UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LUCIA PHARR IDNTON, Individually and on behalf of the Heirs of Lumn W. Pharr and Beulah Pharr, deceased, Descendants of the Cherokee Nation,

Plaintiffs,

vs.

THE CHEROKEE NATION, 17846 S. Muskogee Avenue Tahlequah, OK 74464; and

CHUCK HOSKINS, JR., in his individual capacity as Chief of the Cherokee Nation, 17846 S. Muskogee Avenue Tahlequah, OK 74464; and

JOHN DOES 1-10, in their individual capacities as past chiefs of the Cherokee Nation, Address Unknown, to be served By publication; and et. al.

Defendants.

Civil Action Number: 1:23-cv-01422-RDM

PLAINTIFF'S MEMORANDUM AND REPONSE TO DEFENDANTS THE CHEROKEE NATION, CHUCK HOSKIN, JR., AND JOHN DOES' MOTION TO DISMISS

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NOW COME PLAINTIFFS, by and through the undersigned attorneys, submitting this **MEMORANDUM AND REPONSE TO DEFENDANTS THE CHEROKEE NATION, CHUCK HOSKIN, JR., AND JOHN DOES' MOTION TO DISMISS** [Docket Entry No. 16] [hereinafter collectively referred to as "Defendants", unless otheiwise stated.

PROCEDURALANDFACTUALBACKGROUND:

PLAINTIFF, Lucia Pharr Hinton, individually and as a representative of the heirs of Lumn W. Pharr and Beulah Pharr, her deceased grandparents who were descendants of the Cherokee Nation, commenced this case on November 11, 2022, by the filing of federal complaint, seeking compensatory damages and injunctive relief for wrongs committed by the Defendants in violation of the Treaty of 1866, 42 U.S.C. § 1983, and common law. As a legal and factual backdrop to her claims, Plaintiff seeks to enforce the judgment that was rendered by the Honorable Senior United States District Judge Thomas F. Hogan, of this Court, in a case known as *The Cherokee Nation v. Nash et. al, Case No. 13-01313(TFH)* [hereinafter referred to as the "Nash Case"], which held that *Article 9 of the Treaty of 1866* between the United States and Cherokee Nation entitles Plaintiff as a descendant of Cherokee Freedmen to "all the rights native Cherokees." Judge Hogan's order was rendered on August 30, 2017. Importantly, on July 20, 2018, Judge Hogan entered an Order, on Defendant Cherokee's Motion, entering final judgement [hereinafter referred to as the "Nash's Final Judgment"]. A copy of the Nash Final Judgment is attached to this Memorandum as Attachment Number 1[1] In Nash's Final Judgment, this Court expressly retained jurisdiction in the matter to enforce the Final Judgement which addressed whether the

[1] In determining whether a complaint fails to state a claim, this Court may consider only the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which the Court may take judicial notice. *EEOC v. St. Francis Xavier Parochial Sch., 117 F3d 621, 624-25 (D.C. Cir. 1997).*

descendants of the Cherokee Freedmen[2] have the same rights as the native Cherokees. Since the time of Judge Hogan's Final Judgment, Defendant Cherokee Nation has done absolutely nothing to make the Plaintiffs financially and emotionally whole because of its intentional discrimination that was the bedrock of Judge Hogan's Final Judgment. Moreover, the United States violated Plaintiffs' rights under 42 U.S.C. § 1983 after they were clearly established by Judge Hogan's order-rights that were clearly established by the time Judge Hogan issued the ruling in the *Nash Case.* To that end, Plaintiffs seek to hold the federal United States officials accountable for their deliberate indifference, which also redress the wrongs committed the Defendants.

For additional facts, Plaintiffs will refer to the Complaint as necessary to support the arguments contained herein.

With this introduction of the case, Plaintiffs incorporate by reference the factual allegations contained in the Complaint and will refer to such facts with more specificity as necessary in the arguments stated herein.

LEGAL STANDARDS:

Defendants seek to summarily dismiss Plaintiffs' Complaint under two separate federal rules of civil procedure: (1) *Rule 12(b)(l), Fed. R. Civ. P* and (2) *Rule 12(b)(6), Fed. R. Civ. P* "The distinctions between *12(b)(l)* and *12(b)(6)* are important and well understood. *Rule 12(b)(l)* presents a threshold challenge to the court's jurisdiction, whereas 12(b)(6) presents a ruling on the merits with res judicata effect". *Haase v. Sessions, 835 F2d 902, 906 (D.C. Cir. 1987);see also, e.g., Exchange Nat'! Banko/Chicago v. Touche Ross Co.,544 F2d 1126, 1130-31 (2d Cir. 1976).* "In [a] *12(b)(l)* proceedings, it has been long accepted that the judiciary may make 'appropriate inquiry' beyond the pleadings to 'satisfy itself on authority to entertain the case.' *Gordon v.*

[2]Cherokee Freedmen are former slaves and their descendants. Plaintiffs are Cherokee Freedmen.

National Youth WorkAlliance,675 F2d 356, 362-63 (D.C. Cir. 1982) (citations omitted); see, e.g., Land v. Dollar,330 U.S. 731, 735 n. 4, 67 S.Ct. 1009, 1011 n. 4, 91 L.Ed. 1209 (1947)("[W]hen a question of the District Court's jurisdiction is raised, either by a party or by the court on its own motion, … the court may inquire, by affidavits or otherwise, into the facts as they exist." (citations omitted)).

The legal standard for resolving motions under these two rules are stated as follows:

(]) Rule 12(b)(l)-Lack of Jurisdiction

When a defendant brings a Rule 12(b)(1) motion to dismiss, the plaintiff must demonstrate by a preponderance of the evidence that the court has subject-matter jurisdiction to hear his claims. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992); *U.S. Ecology, Inc. v. U.S. Dep't of Interior,* 231 F.3d 20, 24 (D.C. Cir. 2000). "Because subject-matter jurisdiction focuses on the court's power to hear the plaintiffs claim, a Rule 12(b)(l) motion imposes on the court an affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority." *Grand Lodge of Fraternal Order of Police v. Ashcroft,* 185 F.Supp.2d 9, 13 (D.D.C. 2001). As a result, "the plaintiffs factual allegations in the complaint … will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to state a claim." *Id.* at 13-14 (cleaned up).

In policing its jurisdictional bounds, the court must scrutinize the complaint, treating its factual allegations as true and granting the plaintiff the benefit of all reasonable inferences that can be derived from the alleged facts. *See, Jerome Stevens Pharms., Inc. v. FDA, 402 F.3d 1249, 1253 (D. C. Cir. 2005).* The court, however, need not rely "on the complaint standing alone," as it may also look to undisputed facts in the record or resolve disputed ones. *See, Herbert v. Nat'! Acad. of Sci., 974 F.2d 192, 197 (D.C. Cir. 1992) (citations omitted).* By considering documents

outside the pleadings on a *Rule 12(b)(l)* motion, a court does not convert the motion into one for summary judgment. *Haase v. Sessions,* 835 F.2d 902, 905 (D.C. Cir. 1987) (emphasis in original).

(2) Rule 12(b)(6)-Failure to State a Claim:

To survive a motion to dismiss under *Rule 12(b)(6),* a complaint must "state a claim upon which relief can be granted." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 552 (2007).* Although "detailed factual allegations" are not necessary to withstand a *Rule 12(b)(6)* motion, *Id.* at 555, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Twombly,* 550 U.S. at 570). When considering a motion to dismiss, a court must constme a complaint liberally in the plaintiffs favor, "treat[ing] the complaint's factual allegations as true" and granting the plaintiff "the benefit of all inferences that can be derived from the facts alleged." *Sparrow v. United Air Lines, Inc., 216 F.3d 1111, 1113 (D.C. Cir. 2000) (quoting Schulerv. United States, 617 F.2d 605, 608 (D.C. Cir. 1979)); accord Kowal v. MCI Commc'ns Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994).* Although a plaintiff may survive a Rule 12(b)(6) motion even if "'recovery is very remote and unlikely, '" the facts alleged in the complaint "must be enough to raise a right to relief above the speculative level." *Twombly, 550 U.S. at 555-56 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); see also, Bywalski v. United States, Civil Action 20-265 (FYP) (D.D. C. May 13, 2022).*

ARGUMENTS:

A. THIS COURT HAS JURISDICTION OVER THE PLAINTIFFS' CLAIMS AS ASSERTED AGAINST THE DEFENDANTS BECAUSE THE INDIAN TRIBE WAIVED ITS SOVEREIGN IMMUNITY IN THE PRESENT CASE.

The Defendants' Motion to Dismiss unleashes a three-pronged procedural attack in their efforts to summarily dismiss the Plaintiffs' Complaint. Defendants' first procedural attack is

that this Court does not have jurisdiction[3] in the case because the claims are barred by the doctrine of sovereign immunity. "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez, 436 US. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978).* However, Indian tribes may be sued where there is an express and unequivocal waiver of immunity by the tribe or abrogation of tribal immunity by Congress. *See Burlington N. R.R. Co. v. Blackfeet Tribe, 924 F2d 899, 901 (9th Ci,:1991), cert. denied,505 US. 1212, 112 S. Ct. 3013, 120 L.Ed.2d 887 (1992).* A waiver of sovereign immunity must be unequivocally expressed. *Santa Clara Pueblo, 436 US. at 58, 98 S. Ct. 1670 (internal quotation marks and citations omitted).*

Based upon the authorities cited above, this Court has jurisdiction, despite sovereign immunity, because the Defendant Indian tribe expressly waived its sovereign immunity on March 23, 2009, when it invoked this Court's jurisdiction in the Nash Case. The Defendants concede in its Memorandum that the Defendants expressly waived "the Nation's trial sovereign immunity for the limited purpose of litigating the interpretation and continued validity of Article 9 of the 1866 Treaty." *See, Memorandum in Support of Cherokee Nation Defendants' Motion to Dismiss, Docket Entry No. 16-1, page 10 of 38.* As a further undermine to its defense, the Defendants admitted in this same Memorandum that the Tribal Council of the Cherokee, with Resolution 22-09, approved the Nash Case litigation 'to dete1mine 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.' *Id.*

[3]Defendants do not specify whether sovereign immunity deprives the Court of subject matter or personal jurisdiction. However, a fair reading of the Defendants' Memorandum tends to suggest that they are arguing that sovereign immunity deprives the Court of subject matter and personal jurisdiction.

At this procedural juncture, Plaintiffs contend that the two admissions by the tribal Defendant are outcome determinative as to whether the Cherokee Nation expressly waived sovereign immunity that has given rise to the lawsuit that is now before the Court. Moreover, the Nash Final Judgment further undermines the Defendants' "sovereign immunity defense". For example, the Nash Final Judgment stated the following, in part:

1. "Moreover, any Cherokee Freemen descendent 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"** [emphasis added]. *See, Nash Final Judgment, p. 2.*
2. "This Court retain[ed] jurisdiction to enforce this Final Judgment, which addresses whether descendants of Cherokee Freedmen have the same rights as descendants of native Cherokees. Nothing herein however is intended to change or affect the existing rights and remedies available to Cherokee citizens, both Freedmen and native Cherokees, before tribal administrative and judicial bodies, and any requirements for the exhaustion of those remedies." *Id. at paragraph 3.*
3. "The issue of the citizenship rights of Cherokee Freedmen has been litigated for many years and now that a ruling has been made, all citizens of the Cherokee Nation are entitled to a final judgment not only for closure but **also to faciUtate the implementation and enforcement of the Court's ruling.** Any claims that remain between the Freedmen and the Federal Defendants can be litigated fully independent of the claims involving the Cherokee Nation and its officers" [emphasis added]. *Id. at 5.*

Additionally, Plaintiffs contends that Congress also waived the Cherokee Nations sovereign immunity as pertains to the freedmen and their ancestors suing in the United States federal courts. Judge Hogan found the following:

> The following year, on December 19, 1891, the United States negotiated an agreement with the Cherokee Nation by which the Cherokee Nation agreed to convey the Cherokee Outlet to the United States for $8,595,736.12. Cherokee Nation, 270 U.S. at 480-81. That agreement was approved by the Cherokee Nation's National Council in 1892 and was ratified by Congress via a March 3, 1893, appropriations act, which provided for the immediate availability of $295,736 and payment by annual installment of the remaining $8,300,000. Interior's Mot. for Summ. J. Ex. 18, Act Making Appropriations for Current & Contingent Expenses, & Fulfilling Treaty Stipulations with Indian Tribes, for Fiscal Year Ending June 30, 1894, 27 Stat. 612, 640, 641 (1893), ECF No. 234-18. The March 3, 1893 appropriations act also stated in relevant part that, of the appropriated funds being paid for the Cherokee Outlet, **'a sufficient amount shall also be retained in the Treasury to pay the freedmen who are citizens of the Cherokee Nation[] or their legal heirs and representatives such sums as may be determined by the courts of the United States to be due them" and "[n]or shall anything herein be held to abridge or deny to said freedmen any rights to which they may be entitled under existing laws or treaties'** [emphasis added]

See, Memorandum Opinion, by Judge Hogan, in the *Nash Case,* Docket Entry 248, filed in this Court in the Nash Case 8/30/2015, pages 26-27. Therefore, based on the clear language of27 Stat. 612, as citied above, it is clear our Congress waived sovereign immunity and gave this Court the authority to determine the sums due to the Plaintiffs and her the freedmen's descendants.

In light of the Final Nash Judgment and 27 Stat. 612, it is disingenuous for the Defendants to seek this Court's judicial assistance in initially resolving the "Freedmen issue" by requesting that the doors of the Courthouse to be open to them, and then once an adverse final judgment has been rendered that attempt to hide behalf sovereign immunity with a demand that the doors to the Courthouse be closed to prevent the Freedmen from receiving there full cup of justice. Plaintiffs submit that the Nash Final Judgment anticipated Defendants' legal trickery and included provisions to keep the Courthouse doors open to ensure that the Nash Final Judgment can be enforce.

B. LUCIA P. HINTON HAS ARTICLE III STANDING AND THIRD-PARTY STANDING TO SUE FOR HER RELATIVE DESCENDANTS.

Defendants argue that the Plaintiff Lucia P. Hinton [hereinafter referred to as "Hinton" has failed to show that she has standing to sue on behalf of absent third parties. Third-party standing is available to plaintiffs who, in addition to their own Article III standing, can successfully demonstrate a "close relationship" with the third parties whose rights they assert and some "hindrance" to the third parties pursuing their own rights. *Kowalski,* 543 U.S. at 130, 125 S.Ct. 564; *see also Powers v. Ohio,* 499 U.S. 400,411, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); *Am. Immigr. Laws. Ass'n v. Reno,* 199 F.3d 1352, 1361-62 (D.C. Cir. 2000); *Lepelletierv. FDIC,* 164 F.3d 37, 42--43 (D.C. Cir. 1999). A fair reading of Defendants' Memorandum will lead this Comi to conclude unequivocally that the Defendants do not challenge Mrs. Hinton's own Article III standing. *See, Defendants Memorandum,* pp. 20-38 to 23-38. Therefore, this Court analysis need only to focus on Mrs. Hinton's third-party standing.

Under the authorities cited above, this Court must find allegations of "close relationship" and "hindrance to the third parties pursuing their own rights. *Kowalski,* 543 U.S. at 130. Plaintiff Hinton meets both standards. First, Plaintiff Hinton asserts claims individually and on behalf of the Heirs of Lumm W. Pharr and Beulah Pharr. On the face of the complaint, Plaintiff Hinton alleges that she has a close relationship with the third party represented plaintiffs, i.e., she is related to all of the represented plaintiff through the bloodline of her grandparents. *Complaint, paragraph 3.* She brings this lawsuit individually and on behalf of the heirs of grandparents. This biological connection is sufficient to support the "close relationship" element. As to the "hindrance element", it is reasonable for this Court to infer from the allegations that the heir of Lumn and Beulah Pharr will be tedious to dete1mine, with the realization that some of the descendants have passed, leaving issues from their bloodline. This realization is sufficient for the court to conclude that the

descendants are hindered in pursuing their own action. Moreover, this Court should also conclude that the complexity of the legal issues themselves constitutes a hindrance for the known and unknown heirs of Plaintiff Hinton's grandparents. To that end, Defendants' third-party standing defense has no merit, and this Court should reject it at this procedural juncture.

C. THE COURT LIKEWISE HAS SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' THIRD CLAIM.

Defendants assert that the Court does not have jurisdiction over the Plaintiffs' Third Claim. The gravamen of Defendants' argument is that the Court does not have subject matter jurisdiction because the Third Claim is not a federal claim.[4] This argument is misplaced. It is established jurisprudence that this Court has pendent/supplemental subject matter jurisdiction over purely state law claims derived from the same "common nucleus of operative fact," *United Mine Workers of Am. v. Gibbs, 383 US. 715,725, 86S.Ct.1130, 16L.Ed.2d218(1966).* The conversion claim in the case before this Court alleges claims derived from the same "common nucleus of operative fact" which gives rise to the Plaintiffs' federal claims based upon the 1866 Treaty[5].

D. PLAINITFFS' FIRST AND THIRD CLAIMS SURVIVE DEFENDANTS' 12(b)(6) CHALLENGE.

Plaintiffs Complaint asserts three separate claims for relief, with the First and Third Claims being asserted against the Defendants. In the First Claim, Plaintiff seek to recover economic damages from the Defendant for their violation of the Treaty of 1866. Specifically, the Plaintiffs

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[4]In this argument, Defendants make other disjointed, piece-meal arguments. However, the gravamen of the Defendants' argument is that the Third Claim, one for conversion, is not a federal claim.

[5]Defendants argue that supplemental jurisdiction does not exist because the First Claim fails to state a cause of action. This argument would be correct only if the Defendants prevail on its Motion to Dismiss the First Claim. The reverse is also true: supplemental jurisdiction exists if the Motion to Dismiss is denied.

allege that in 2007, Defendants amended its constitution "in on or about 2007, Defendant Cherokee Nation amended its constitution 'to limit citizenship in the Cherokee Nation to only those persons who were descended from individuals who appeared on the Dawes Rolls as Cherokee, Shawnee or Delaware by blood" [hereinafter referred to as the "2007 Amendment"]. *Complaint, paragraph 22.* Plaintiff further alleges that "[a]s a direct and proximate result of the 2007 Amendment, Plaintiffs were constitutionally denied all economic benefits that the native Cherokee received from the Defendant Cherokee, from 2007 to present, all in a excess Ninety Million Dollars ($90,000,000.00). *Complaint, paragraph 24.* "Moreover, from the inception of the Treaty of 1866 to the 2017, Defendant Cherokee Nation administered the benefits emanating, directly or indirectly from the Treaty of 1866, in a biased and discriminatory way that excluded the benefits from flowing to the Plaintiff. . ." *Complaint, paragraph 24.* Using Judge Hogan's findings and holdings in the Nash Cash, Plaintiff asserts that the factual allegations as alleged above gives them a claim against the Cherokee Nation.

1. The First Claim states a claim for relief under a treaty.

Plaintiffs' First Claim rests upon the interpretation of the Treaty of 1866 and the subsequent findings by this Court in the Nash Decision. Defendants' position is that the Plaintiffs cannot state a viable claim under the Treaty of 1866. This contention is incorrect under the controlling authority of the United States Constitution as interpreted by this Court. Treaty clauses must confer such rights for individuals to assert a claim "arising under" them. *See U.S. Const. art. III, § 2, clause 1; 28 U.S.C. § 1331* ["The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, **or treaties** of the United States (emphasis added0}. "Whether a treaty clause does create such enforcement rights is often described as part of the larger question of whether that clause is "self-executing." *Comm. of U.S. Citizens in Nicaragua v. Reagan,* 859

F.2d 929, 937-38 (D.C. Cir. 1988). This Court "has noted that, in 'determining whether a treaty is self-executing' in the sense of it creating private enforcement rights, 'courts look to the intent of the signatory parties as manifested by the language of the instrument.'" *Diggs v. Richardson, 555 F.2d 848, 851 (D.C. Cir. 1976); see also, Johnson v. Quander, 370 F. Supp. 2d 79, 100-01 (D.D.C. 2005).* "Unless a treaty is self-executing, it must be implemented by legislation before it gives rise to a private cause of action." *Mannington Mills, Inc. v. Congoleum Corp., 595 F2d 1287, 1298 (3d Cir. 1979); see also, Hanoch Tel-Oren v. Libyan Arab Republic, 517 F Supp. 542, 547 (D.D.C. 1981), ajfd, 726 F2d 774 (D.C. Cir. 1984).*

In sum, contrary to the Defendants contention, a viable claim can be stated under a treaty if the treaty is self-executing or implemented by legislation. In this case, both situations exist. The clear language of the Treaty of 1866 implicitly suggests that the Court gave a private right of action in the treaty. For example, the Treaty of 1866 unilaterally confers benefits to the Freedmen. For Congress to give such benefits to the former slaves, then, provides them no judicial means to enforce such rights is illogical. Judge Hogan recognized such illogical contention when he noted in the Nash Memorandum Opinion that Congress gave Plaintiffs and the freedmen access to the Courts when Congress required that 'a sufficient amount shall also be retained in the Treasury to pay the freedmen who are citizens of the Cherokee Nation[] or their legal heirs and representatives such sums as may be determined by the courts of the United States to be due them" and "[n]or shall anything herein be held to abridge or deny to said freedmen any rights to which they may be entitled under existing laws or treaties' *See, Memorandum Opinion,* by Judge Hogan, in the *Nash Case* [nothing that such requirement was promulgated by 27 Stat. 612 in 1893.

At this stage, the issue is not whether the Court believes that Plaintiffs will prevail on the merits of the case-the issue is whether the Plaintiff can prevail under any theory if he proves his

allegations as alleged in the Complaint. Based upon the facts alleged and the authorities cited, Plaintiffs has stated a cognizable claim under the Treaty of 1866.

2 The Second Claim states a claim for relief under a treaty.

Plaintiffs' Second Claim against the Defendants is self-styled as a conversion claim. It is well accepted that the "label which a plaintiff applies to a pleading does not determine the nature of the cause of action which he states." *Aktiebolaget Bofors v. United States, 194 F2d 145, 148 (D.C. Cir. 1951). see also, Johnson v. United States,547 F2d 688 (D.C. Cir. 1976).* In paragraphs 42 through 43 of the Complaint, Plaintiffs allege "[n]otice of this lawsuit is a demand to Defendant Cherokee Nation to release any and all funds claimed by the Plaintiffs. The Defendant Cherokee Nation is unlawfully and without legal justification committing an unauthorized detention of funds and other economic tangibles owned by the Plaintiff. The Treaty of 1866 gives the Plaintiffs the rights to the funds and other economic tangibles being retained by the Defendant Cherokee. Liberally reading these allegations, as the Court is required to due at this stage of the litigation, one could fairly infer that the Plaintiff is alleging that the Defendants are in possession of the funds owed to the Plaintiffs, and that the Plaintiff an equitable remember, such as a constructive trust or to obtain possession of the funds being held by the Defendants.[6]

Interpreting Plaintiffs' Third Claim as a constructive trust case, seeking injunctive relief, would cause this Court to unequivocally conclude that the Third Claim for relief can easily be resolved un the *Ex parte Young,* 209 U.S. 123 (1908). This Comi held in 2008 the following:

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[6]Defendant stands by its conversion theory, and any argument concerning constructive trust or injunctive relief is argued in the alternative in light of *Aktiebolaget Bofors v. United States, 194 F2d 145, 148 (D.C. Cir. 1951*

> The basic doctrine of *Ex parte Young* can be simply stated. A federal court is not barred by the Eleventh Amendment from enjoining state officers from acting unconstitutionally, either because their action is alleged to violate the Constitution directly or because it is contrary to a federal statute or regulation that is the supreme law of the land." 17A CHARLES ALAN WRIGHT. ARTHUR R. MILLER, EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4232 (3d ed. 2007) [hereinafter WRIGHT MILLER] (citations omitted).
>
> In *Ex parte Young,* a private party was allowed to pursue an injunction in federal court against Minnesota's attorney general to prohibit his enforcement of a state statute alleged to violate the Fourteenth Amendment. This result rested upon the fiction that the suit went against the officer and not the State, thereby avoiding sovereign immunity's bar. *Pennhurst State Sch. Hosp. v. Halderman,* 465 U.S. 89, 114 n. 25, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) (noting the fiction); Kenneth Culp Davis, *Suing the Government by Falsely Pretending to Sue an Officer,* 29 U. CHI. L.REV. 435 (1962) (same). The officer, so the reasoning goes, cannot take refuge in the State's immunity if he contravenes federal law, and is "stripped of his official or representative character and . . . subjected in his person to the consequences of his individual conduct." *Ex parte Young,* 209 U.S. at 159-60, 28 S.Ct. 441. The Supreme Court recently confirmed the ease with which this stripping rationale can be applied. 'In determining whether the doctrine of *Ex -parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.' *Verizon Md. Inc. v. Pub. Serv. Comm'n,* 535 U.S. 635, 645, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002) (citation and quotation marks omitted).

Vann v. Kempthorne, 534 F.3d 741, 749-50 (D.C. Cir. 2008). In applying the *Ex Parte Young* paradigm to the case at bar, this Comt "need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective. There no question, Plaintiff alleges an ongoing violation of federal law, and they seek relief properly characterized as prospective. For example, paragraph 42 of the Complaint alleges that "[t]he Defendant Cherokee Nation *is* unlawfully and without legal justification committing an unauthorized detention of funds and other economic tangibles owned by the Plaintiff [emphasis added]. Before this allegation, Plaintiffs' Complaint stated that Plaintiffs brings (sic) this civil action against the Defendants, seeking compensatory damages and injunctive

relief for wrongs committed by the Defendants in violation of the Treaty of 1866, 42 U.S.C. § 1983, and common law. Such injunctive reliefrequest is also included in the "Prayer for Relief'.

As held by *Vann v. Kempthorne,* relying upon the *Ex parte* Young line of cases, named trial leader in this lawsuit cannot hide behind sovereign immunity. Such immunity is stripped from Chief Defendant Hoskins, and he is required to state before and be held accountable for his actions as alleged in the Complaint.

In summary, a conversion claim states a cause of action because it emanates from the denial of the economic benefits Plaintiff are entitled due under the Treaty of 1866. Alternatively, the Court may liberally constrne the pleadings and determine that the *Ex parte Young,* supra, analysis applies, which would stripped the Defendants of sovereign immunity and allow the case to proceed to discovery.

Any express or implied arguments raised in the Defendants' Memorandum or Motion to dismiss is without merit for the reasons stated in this Memorandum.

CONCLUSION:

For the foregoing reasons, Defendants' Motion to Dismiss should be DENIED, and the case be allowed to move forward to the pleading and discovery phases.

At Orangeburg, SC

Dated: December 11, 2023

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CERTIFICATE OF SERVICE:

I, Glenn Walters, Sr., hereby certify that on December 11, 2023, I electronically filed or caused to be electronically filed the foregoing PLAINTIFF'S MEMORANDUM AND REPONSE TO DEFENDANTS THE CHEROKEE NATION, CHUCK HOSKIN, JR., AND JOHN DOES' MOTION TO DISMISS, and I mailed a copy to the opposing counsel as listed below:

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Defendant

JOHN DOES #1-#10
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Defendant

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At Orangeburg, SC

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