caroline Weaver, Deborah Mason and Laura wade, in their official capacities as Court Clerks of Nowata, Washington, Delaware, Craig and Mayes Counties, respectively, respectfully request this Court dismiss Plaintiffs' claims against them pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted.

[5] A copy of this unpublished Memorandum and Order is attached as Exhibit 6.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2020, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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