IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LUCIA PHARR HINTON, individually and on behalf of heirs of Lumn W. Pharr and Beulah Pharr,	)	
Plaintiff,	)	
v.	)	Case No. 1:23-cv-01422-RDM
CHEROKEE NATION, ET AL.,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF CHEROKEE NATION DEFENDANTS' MOTION TO DISMISS

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Pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6), Defendants Cherokee Nation ("Nation"), Principal Chief Chuck Hoskin, Jr. ("Defendant Chief Hoskin"), and John Does 1-10 ("John Doe Defendants")[1] (collectively, "Cherokee Nation Defendants") respectfully request that the Court dismiss Plaintiff's suit against them. Jurisdictional and procedural barriers bar Plaintiff's First and Third Claims from proceeding in this Court.

BACKGROUND[2]

In 1866, the Cherokee Nation signed a treaty with the United States in which it, *inter alia*, reaffirmed its decision to abolish slavery as a matter of tribal law, promised that slavery would never be reinstituted in the Nation, and agreed that "all freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the [Civil War], and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees." 1866 Treaty of Washington with the Cherokee, art. 9, July 19, 1866, 14 Stat. 799 ("1866 Treaty").

In 2009, the Cherokee Nation filed a lawsuit for declaratory relief in the United States District Court for the Northern District of Oklahoma against private individuals, the Secretary of the Interior, and the Department of the Interior, seeking a declaration as to whether this treaty promise was still in effect and if so, what it required. *See Cherokee Nation v. Nash*, 267 F. Supp.

[1] The Nation is the real party in interest to Plaintiff's suit against these fictious defendants, *see infra* at 11-12, and therefore its counsel represents them.

[2] This section relies on the allegations of the operative complaint, *see* Am. Compl. (May 24, 2023), ECF No. 2 ("Am. Compl." or "complaint"), documents on which the complaint relies, and matters of public record subject to judicial notice and therefore not subject to reasonable disputes of fact. *See infra* at 5-6 (describing standard of review for motions to dismiss under Rules 12(b)(1) and 12(b)(6)); *Connecticut v. U.S. Dep't of Interior*, 363 F. Supp. 3d 45, 52 nn. 4 & 8, 53 n.9 (D.D.C. 2019) (taking judicial notice of documents incorporated by reference in complaint and documents posted on government websites that therefore are "public records"); *Connecticut v. U.S. Dep't of Interior*, 344 F. Supp. 3d 279, 291 nn. 6 & 7, 306 n.23 (D.D.C. 2018) ("*Connecticut I*") (citing *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, 67 (D.D.C. 2014)) (same).

3d 86, 112 (D.D.C. 2017). The Nation filed the suit after the then-Principal Chief signed legislation waiving the Nation's tribal sovereign immunity for the limited purpose of litigating the interpretation and continued validity of Article 9 of the 1866 Treaty. *See In re Effect of Cherokee Nation v. Nash & Vann v. Zinke*, 16 Am. Tribal Law 268, 271-72 (Cherokee Nation 2021) ("*Effect of Nash II*")[3] (discussing Tribal Council of the Cherokee Nation Res. No. 22-09 (Mar. 23, 2009)[4] (approving litigation "to determine the narrow issue of construction of the 1866 Treaty language and any federal law affecting that treaty regarding federal rights, if any, of freedmen and their descendants")). The Secretary and Department counterclaimed for declaratory relief on the meaning of the 1866 Treaty and injunctive relief to enforce it. *Nash*, 267 F. Supp. 3d at 113. Freedman descendants intervened as defendants, as representatives of a class of people who were enrolled in the Cherokee Nation but then dis-enrolled in 2007, and also counter-claimed against the Nation for declaratory and injunctive relief, as well as cross-claiming against the federal defendants. *Id.* at 112.[5] Plaintiff was not a party to that suit.

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[3] The slip opinion, which is a public record subject to judicial notice, *see supra* at 1 n.2, is available at https://www.cherokeecourts.org/Portals/cherokeecourts/Documents/Supreme%20Court/Order%20and%20Opinions/SC-17-07%2037-Final%20Order%202-22-21.pdf?ver=2021-02-26-135726-990.

[4] This resolution, which is a public record subject to judicial notice, *see supra* at 1 n.2, is available at https://cherokee.legistar.com/LegislationDetail.aspx?ID=337809&GUID=938C86D2-445E-4F76-B8EB-E5917C82715A (follow hyperlink "R-22-09" next to "Attachments:").

[5] Certain Freedmen descendants—but again, not Plaintiff—earlier filed suit against federal officials (and in an amended complaint, the Principal Chief in his official capacity) regarding Freedmen descendants' citizenship rights under the 1866 Treaty. *See Vann v. Zinke*, No. 1:03-cv-01711 (TFH) (D.D.C.). The Nation intervened into the suit for the limited purpose of asserting tribal sovereign immunity and seeking dismissal under Federal Rule of Civil Procedure 19. *See Vann v. Salazar*, 883 F. Supp. 2d 44, 47-48 (D.D.C. 2011) ("*Vann III*"), *rev'd sub nom Vann v. U.S. Dep't of Interior*, 701 F.3d 927 (D.C. Cir. 2012) (Kavanaugh, J.) ("*Vann IV*"). The *Vann* litigation was dismissed after the decision in *Nash*. *See* Joint Stip. of Dismissal, *Vann v. Zinke*, No. 1:03-cv-01711 (TFH) (D.D.C. filed Sept. 5, 2018), ECF No. 174.

The parties filed cross-motions to dismiss, but then stayed those motions in order to "proceed[] to resolve by summary judgment 'the core issue in dispute in this action—*i.e.*, whether the Freedmen possess a right to equal citizenship in the Cherokee Nation under the Treaty of 1866 . . . .'" *Id.* at 113 (second alteration in original) (citation omitted). The court resolved that issue by determining that "[i]n accordance with Article 9 of the 1866 Treaty, the Cherokee Freedmen have a present right to citizenship in the Cherokee Nation that is coextensive with the rights of native Cherokees." *Id.* at 140. Specifically, the court reasoned that Article 9 "guarantees for qualifying freedmen the right to citizenship to the same extent that native Cherokees have a just claim to that right. . . . [B]y virtue of Article 9 of the 1866 Treaty, qualifying freedmen have a right to citizenship as defined by the Cherokee Nation Constitution to the same extent that native Cherokees have that right." *Id.* at 123. The court further explained that "[t]he panoply of rights to which native Cherokees have a just claim, including citizenship, is not, however, set forth in the 1866 Treaty . . . . So the identity and scope of the 'rights' promised by Article 9 must be found in independent sources such as the Cherokee Nation's constitution and laws." *Id.* at 122. In short, the court concluded that Cherokee Freedmen and their descendants have an equal right to Cherokee citizenship, on the exact same terms the Nation makes citizenship available to "native Cherokees." But the terms on which the Nation establishes rights for Cherokee citizens are not defined by the 1866 Treaty itself.

The Nation did not appeal that decision. It became final on the Nation's Motion for Entry of Final Judgment, *Cherokee Nation v. Nash*, No. 1:13-cv-01313 (TFH) (D.D.C. filed Dec. 21, 2017), ECF No. 251, in an order in which the Court held that "any Cherokee Freedman descendant who qualifies for citizenship in the Cherokee Nation shall have all the benefits and privileges of such citizenship on the same terms as other citizens of the Cherokee Nation," and "retain[ed]

jurisdiction to enforce *this Final Judgment*, which addresses whether descendants of Cheroke 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*." Order & J. at 2, *Cherokee Nation v. Nash*, No. 1:13-cv-01313 (TFH) (D.D.C. Feb. 20, 2018), ECF No. 257 (emphases added).

The Cherokee Nation moved quickly to implement the *Nash* ruling as a matter of tribal law. First, the Cherokee Nation, through its Attorney General, sought and obtained a declaration from its own Supreme Court that the *Nash* opinion was binding on the Nation. *See In re Effect of Cherokee Nation v. Nash & Vann v. Zinke*, 15 Am. Tribal Law 102 (Cherokee Nation 2017) ("*Effect of Nash I*").[6] The Cherokee Nation Supreme Court issued that declaration on the basis that "the [*Nash*] case was entered into voluntarily by the Nation, that the Nation had a full and proper presentation of its case, and that the Nation is therefore now subject to the opinion of the D.C. District Court." *Id.* at 103. Then the Nation, again through its Attorney General, sought and obtained an order from its Supreme Court striking language from the Cherokee Nation Constitution and laws inconsistent with the *Nash* decision. *See Effect of Nash II*, 16 Am. Tribal Law at 273-74, 276. The Nation's Supreme Court ruled that language in tribal law that would limit the rights of citizens to Cherokee people "by blood," "were never valid from inception, *and* must be removed wherever found throughout our tribal law when . . . used in reference to" tribal citizenship requirements. *Id.* at 274. Under the Cherokee Nation Supreme Court's order, that decision "shall

[6] The slip opinion, which is a public record subject to judicial notice, *see supra* at 1 n.2, is available at https://www.cherokeecourts.org/Portals/cherokeecourts/Documents/Supreme%20Court/Order%20and%20Opinions/SC-17-07%202-Order%20%209-1-17.pdf?ver=2021-02-26-135512-003.

have the force of law, as to the construction and application there, in all the Courts of this Nation, until such construction or application shall be limited, altered or in any manner amended, by the subsequent decision of a subsequent case by the [Nation's] Supreme Court." *Id.* at 276.

STANDARD OF REVIEW

When a motion to dismiss is brought under both Rule 12(b)(1) and (6), the court must consider the Rule 12(b)(1) contention first. *Schmidt v. U.S. Capitol Police Bd.*, 826 F. Supp. 2d 59, 64 (D.D.C. 2011) (citing *United States ex rel. Settlemire v. District of Columbia*, 198 F.3d 913, 920 (D.C. Cir. 1999); *Epps v. U.S. Capitol Police Bd.*, 719 F. Supp. 2d 7, 12 (D.D.C. 2010)).

In evaluating a Rule 12(b)(1) motion, the court "must accept as true all factual allegations in the complaint and construe the complaint liberally, granting plaintiff the benefit of all inferences that can be drawn from the facts alleged." *Kialegee Tribal Town v. Zinke*, 330 F. Supp. 3d 255, 262 (D.D.C. 2018) ("*Kialegee I*") (citing *Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 164 (1993)); *accord Z St. v. Koskinen*, 791 F.3d 24, 28 (D.C. Cir. 2015). It is "the plaintiff's burden to prove subject matter jurisdiction by a preponderance of the evidence." *Kialegee I*, 330 F. Supp. 3d at 262 (citing *Am. Farm Bureau v. EPA*, 121 F. Supp. 2d 84, 90 (D.D.C. 2000)); *accord McNutt v. GM Acceptance Corp.*, 298 U.S. 178, 182-83 (1936). "In determining whether there is jurisdiction, the Court may 'consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts.'" *Kialegee I*, 330 F. Supp. 3d at 262 (quoting *Coal. for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003), and citing *Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005)).

"A motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) challenges the adequacy of a complaint on its face." *Johnson v. Comm'n on Presid'l Debates*, 202 F. Supp. 3d 159, 167 (D.D.C. 2016). Such a motion "does not test a plaintiff's

ultimate likelihood of success on the merits; rather, it tests whether a plaintiff has properly stated a claim." *Connecticut I*, 344 F. Supp. 3d at 295 (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). "'In evaluating a [Rule 12(b)(6)] motion to dismiss, the Court must accept the factual allegations in the complaint as true and draw all reasonable inferences in favor of plaintiff.'" *Kialegee I*, 330 F. Supp. 3d at 263 (quoting *Nat'l Postal Pro. Nurses v. USPS*, 461 F. Supp. 2d 24, 27 (D.D.C. 2006)). "To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain sufficient factual allegations that, if accepted as true, 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "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." *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

On a Rule 12(b)(6) motion, the court can consider, in addition to the materials in the complaint and any materials incorporated into it or attached to it, matters of public record and other materials that are subject to judicial notice. *N. Am. Butterfly Ass'n v. Wolf*, 977 F.3d 1244, 1249 (D.C. Cir. 2020). The court may also consider "documents upon which the plaintiff's complaint necessarily relies even if the document is produced not by the plaintiff in the complaint but by the defendant in a motion to dismiss." *In re Domestic Airline Travel Antitrust Litig.*, 221 F. Supp. 3d 46, 54-55 (D.D.C. 2016) (citation omitted).

SUMMARY OF ARGUMENT

The complaint suffers from numerous pleading defects, and as a result Plaintiff's claims against Cherokee Nation Defendants must be dismissed.

First, and fundamentally, suits against the Cherokee Nation Defendants are barred by the Nation's tribal sovereign immunity. The Nation has never consented to Plaintiff's claims against it or the other Cherokee Nation Defendants. Plaintiff claims otherwise based on litigation conduct

in other cases. That assertion has already been squarely and properly rejected by one court in this District, and the Nation itself expressly *did not* waive its immunity from this claim when it litigated the meaning of Article 9 of the 1866 Treaty in another case. Plaintiff also fails to show third party standing to assert claims for absent alleged heirs of Lumn and Beulah Pharr, and the Court lacks subject matter jurisdiction over Plaintiff's Third Claim.

Plaintiff also fails to state a claim against the Cherokee Nation Defendants. Plaintiff does not identify a cause of action for the First and Third Claims, nor does any federal court cause of action exist for these claims. The 1866 Treaty does not establish a cause of action against the Cherokee Nation Defendants, and so does not allow any claims against the Nation or Nation officials. Nor does the 1866 Treaty itself establish a right to "tangible economic benefits." Those benefits are provided, if at all, under Cherokee Nation law, and so Plaintiff's First and Third Claims fail to state a claim for that additional reason. And Plaintiff fails to state any claim at all against Defendants Chief Hoskin and the John Doe Defendants.

Finally, Plaintiff's claims must be exhausted in Cherokee Nation court before they can be litigated in federal court. The *Nash* decision concerned the meaning of the 1866 Treaty, and it is being implemented as to Cherokee Nation law through orders of the Cherokee Nation Supreme Court. The Cherokee Nation's courts have jurisdiction over claims concerning Cherokee treaties and laws, and so should have first opportunity to adjudicate them. Plaintiff does not allege she exhausted Cherokee Nation court remedies, nor does she allege any facts that would excuse exhaustion of remedies in the Cherokee Nation's courts.

ARGUMENT

I. This Court Lacks Jurisdiction Over Plaintiff's Claims.

The Court lacks subject matter jurisdiction over Plaintiff's claims against the Cherokee Nation Defendants. All Plaintiff's claims are barred by tribal sovereign immunity. Additionally,

Plaintiff has not shown standing to sue on behalf of third parties, and the court lacks jurisdiction over Plaintiff's tort claim for conversion. Therefore, Plaintiff's claims against the Cherokee Nation Defendants should be dismissed under Rule 12(b)(1).

A. The Cherokee Nation and Its Officers are Protected by Tribal Sovereign Immunity.

The Cherokee Nation is a federally-recognized Indian tribe, 88 Fed. Reg. 2112, 2112 (Jan. 12, 2023), which is protected by tribal sovereign immunity, *see* Am. Compl. ¶¶ 6-7 (alleging the Cherokee Nation is a "sovereign Indian nation recognized by the United States of America" and "[o]rdina[ri]ly, as a sovereign nation, Defendant Cherokee Nation is immune from suit by a private citizen in the courts of the United States"). Sovereign immunity is jurisdictional, *Tri-State Hosp. Supply Corp. v. United States*, 341 F.3d 571, 575 (D.C. Cir. 2003) (citing *FDIC v. Meyer*, 510 U.S. 471, 475 (1994)), and motions to dismiss for sovereign immunity are properly brought and considered under Rule 12(b)(1), *see, e.g.*, *Nemariam v. Fed. Democratic Republic of Ethiopia*, 491 F.3d 470, 483 (D.C. Cir. 2007); *Cherokee Nation v. U.S. Dep't of Interior*, 643 F. Supp. 3d 90, 119 (D.D.C. 2022).

Under the doctrine of tribal sovereign immunity, the Nation is immune from suit unless it has clearly waived its immunity or Congress has unequivocally abrogated that immunity. *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991); *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1010 (10th Cir. 2007) (quoting *E.F.W. v. St. Stephen's Indian High Sch.*, 264 F.3d 1297, 1304 (10th Cir. 2001)). The Nation's immunity extends to the Nation's officers sued in their official capacities, as such suits "represent only another way of pleading an action against an entity of which an officer is an agent" and the relief sought in them is "only nominally against the official and in fact is against the official's office and thus the sovereign itself." *Lewis v. Clarke*, 581 U.S.

155, 155 (2017) (quoting *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985), and citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989)). "[C]onsent 'cannot be implied but must be unequivocally expressed.'" *Wichita & Affiliated Tribes v. Hodel*, 788 F.2d 765, 773 (D.C. Cir. 1986) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)).

Plaintiff does not allege that Congress ever unequivocally abrogated the Nation's immunity from her claims. Nor could such an assertion based on the 1866 Treaty succeed. *See Vann v. Kempthorne*, 534 F.3d 741, 748-49 (D.C. Cir. 2008) ("*Vann II*") ("The 1866 Treaty . . . lacks any clear abrogation of tribal sovereign immunity." (citing *Nero v. Cherokee Nation of Okla.*, 892 F.2d 1457, 1461 (10th Cir. 1989))). Instead, Plaintiff relies only on a supposed waiver by litigation conduct, alleging that the Nation "waived immunity by suing in one or more district courts of the United States, in which it raised the same issues that give rise to the Plaintiff['s] claims." Am. Compl. ¶ 7. The rule for waiver by litigation conduct is narrower than Plaintiff alleges. "An Indian tribe's immunity is co-extensive with the United States' immunity, and neither loses that immunity by instituting an action, even when the defendant files a compulsory counterclaim." *Wichita & Affiliated Tribes*, 788 F.2d at 773-74 (citing *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 514 (1940)); *Cherokee Nation*, 643 F. Supp. 3d at 120; *accord Ute Indian Tribe of Uintah & Ouray Rsrv. v. Utah*, 790 F.3d 1000, 1009 (10th Cir. 2015) (Gorsuch, J.). "The objection to a suit against the United States is fundamental, whether it be in the form of an original action, or a set-off, or a counterclaim. Jurisdiction in either case does not exist, unless there is specific congressional authority for it." *United States v. Shaw*, 309 U.S. 495, 503 (1940).[7]

[7] This "confine[s]" counterclaims against the United States to "reducing the sovereign's recovery," *Nat'l City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 358 n.2 (1955), i.e., a claim for recoupment. Some courts—although not in this District or Circuit—have recognized that a defendant may bring counterclaims in recoupment against a plaintiff Indian tribe when the tribe seeks money damages, *see Ute Indian Tribe*, 790 F.3d at 1011, and the counterclaim does not

Consistent with this narrow rule for waiver by litigation conduct, no case has ever held that a tribe waived its immunity from suit simply by filing a *different* lawsuit that concerned similar (or even identical) issues. This circuit's precedent "foreclose" a defendant even from bringing counterclaims "mirroring [a] plaintiff tribe's own claims in the [same] case." *Cherokee Nation*, 643 F. Supp. 3d at 120. Indeed, Judge Kennedy concluded in the *Vann* litigation in this District that the Nation had not waived its sovereign immunity from suits concerning the rights of Freedmen under the 1866 Treaty simply by filing the *Nash* case in the Northern District of Oklahoma: "This court . . . can 'discern no . . . clear waiver' from the filing of a separate suit on a similar subject." *Vann III*, 883 F. Supp. 2d at 54-55 (second alteration in original) (citation omitted); *see id.* at 55 (quoting *Citizen Potawatomi*, 498 U.S. at 509) (noting that Supreme Court precedent forecloses the conclusion that, by filing suit, a tribe waives immunity from other suits concerning the same subject matter).[8] *A fortiori* the Nation is immune here, where Plaintiff not only alleges her claims concern issues that the Nation litigated *in different cases*, but seeks damages, which the Nation has not sought *in any case* involving the 1866 Treaty.

Although Plaintiff alleges that this Court may exercise jurisdiction because the court in *Nash* retained jurisdiction to enforce its judgment in that case, *see* Am. Compl. ¶ 13, that does not affect the Nation's tribal sovereign immunity. The court's retention of jurisdiction in its February

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"involv[e] relief different in kind or nature to that sought by the [tribe]" and does not "exceed[] the amount of the [tribe]'s claims," *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 (10th Cir. 1982) (quoting *Frederick v. United States*, 386 F.2d 481, 488 (5th Cir. 1967)); *see King v. Barbour*, 240 F. Supp. 3d 136, 140 (D.D.C. 2017) (recoupment is "the right of a defendant to have the plaintiff's claim reduced or eliminated because of the plaintiff's breach of contract or duty in the same transaction" (citation omitted)). The Nation has not filed a claim against Plaintiff. So even if this Court were to conclude, without any in-circuit support, that a plaintiff tribe's conduct in litigation can open it to recoupment counterclaims, recoupment is not available here.

[8] The D.C. Circuit reversed the *Vann III* decision on other grounds, without reaching the waiver-by-litigation issue. *See Vann IV*, 701 F.3d at 930.

20, 2018 Final Order and Judgment only concerned that court's enforcement of "this Final Judgment" which was entered in that case, in which the Nation only waived its immunity for the narrow purpose of litigating a declaratory judgment action regarding Freedmen descendants' right to citizenship under the 1866 Treaty. *See supra* at 1-4. Indeed, that was the understanding of all the parties, which was clearly explained to the court in the Joint Motion in which the parties sought resolution of the "Core Issue" of Freedmen descendants' citizenship, and the Nation expressly reserved its immunity on other claims and questions, on the following terms:

> The Cherokee Nation voluntarily consents to the jurisdiction of this Court for the sole purpose of reaching an expeditious determination of the Core Question in this case, which is of great importance to the Cherokee Nation, and reserves all other rights with respect to its sovereign immunity. The Federal Government and the Freedmen expressly agree that the Cherokee Nation has not waived its sovereign immunity with respect to any other claim or issue in this or any other jurisdiction by voluntarily consenting to the jurisdiction of this Court for determination of the Core Question.

Joint Mot. for Entry of Order Setting Br'g Sch. For Summ. J. on Core Issue & Staying Case on All Other Matters at 4, *Cherokee Nation v. Nash*, No. 1:13-cv-01313 (TFH) (D.D.C. filed Sept. 13, 2013), ECF No. 223 ("Joint Mot."); *see Nash*, 267 F. Supp. 3d at 113 (citing Joint Mot.).

Defendant Chief Hoskin and the John Doe Defendants are also immune from this suit. A tribe is a "real party in interest" to a suit against its officers where the claims would, if satisfied, "require action by the sovereign [and] disturb the sovereign's property." *Lewis*, 581 U.S. at 163 (quoting *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 687 (1949)). Plaintiff alleges that these defendants are named in their "individual" capacities, *see* Am. Compl. at 1 (caption); *id.* ¶ 8, but when determining whether sovereign immunity bars a suit "courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign," *Lewis*, 581 U.S. at 162 (citing *Ex parte New York*, 256 U.S. 490, 500-02 (1921)). Plaintiff names Defendant Chief Hoskin in his capacity

"as the Chief of the Cherokee Nation," Am. Compl. ¶ 8, names the John Doe Defendants each "as the Chief of the Cherokee Nation before Defendant [Chief] Hoskin[]," *id.* ¶ 9, and only seeks relief against the Nation in the form of damages that would be paid out of funds allegedly held by the Nation, *see id.* ¶¶ 27, 42, 45. Because the claims are really against the Nation and the office of the Principal Chief, and seek monetary relief only from the Nation, the Nation is the "real party in interest," and its tribal sovereign immunity bars the claims. *See Lewis*, 581 U.S. at 162.[9]

B. Plaintiff Has Failed to Show Standing to Sue On Behalf of Absent Third Parties.

Plaintiff sues "on behalf of herself" and "the heirs of Lumn and Beulah Pharr" and alleges that she and those heirs—who do not appear in the case or sue on their own behalf—are "Plaintiffs" in the case. *See* Am. Compl. ¶ 5. But Plaintiff lacks standing to sue on behalf of these absent third parties, and Plaintiff's First and Third Claims should be dismissed to the extent they are brought on those third parties' behalf.

"[T]he defect of standing is a defect in subject matter jurisdiction" which is properly raised in a Rule 12(b)(1) motion to dismiss. *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987) (citing *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986)). Standing "'is an essential and unchanging' predicate to any exercise of . . . jurisdiction." *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). There is

[9] There is an exception to tribal sovereign immunity for claims against tribal officers seeking prospective relief to remedy ongoing violations of federal law. *See Vann II*, 534 F.3d at 749-50 (applying *Ex parte Young*, 209 U.S. 123 (1908), to allow claims against tribal officials and noting that "[i]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward injury into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective" (alteration in original) (quoting *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002))); *accord Vann IV*, 701 F.3d at 929-30. However, that exception is not available because Plaintiff makes no claim for relief against tribal officers, *see infra* at 24, and seeks *damages from the Nation*, to remedy alleged *past* harms, Am. Compl. ¶¶ 24-25, 45.

a "narrow, three-part" test for standing. *Grand Lodge of Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 14 (D.D.C. 2001). A plaintiff must show an "'injury in fact'—an invasion of a legally protected interest," a "causal connection between the injury and the conduct complained of," and that "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 560-61.

"A 'plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 15 (D.D.C. 2010) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). Under this rule, a plaintiff only has standing to make claims on behalf of third parties in very limited circumstances. He or she can do so under the doctrine of "third party standing"[10] when he or she meets three requirements: When plaintiff has "suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute," where the plaintiff has "a close relationship to the third party," and where there is "some hindrance to the third party's ability to protect his or her own interests." *Lepelletier v. FDIC*, 164 F.3d 37, 44 (D.C. Cir. 1999) (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)).[11] As to the first requirement, "[w]hen a plaintiff seeks

[10] Alternatively, a plaintiff may have "next friend" standing where she either sues on behalf of minors or incompetents with whom she has a "significant relationship" or seeks a writ of habeas corpus, and where the absent third party has Article III standing. *See Muthana v. Pompeo*, 985 F.3d 893, 901-02 (D.C. Cir. 2021), *cert. denied sub nom. Muthana v. Blinken*, 142 S. Ct. 757 (2022) (discussing *Whitmore v. Arkansas*, 495 U.S. 149 (1990); *T.W. ex rel. Enk v. Brophy*, 124 F.3d 893, 895 (7th Cir. 1997)); *see also* Fed. R. Civ. P. 17(c). Just as Plaintiff has not alleged facts showing a "close relationship" or "hindrance" necessary for third party standing, *see infra* at 14-15, she has also not alleged facts that show she has "next friend" standing on behalf of absent minors or incompetents with whom she has a "significant relationship." And this is not a habeas action.

[11] Third party standing may also exist "[w]hen . . . enforcement of a restriction against the litigant prevents a third party from entering into a relationship with the litigant (typically a contractual relationship), to which relationship the third party has a legal entitlement (typically a constitutional entitlement)." *Fair Emp. Council of Greater Wash., Inc. v. BMC Mkt'g Corp.*, 28 F.3d 1268, 1280-81 (D.C. Cir. 1994) (quoting *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 720 (1990)). But this

to vindicate the rights of a third party not before the court, the plaintiff himself must suffer a concrete injury, which must be particularized in the sense that it 'affect[s] the plaintiff in a personal and individual way.'" *Al-Aulaqi*, 727 F. Supp. 2d at 24 (second alteration in original) (quoting *Lujan*, 504 U.S. at 561 n.1). As to the second requirement, a "close relationship" "exists when there is 'an identity of interests between the parties such that the plaintiff will act as an effective advocate of the third party's interests,'" *Turner v. U.S. Agency for Global Media*, 502 F. Supp. 3d 333, 361 (D.D.C. 2020) (quoting *Lepelletier*, 164 F.3d at 44), such as "confidential or contractual relationships" or factual circumstances that show that the absent third parties and the plaintiff have shared interests, *id.* at 361-62 (discussing evidence showing that plaintiff's "decades-long career" at Voice of America and "broad responsibility for implementation of . . . journalistic principles" at issue made her an "effective advocate" for journalists employed by Voice of America). And, as to the third requirement, a "hindrance" suffered by an absent third party could include a financial disincentive to litigate, a desire to protect personal privacy, or the "imminent mootness" of their claim. *Al-Aulaqi*, 727 F. Supp. 2d at 31 (citations omitted). The burden is "on the party attempting to assert third-party rights to establish that [s]he has third-party standing." *United States v. TDC Mgmt. Corp.*, 263 F. Supp. 3d 257, 272 (D.D.C. 2017). Plaintiff fails to meet that burden.

Plaintiff alleges she and other heirs did not receive "tangible economic benefits" from the Nation "from the inception of the Treaty of 1866 to . . . 2017," Am. Compl. ¶¶ 21, 25, and "from 2007 to present, *id.* at ¶ 24. However, Plaintiff fails to allege facts that would meet any of the requirements for third party standing. First, Plaintiff makes no allegations that the alleged withholding of benefits to other alleged heirs affected her in any way, so she cannot show "injury

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is not such a case, since Plaintiff has not alleged that the withholding of "tangible economic benefits" has had any effect on her relationship with absent third parties.

in fact" from alleged withholdings from absent third parties. Second, Plaintiff does not make any allegations about the nature of her relationship with the other heirs or whether they share any of her interests, so she does not show a "close relationship" for purposes of the third-party standing test. Third, she does not allege any of the other heirs suffers any hindrance that would prevent them from protecting their own interests by bringing their own suit. For these reasons Plaintiff has failed to show she has third party standing, and to the extent she brings claims on third parties' behalf, those claims must be dismissed.

C. The Court Lacks Subject Matter Jurisdiction over Plaintiff's Third Claim.

Plaintiff's Third Claim is based on "common law" and makes a claim for conversion against the Nation. Am. Compl. ¶¶ 13, 44. That is not a federal law claim and this Court therefore lacks subject matter jurisdiction. *See* 28 U.S.C. § 1331; *Lyles v. Hughes*, 964 F. Supp. 2d 4, 6, 8 (D.D.C. 2013) (finding no federal question jurisdiction for conversion claim); *Walker v. Dickerson*, No. 10-cv-00322, 2010 WL 2132488, at *1 (D.D.C. May 27, 2010) (finding conversion claim "do[es] not appear to arise under federal law" but "[r]ather . . . appear[s] to sound in tort" and "appear[s] to arise under the common law or the laws of the District of Columbia rather than under federal law"). And Plaintiff's allegation of conversion depends on proving entitlement to "tangible economic benefits" allegedly withheld by the Nation. Am. Compl. ¶ 21; Restatement (Second) of Torts, § 222A(1) (Am. L. Inst. 1965) (tort of conversion requires that the claimant have a legal right to the chattel which is the subject of the conversion). Plaintiff never alleges any federal law that entitles her to any "benefits," other than the 1866 Treaty. As *Nash* explained, "[t]he panoply of rights to which native Cherokees have a just claim, including citizenship, is not, however, set forth in the 1866 Treaty . . . . So the identity and scope of the 'rights' promised by Article 9 must be found in independent sources *such as the Cherokee Nation's constitution and laws*." 267 F. Supp. 2d at 122 (emphasis added). Entitlement to alleged "benefits" provided by the Nation would,

therefore, be governed by the Cherokee Nation laws, regulations, and procedures that establish the Nation's services and programs and define whether and how any Cherokee citizen is eligible for participation in them. Disputes arising from alleged violations of tribal law do not raise a federal question. *See Newtok Vill. v. Patrick*, 21 F.4th 608, 620-21 (9th Cir. 2021) (discussing *Boe v. Fort Belknap Indian Cmty. of Fort Belknap Rsrv.*, 642 F.2d 276, 279 (9th Cir. 1981) (concluding a suit alleging violations of tribal law did not raise a federal question), and *Chilkat Indian Vill. v. Johnson*, 870 F.2d 1469, 1475-76 (9th Cir. 1989) (concluding that a dispute over tribal law between tribe and its members in which tribal jurisdiction was not at issue did not raise a federal question and was more akin to a common law claim)). Therefore, the Court lacks federal question jurisdiction over the Third Claim.

Plaintiff cannot rely on any other bases for subject matter jurisdiction over the Third Claim because she does not allege any other basis for jurisdiction. *See Kialegee Tribal Town v. U.S. Dep't of Interior*, No. 21-cv-00590, 2022 WL 4547528, at *5 (D.D.C. Sept. 29, 2022) ("*Kialegee II*") ("[T]he Court may not draw 'argumentative inferences' in favor of [a plaintiff] or add theories of relief to [a plaintiff's] complaint that are not there.") (quoting *S. Poverty L. Ctr. v. U.S. Dep't of Homeland Sec.*, 605 F. Supp. 3d 157, 163 (D.D.C. 2022)). But even if she could rely on other bases, they are unavailable. Federal courts lack diversity jurisdiction over Indian tribes, which are not "citizens" of any state. *See* 28 U.S.C. § 1332(a); *Mitchell v. Bailey*, 982 F.3d 937, 942 (5th Cir. 2020) (collecting cases showing unanimous conclusion that tribes are not citizens of states for diversity jurisdiction). There is no supplemental jurisdiction for the Third Claim against the Nation, *see* 28 U.S.C. § 1367, because Plaintiff's First Claim fails to state a claim, *see infra* at 17-23, and "[t]here can be no supplemental jurisdiction without original jurisdiction to supplement," *Lyles*, 964 F. Supp. 2d at 8 (finding no supplemental jurisdiction over tort claims, including

conversion, where federal questions were dismissed for failure to state a claim) (alteration in original). Therefore, the Third Claim must be dismissed for lack of subject matter jurisdiction.

II. Plaintiff Fails to State a Claim Against the Cherokee Nation Defendants.

Even if all of Plaintiff's claims against Cherokee Nation Defendants were not barred by the Nation's tribal sovereign immunity and other jurisdictional deficiencies, Plaintiff's claims would still fail because she lacks a cause of action, does not have a right to any particular "tangible economic benefits" under the 1866 Treaty, and totally fails to state a claim against Defendant Chief Hoskin and Doe Defendants. For all these reasons, Plaintiff's claims should be dismissed under Federal Rule of Civil Procedure 12(b)(6).

A. Plaintiff Has No Cause of Action for the First and Third Claims.

"[A] plaintiff must have a valid cause of action for the court to proceed to the merits of its claim." *Gunpowder Riverkeeper v. FERC*, 807 F.3d 267, 273 (D.C. Cir. 2015) (citing *Nat. Res. Def. Council v. EPA*, 755 F.3d 1010, 1018 (D.C. Cir. 2014)). "Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (citing *Touche Rosse & Co. v. Redington*, 422 U.S. 560, 578 (1979)). Plaintiff makes substantive claims against the Nation under the 1866 Treaty and under common law. However, Plaintiff does not plead any cause of action for those claims. Because Plaintiff fails to identify a cause of action, she fails to state a claim. *See Kialegee II*, 2022 WL 4547528, at *5. But even if the complaint could be understood to allege that the substantive laws on which it relies provide causes of action, it would still fail to state a claim.

First, the tort of conversion provides no cause of action. *See Acree v. Republic of Iraq*, 370 F.3d 41, 59 (D.C. Cir. 2004) ("[G]eneric common law cannot be the *source* of a federal cause of action."), *abrogated on other grounds by Republic of Iraq v. Beaty*, 556 U.S. 848 (2009). So there is no cause of action for the Third Claim.

Second, the 1866 Treaty does not provide a cause of action for Plaintiff's First Claim. Although the Supreme Court has recognized that Indian tribes may sue to enforce their rights to possess and occupy their lands, *see, e.g.*, *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 233-36 (1985), and enforce their treaty rights against non-signatories, *see, e.g.*, *Moe v. Confederated Salish & Kootenai Tribes of Flathead Rsrv.*, 425 U.S. 463, 473 (1976), no such claim is raised here, as this is a claim by a private person who is not a party to the treaty, against a signatory Indian tribe. Any cause of action must therefore derive from the text of the treaty itself.

To determine whether there is such a cause of action, the treaty's text must be read against several background principles. "A treaty . . . ordinarily 'depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it,'" and "[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." *Medellín v. Texas*, 552 U.S. 491, 505, 506 n.3 (2008) (alteration in original) (quotations omitted). And "Indian treaties 'must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians . . . .'" *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 (2019) (quoting *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 206 (1999)). What's more, "a proper respect for both tribal sovereignty itself and for the plenary authority of Congress in this area [of Indian affairs] cautions that [courts] tread lightly in the absence of clear indications of legislative intent," and "these considerations of 'Indian sovereignty'" form a "backdrop against which the applicable . . . federal statut[e] must be read." *Martinez*, 436 U.S. at 60 (quoting *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 172 (1973)) (final alteration and ellipsis in opinion).

Nothing in the plain text of Section 9 of the 1866 Treaty says anything to expressly establish a private right of action against the Nation. Indeed, Article 9 "say[s] nothing about

federal court suits against the Cherokee Nation." *Vann II*, 534 F.3d at 749. Thus, a federal court cause of action under the Treaty could only exist if it were implied. *See Martinez*, 436 U.S. at 60 (citing *Cort v. Ash*, 422 U.S. 66 (1975)). A court considers four factors to determine whether a cause of action is implied, and none weighs in favor of an implied right of action here.

The second factor and the "dispositive question" in this analysis is whether there is any indication of legislative intent to create a private remedy or deny one. *Transam. Mortg. Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 24 (1979); *Martinez*, 436 U.S. at 60 n.10; *Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 789 (D.C. Cir. 1983). Plaintiff alleges no facts that would support a conclusion that the United States or the Nation intended to create a private cause of action in the 1866 Treaty. And such allegations, if they existed, would have to overcome the presumption that treaties do *not* create private causes of action. *Medellín*, 552 U.S. at 506 n.3. Nothing in the 1866 Treaty's text overcomes that presumption. The 1866 Treaty says nothing about a private remedy against the Nation in federal court. *See Vann II*, 534 F.3d at 749. Moreover, implying a private right of action here would be a "judicially sanctioned intrusion into tribal sovereignty," *see Martinez*, 436 U.S. at 61, that would be inconsistent with the 1866 Treaty's re-affirmation of the Nation's pre-existing treaty rights, which included the right to self-government, *see* 1866 Treaty, art. 31; Treaty of New Echota, art. 5, Dec. 29, 1835, 7 Stat. 478 ("1835 Treaty") (securing "to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them"). If that were not enough, reading a private right of action into the 1866 Treaty would violate the Indian canons of treaty construction by reading the Treaty *against* the Nation's favor,

by imposing litigation expenses on the Nation that the 1866 Treaty does not expressly allow. *See Martinez*, 436 U.S. at 65 n.19 (noting the expensive burden of federal litigation on tribes).

Further, the limited express remedies that the 1866 Treaty does provide, and the fact it does not provide authorize suits that Congress clearly knew how to authorize for violations of equal rights, are "clear signal[s]" that the Treaty does not imply a cause of action. *See Florida v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1248-49 (11th Cir. 1999). First, the 1866 Treaty establishes that individuals may make claims for damages *without* use of the federal court system. *Compare* 1866 Treaty, art. 3 (Nation agrees to pay compensation for confiscations during the Civil War), art. 28 (United States agrees to pay claims for provisions and clothing furnished to Indian soldiers in Civil War), *and* art. 30 (United States agrees to pay claims by missionaries and missionary societies for loss of property caused by U.S. agents and troops), *with id.* art. 2 (providing that "no right of action" arising from assisting or suppressing the "rebellion" during the Civil War could be heard in federal or tribal courts). The fact the 1866 Treaty says nothing to allow individuals to bring suit in federal court for compensation, even while expressly providing some claims can be brought outside of federal court, indicates the Treaty is not intended to provide a federal court remedy for damages. Second, contemporaneous enactments dealing with Freedmen's rights illustrate that, when it wished to, Congress knew how to authorize federal court suits against officials who violated citizens' equal rights. That is specifically shown by the Civil Rights Act of 1866, ch. 31, 14 Stat. 27, which Congress passed shortly before the Senate ratified the 1866 Treaty. Section 1 of that Act guaranteed equal rights to all citizens—which excluded "Indians not taxed,"—while Section 3 established a private right of action in federal court for "all causes" to enforce the guarantees of Section 1. "Obviously, then, when [the parties to the treaty] wished to provide a private . . . remedy, [they] knew how to do so and [could do] so expressly." *Touche Rosse & Co.*,

442 U.S. at 572. But they did not do so for claims arising under Article 9 of the 1866 Treaty. Thus, the strong negative implication is that the 1866 Treaty was not intended to establish a private cause of action in federal court for Plaintiff's claim.

Since there is no indication of intent to create a cause of action, the Court's inquiry should be "at an end." *Transam.*, 444 U.S. at 24. But, even if they were applicable, the three other factors also weigh against a private right of action. Under the first factor, a court considers whether the plaintiff is "one of the class for whose *especial* benefit the statute was enacted." *Martinez*, 436 U.S. at 60 n.10 (quoting *Cort*, 422 U.S. at 78). The 1866 Treaty was an agreement between sovereigns that was ratified for the benefit of the Nation and the United States. Those sovereigns are the "class" for whose benefit the Treaty was ratified. Moreover, Article 9 established that Freedmen and their descendants would be Cherokee citizens with equal rights, but it did not itself establish any citizen's entitlement to any particular Nation governmental benefit or service, *see Nash*, 267 F. Supp. 3d at 122, and therefore did not establish a "class" entitled to the damages which Plaintiff seeks. *See infra* at 22-23.

As to the third factor, implying a private right of action would not be "consistent with the underlying purposes of the legislative scheme," *Martinez*, 436 U.S. at 60 n.10 (quoting *Cort*, 422 U.S. at 78). The relevant "underlying purposes" of the 1866 Treaty, as shown by its plain terms, were to resolve definitively inter-sovereign conflicts related to or caused by the Civil War, confirm the Nation's abolition of slavery as a matter of tribal law, provide limited methods for those affected by the war to obtain compensation described in the Treaty, and preserve the Nation's pre-existing treaty rights, which included the right to self-government and to pass laws governing its members and people associated with the Nation. *See supra* at 19. The establishment of a private

right of action in federal court against the Nation or its officials would not be consistent with these purposes.

As to the fourth and final factor, the Court is to consider whether the cause of action is "one traditionally relegated to state [or tribal] law, in an area basically the concern of the State [or tribes], so that it would be inappropriate to infer a cause of action based on solely on federal law[.]" *Martinez*, 436 U.S. at 60 n.10 (quoting *Cort*, 422 U.S. at 78) (alterations in opinion). That is so here. Tribes have always been understood to be "separate people, with the power of regulating their internal and social relations," *United States v. Kagama*, 118 U.S. 375, 381-82 (1886), and an assertion of the right to obtain benefits from a tribe based on tribal citizenship certainly concerns a tribe's internal relations and laws, as the *Nash* court itself recognized, 267 F. Supp. 3d at 122. The Nation's treaty-protected power to pass legislation and exercise authority over its citizens and govern its affairs was confirmed by the 1866 Treaty. *See* 1866 Treaty, art. 31; 1835 Treaty, art. 5; *see also Choctaw Nation v. Oklahoma*, 397 U.S. 620, 635 (1970) (finding that in many respects the Cherokee Nation was "promised virtually complete sovereignty over their new lands"). The exercise of non-tribal jurisdiction over disputes concerning tribal law "infringes upon tribal law-making authority." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987). Implying a private right of action for Plaintiff's 1866 Treaty claim would, therefore, interfere with an area "traditionally relegated" to the Nation's jurisdiction, and that was confirmed to be within the Nation's jurisdiction by solemn treaty promises.

B. Plaintiff's First and Third Claims Fail to State a Claim.

Plaintiff also fails to state a claim against the Nation. Plaintiff alleges that "[a]s a result of the Treaty of 1866, the native Cherokees have enjoyed a substantial economic benefit from the Cherokee Nation," Am. Compl. ¶ 21, and "[a]s a direct and proximate cause of Defendant Cherokee Nation's violation of the Treaty of 1866, Plaintiff[] suffered economic damages of more

than Ninety Million Dollars," *id.* ¶ 27. And Plaintiff's conversion claim relies on the allegation that "[t]he Treaty of 1866 gives the Plaintiff[] the rights to the funds and other economic tangibles being retained by the Defendant Cherokee [Nation]." *Id.* ¶ 43.

However, Plaintiff points to no provision of Article 9, or any other part of the 1866 Treaty, that created "economic benefit" for Cherokee citizens that would establish that Plaintiff or her relatives had a legal right to the alleged "economic benefit." In fact, with only a few narrow exceptions inapplicable here,[12] the 1866 Treaty does not require the Nation to establish any programs or provide any services or benefits to anyone. The availability of, and eligibility for, such services or benefits is established under other enactments that are neither part of nor mandated by the 1866 Treaty, as "the identity and scope of the 'rights' promised by Article 9 must be found in independent sources . . . ." *Nash*, 267 F. Supp. 3d at 122. But Plaintiff's First Claim does not allege that the Nation violated any law other than the 1866 Treaty.

Nor does Plaintiff allege facts to show that she, or the heirs on whose behalf she is suing, would have been entitled to any services or programs provided by the Nation under its laws, regulations, and procedures. *See FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 316 (1993) ("[S]cope-of-coverage provisions are unavoidable components of most economic or social legislation."). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal*, 556 U.S. at 679. Because the First and Third Claims lack necessary legal and factual support, they fail to state a claim and should be dismissed.

[12] *See* 1866 Treaty, art. 14 (requiring the Nation to grant "use and occupancy" of up to 160 acres of land to "every society or denomination which has erected, or which with the consent of the [Cherokee] national council may hereafter erect, buildings with the Cherokee country for missionary or educational purposes"); *id.* art. 26 ("In case of hostilities among the Indian tribes, . . . the "party or parties commencing the same shall . . . make reparation for the damages done.").

C. Plaintiff Fails to State Any Claim against Defendant Chief Hoskin and John Doe Defendants.

Although Plaintiff names Defendant Chief Hoskin and John Doe Defendants, Plaintiff makes no claims against them. *See* Am. Compl. 5, 9 (stating First and Third Claims are "[a]gainst Defendant Cherokee Nation only"); *id.* at 7 (making Second Claim against federal defendants only). Therefore, Plaintiff literally fails to state a claim against Defendant Chief Hoskin and John Doe Defendants. The suit against those Defendants also fails to comply with Federal Rule of Civil Procedure 8(a)(3), which requires "a demand for the relief sought." *See Watlington v. Fox*, No. 09-cv-01991, 2009 WL 3483986, at *1 (D.D.C. Oct. 21, 2009) (dismissing a civil complaint "for failure to comply with minimum requirements of Rule 8(a)" where it, *inter alia*, "fail[ed] to identify the nature of the civil claim against the defendants"). Defendant Chief Hoskin and the John Doe Defendants should therefore be dismissed from this suit.

III. Plaintiff's Claims are Subject to Tribal Court Exhaustion.

Finally, Plaintiff's claims require adjudication of questions of the 1866 Treaty and tribal law, and they are asserted against the Nation and its officials. So, even if this Court could be plausibly said to have jurisdiction (and it does not, for the reasons described above), the doctrine of tribal court exhaustion would require that her claims be fully litigated in the Cherokee Nation's legal system before they could be brought in this Court. Plaintiff failed to exhaust available remedies in the Nation's forums before initiating this suit, and so this suit should be dismissed for that reason, as well.

"[M]otions to dismiss for failure to exhaust tribal remedies are considered under Federal Rule of Civil Procedure 12(b)(6)." *Muscogee Creek Indian Freedmen Band, Inc. v. Bernhardt*, 385 F. Supp. 3d 16, 20 (D.D.C. 2019) (citing *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985)). "When a tribal court has jurisdiction over a claim, a plaintiff

must exhaust tribal remedies prior to bringing suit in federal court." *Id.* at 21 (citing *Nat'l Farmers Union*, 471 U.S. at 857). The Nation's courts have jurisdiction over claims that involve the interpretation and application of Cherokee Nation law, as we now describe, and so Plaintiff must first exhaust her remedies in the Nation's courts.

Plaintiff seeks a determination that she and her relatives are entitled to "tangible economic benefits" allegedly made available to Cherokee Nation citizens and alleges that those "benefits" were withheld from her and others because of their status as descendants of a Cherokee Freedman. Although Plaintiff's claim alleges the 1866 Treaty as a basis for entitlement to such "benefits," the *Nash* court explained that "the identity and scope of the 'rights' promised by Article 9 must be found in independent sources such as the Cherokee Nation's constitution and laws." *Nash*, 267 F. Supp. 2d at 122. And the *Nash* decision has been implemented as a matter of Cherokee Nation law, pursuant to orders of the Cherokee Nation Supreme Court, which describe the scope of the Nation's consent to the judgment and govern the terms and conditions of Cherokee Nation statute, regulations, rules, and policies. *See Effect of Nash I*, 15 Am. Tribal Law at 103; *Effect of Nash II*, 16 Am. Tribal Law at 273-74, 276. The legal impacts of the *Effect of Nash* decisions and *Nash* itself on any claims against the Nation therefore necessarily require resolution of questions of tribal law.

The interpretation and application of the Cherokee Nation's laws and the 1866 Treaty are within the Cherokee Nation courts' jurisdiction. *See* Cherokee Nation Code, tit. 20, ch. 2, § 11 ("Cherokee Nation District Court" has "general jurisdiction to hear cases and controversies arising under the Constitution, treaties and laws of the Cherokee Nation" and its decisions "will be subject

to review by the Cherokee Nation Supreme Court . . . ."); *see also id.* § 24.[13] And the Nation's courts have territorial jurisdiction over Plaintiff's claims, as the alleged actions and decisions by Cherokee Nation Defendants in this case would necessarily have been made on the Cherokee Nation Reservation, where the Nation resides and governs, and the Nation's courts have territorial jurisdiction over Indian country within the Nation's treaty boundaries. *Id.* § 25; *see* 18 U.S.C. § 1151(a) (defining Indian country to include all the land within the boundaries of an Indian reservation). If Plaintiff's claims against the Nation were brought in Cherokee Nation court, they might well fail for pleading deficiencies or be barred for other reasons. But because Plaintiff's claims deal with the interpretation and application of tribal laws, the Cherokee Nation's forums must have the first opportunity to make that determination.

There are four recognized exceptions to tribal court exhaustion, and a party must make a "substantial showing of eligibility" to invoke any of the four. *See Muscogee Creek Indian Freedmen*, 385 F. Supp. 3d at 22 (quoting *LECG, LLC v. Seneca Nation of Indians*, 518 F. Supp. 2d 274, 277 (D.D.C. 2007)); *id.* at 27 (quoting *Norton v. Ute Indian Tribe of Uintah & Ouray Rsrv.*, 862 F.3d 1236, 1243 (10th Cir. 2017)). None of these exceptions are available to Plaintiff, as we now show.

Under the first exception, exhaustion is not required when the "assertion of tribal jurisdiction is to harass or is in bad faith." *Id.* at 22; *see Nat'l Farmers Union*, 471 U.S. at 856 n.21 (citing *Juidice v. Vail*, 430 U.S. 327, 338 (1977)). Plaintiff never alleges circumstances that would demonstrate "bad faith" by the Nation's courts. *Cf. Juidice*, 430 U.S. at 338. And none

[13] The full Cherokee Nation Code with current amendments is a public record, subject to judicial notice, *see supra* at 1 n.2, 6, and is available here: https://attorneygeneral.cherokee.org/tribal-code/.

exist, as Cherokee Nation Defendants here assert tribal jurisdiction in response to a claim to which they have not consented to ensure that tribal law is first interpreted by tribal courts.

The second exception—"when the action is patently violative of express jurisdictional prohibitions," *Muscogee Creek Indian Freedmen*, 385 F. Supp. 3d at 22 (quoting *LECG, LLC*, 518 F. Supp. 2d at 277) (internal quotation marks omitted)—is also inapplicable. "The question is not whether Plaintiff[] would be able to file this exact lawsuit in tribal court. Instead, the question is whether the tribal administrative and judicial process would *be able to* grant Plaintiff[] the relief which [she] request[s]." *Id.* at 26 (emphasis added). The Plaintiff does not allege any express prohibition on the Nation's jurisdiction that would apply in this circumstance, and the Cherokee Nation's courts clearly have the ability to grant relief against the Nation and Nation officials, as they did in the *Effect of Nash* litigation. The presence of federal defendants in the suit does not excuse exhaustion under the second exception because the nature of the claims—seeking "tangible economic benefits" from the Nation—is "of the type which should first be decided through the tribal administrative and judicial process, regardless of whom Plaintiff has sued in federal court." *Id.* at 24.[14]

The third exception—where exhaustion would be futile "because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction," *Muscogee Creek Indian Freedmen*, 385

[14] Although Judge Kennedy concluded in his decision in *Vann v. Kempthorne*, 467 F. Supp. 2d 56, 73 (D.D.C. 2006) ("*Vann I*"), *reversed in part on other grounds*, *Vann II*, 534 F.3d at 756, that the Cherokee Nation courts would lack jurisdiction over a case making Administrative Procedure Act ("APA") claims relating to Freedmen's citizenship rights, that decision is distinguishable for the same reasons that Judge Kollar-Kotelly distinguished it under the second exception in *Muscogee Creek Indian Freedmen*, 385 F. Supp. 3d at 22-23. Unlike *Vann I*, Plaintiff in this case has sued the Nation and Nation officials, whom Plaintiff could sue in Cherokee Nation court. *Id.* at 23 (discussing *Vann I*, 467 F. Supp. 2d at 59-60). And in *Vann I*, the plaintiffs only sought relief that could be issued by the Secretary of the Interior, whereas here Plaintiff seeks relief from the Nation. *See id.* (discussing *Vann I*, 467 F. Supp. 2d at 60).

F. Supp. 3d at 22 (quoting *LECG, LLC*, 518 F. Supp. 2d at 277)—is obviously inapplicable. The Cherokee Nation District Court has adopted the Federal Rules of Civil Procedure as modified by its own Rules, which allow for motions to dismiss for lack of jurisdiction. *See* Cherokee Nation Code, tit. 12, § 1(A); *id.* tit. 20, app. II, R. 123(1), (2). And its rulings can be appealed to the Cherokee Nation Supreme Court. *See id.* tit. 20, app. I, R. 50(A). These rules provide ample opportunity to challenge tribal court jurisdiction.

The fourth exception applies where exhaustion of tribal remedies is "futile" and serves no purpose other than delay, which one court in this District has reasoned only applies "when exhaustion is 'clearly useless'" because no "tribal remedy exists" and therefore resort to tribal court is merely "hypothetical," *Muscogee Creek Indian Freedmen*, 385 F. Supp. 3d at 27-28 (quoting *Commc'ns Workers of Am. v. AT&T Co.*, 40 F.3d 426, 432 (D.C. Cir. 1994)) and citing *Norton*, 862 F.3d at 1243), and which the Tenth Circuit has explained applies where "the tribal court lacks jurisdiction so that the exhaustion requirement would serve no purpose other than delay," *Chegup v. Ute Indian Tribe*, 28 F.4th 1051, 1061 (10th Cir. 2022) (quoting *Norton*, 862 F.3d at 1243). Plaintiff alleges no facts to show that the Nation's courts are unavailable to her or otherwise would lack jurisdiction such that exhaustion would serve no purpose other than delay, and the Nation's own laws and record of judicial proceedings show that "a tribal remedy exists and is more than hypothetical." *Muscogee Creek Freedmen*, 385 F. Supp. 3d at 28.

Again, Cherokee Nation Defendants stress that Plaintiff's suit might fail in Cherokee Nation courts for pleading or other defects, just as this case fails for pleading defects under Federal Rule of Civil Procedure 12. But under the tribal exhaustion rule, that does not excuse Plaintiff from filing in Cherokee Nation courts first.

CONCLUSION

For the foregoing reasons, Plaintiff cannot bring this suit against Cherokee Nation Defendants, and the First and Third Claims of Plaintiff's Complaint should be dismissed.

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Respectfully submitted,

By: */s/ Frank S. Holleman*

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CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2023, I electronically filed the above and foregoing document with the Clerk of Court via the ECF System for filing and mailed a copy by first class mail to:

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