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.	)	

REPLY IN SUPPORT OF CHEROKEE NATION DEFENDANTS' MOTION TO DISMISS

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Pursuant to Local Rule 7(d), Defendants Cherokee Nation ("Nation"), Principal Chief Chuck Hoskin, Jr. ("Defendant Chief Hoskin"), and John Does 1-10 ("John Doe Defendants") (collectively, "Cherokee Nation Defendants"), file this reply in support of their Motion to Dismiss, ECF No. 16. For the reasons described below and in their Memorandum in Support of Motion to Dismiss, ECF No. 16-1 ("Memo."), the Cherokee Nation Defendants' motion should be granted, and the First and Third Claims should be dismissed.

SUMMARY OF ARGUMENT

Plaintiff's First and Third Claims are barred by the Nation's tribal sovereign immunity, which it has not waived. Plaintiff now goes far beyond the waiver theory alleged in her Amended Complaint, ECF No. 2 ("Compl." or "Complaint"), to assert the Nation's tribal sovereign immunity was abrogated by Congress in an 1893 Act and that she can file the Third Claim under *Ex parte Young*, 209 U.S. 123 (1908). These theories are not alleged in the Complaint and are therefore unavailable to Plaintiff. They fail in any event, as the 1893 Act did not abrogate the Nation's tribal sovereign immunity, and Plaintiff meets none of the necessary elements of *Young*. Plaintiff also lacks standing to assert claims on behalf of third parties, because she does not allege injuries in fact from the alleged injuries to the third parties—a necessary element of Article III standing—and fails to meet the other two requirements for third party standing. Plaintiff also does not have a cause of action. Plaintiff's conclusory arguments that one exists under the 1866 Treaty of Washington with the Cherokee, 14 Stat. 799, July 19, 1866 ("1866 Treaty") or the 1893 Act fails, and *Ex parte Young* is unavailable. Further, Plaintiff does not contest that she otherwise fails to state a claim for relief and concedes the applicability of the doctrine of tribal court exhaustion, both of which are independent bases for dismissal.

ARGUMENT

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

Plaintiff has the burden of showing that the Court has subject matter jurisdiction over her claims. Memo. at 13. She has not done so as to the First and Third Claims, and they must be dismissed under Federal Rule of Civil Procedure 12(b)(1).

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

Plaintiff does not contest that the Nation is protected by tribal sovereign immunity, or that this immunity extends to Defendant Chief Hoskin and John Doe Defendants. Plaintiff instead asserts that tribal sovereign immunity does not bar suit against Cherokee Nation Defendants on the bases of waiver, congressional abrogation, and, as to the Third Claim, on the basis of *Ex parte Young*. Pl.'s Mem. & Resp. to Defs. Cherokee Nation, Chuck Hoskin, Jr., & John Does' Mot. to Dismiss at 10-12, 17-19, ECF No. 25 ("Resp." or "Response"). All these arguments fail.[1]

i. The Nation Did Not Waive Its Tribal Sovereign Immunity.

Plaintiff only alleged in her Complaint that tribal sovereign immunity does not bar her claims because the Nation waived immunity by its litigation conduct in other cases. Memo. at 17 (citing Compl. ¶ 7). But an Indian tribe does not waive its tribal sovereign immunity "by instituting an action, even when the defendant files a compulsory counterclaim," Memo. at 17 (quoting *Wichita & Affiliated Tribes v. Hodel*, 788 F.2d 765, 773-74 (D.C. Cir. 1986)), and "the filing of a separate suit" does not waive a tribe's immunity from suit, even when the separate suit concerns a "similar subject," *id.* at 18 (quoting *Vann v. Salazar*, 883 F. Supp. 2d 44, 54-55 (D.D.C. 2011)

[1] Cherokee Nation Defendants seek to dismiss for tribal sovereign immunity under Rule 12(b)(1), which allows motions to dismiss for lack of subject matter jurisdiction. In this Circuit, motions to dismiss on the basis of sovereign immunity are brought under Rule 12(b)(1). *See* Memo. at 20. Cherokee Nation Defendants do not bring a Rule 12(b)(2) motion. *Cf.* Resp. at 10 n.3.

("*Vann III*")); *see Cherokee Nation v. U.S. Dep't of Interior*, 643 F. Supp. 3d 90, 120 (D.D.C. 2022); *Ute Indian Tribe of Uintah & Ouray Rsrv. v. Utah*, 790 F.3d 1000, 1009 (10th Cir. 2015) (Gorsuch, J.). Plaintiff does not dispute that this is the controlling law. Nevertheless, she asserts that the Nation waived immunity from these claims "when it invoked this Court's jurisdiction in [*Cherokee Nation v. Nash*, 267 F. Supp. 3d 86 (D.D.C. 2017)]" and when the Tribal Council "approved the Nash case litigation." Resp. at 10. That is flatly contrary to the doctrine of tribal sovereign immunity. As just explained, a tribe does not waive its immunity to claims in one case by filing a claim—even on a similar or identical issue—in another case. In case there was any doubt about how those principles apply in a case like this, Judge Kennedy in *Vann III* already squarely and correctly rejected the argument that the Nation waived its tribal sovereign immunity from claims in other cases that concern "similar subjects" as those litigated in *Nash*. *See* 883 F. Supp. 2d at 54-55; Memo. at 18.

Plaintiff also claims the judgment in *Nash* "further undermines the [Cherokee Nation Defendants'] 'sovereign immunity defense'." Resp. at 11. However, as Plaintiff concedes, "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." *Id.* at 10 (citations omitted). A court judgment is not an act of the Nation or of Congress. There has been no congressional abrogation, *see infra* § I(A)(ii), so the effect of the *Nash* judgment on tribal sovereign immunity is no broader than the waiver the Nation made when it filed suit in *Nash*. And that waiver does not encompass the claims Plaintiff brings here, as the Nation only expressly waived immunity to bring suit to litigate the meaning of Article 9 of the 1866 Treaty, which it did by seeking declaratory and injunctive relief against the defendants in *Nash*. Memo. at 18-19. By contrast, Plaintiff now seeks to litigate whether she and other alleged heirs of Lumn W. and Beulah Pharr are entitled to "economic

benefits" allegedly made available by the Nation to its citizens. And because those questions were not litigated or decided in *Nash*, Plaintiff cannot assert that the filing of this separate lawsuit is an effort to enforce the *Nash* judgment, *see* Resp. at 6, 11, 12.

ii. Congress Did Not Abrogate the Nation's Tribal Sovereign Immunity From This Suit in 1893.

Plaintiff then diverges from her Complaint, asserting for the first time that *Nash* found that Congress "waived" the Nation's tribal sovereign immunity in a provision of Section 10 of the Indian Appropriations Act of 1893, ch. 209, 27 Stat. 612, 641 ("1893 Act"). Resp. at 12. Because Plaintiff did not allege congressional abrogation of tribal sovereign immunity from her claims in her Complaint, that argument is not available to her now. *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)); *Arbitraje Casa de Cambio, S.A. de C.V. v. USPS*, 297 F. Supp. 2d 165, 170 (D.D.C. 2003) ("It is axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss") (quoting *Coleman v. Pension Benefit Guar. Corp.*, 94 F. Supp. 2d 18, 24 n.8 (D.D.C. 2000)).

Plaintiff's assertion is not only unavailable to her, it is also wrong. *Nash* said nothing at all about the Nation's tribal sovereign immunity, which was not at issue in that case. Instead, the portion of *Nash* that Plaintiff quotes only summarized a part of Section 10 of the 1893 Act which ratified and amended an 1891 agreement between the Nation and the United States. Under that agreement, the Nation ceded to the United States the portion of the Cherokee Nation Reservation west of the 96th meridian, which was known as the Cherokee Outlet. *See Nash*, 267 F. Supp. 3d at 106. Section 10 guaranteed that the United States would retain money from that sale in the

Treasury in order to pay "such sums as may be determined by the courts of the United States to be due" to the Freedmen[2] and preserved the Freedmen's "rights to which they may be entitled under existing laws or treaties." *See Nash*, 267 F. Supp. 3d at 106 (quoting 27 Stat. at 641). Section 10 says nothing about the Nation's tribal sovereign immunity—it governs the United States' conduct and reaffirmed Freedmen's then-existing rights, which did not include a right to sue the Nation under Article 9, *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.").

Although Plaintiff suggests otherwise, Resp. at 12, Section 10's reference to the United States' payment of "sums as may be determined by the courts of the United States" has nothing to do with this case and therefore cannot be understood to affect the Nation's tribal sovereign immunity from Plaintiff's claims. Those "sums" were to be paid out of income held *by the United States* and, as described in *Nash*, were to be "determined" in one then-pending suit against the Nation in the United States Court of Claims that had been authorized in the Act of Oct. 1, 1890, ch. 1249, 26 Stat. 636 ("1890 Act"). *See Nash*, 267 F. Supp. 3d at 106 (describing history); *Cherokee Nation v. United States*, 85 Ct. Cl. 76, 81-85 (1937) (discussing 1890 Act and Section 10 of 1893 Act). That suit had to be filed in the Court of Claims within twelve months of the

[2] The Cherokee Freedmen guaranteed citizenship under Article 9 of the 1866 Treaty are "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 [i.e., the Cherokee Nation Reservation] at the commencement of the [Civil War], and are now residents therein, or who may return within six months, and their descendants . . . ." *See* Memo. at 9 (quoting 1866 Treaty, art. 9). Plaintiff's characterization of who is entitled to citizenship rights as a Cherokee Freedman, Resp. at 7 & n.2, is therefore both under- and over-inclusive, as it excludes Cherokee Freedmen whose ancestors were never enslaved while including some people whose formerly enslaved ancestors did not satisfy the residency requirement of Article 9, *see Nash*, 267 F. Supp. 3d at 118-19 (discussing distinction between Cherokee Freedmen in the Indian Territory and Cherokee Freedmen with rights under Article 9); *id.* at 137-38 (discussing *Garfield v. United States ex rel. Lowe*, 34 App. D.C. 70 (1909)).

passage of the 1890 Act—over 130 years ago. 1890 Act, § 3, 26 Stat. at 636. And it had to be filed by a trustee who would be selected by the Freedmen with the approval of the Secretary of the Interior. *Id.* This suit does not fit that bill. *Nash* went on to explain that the litigation authorized by the 1890 Act was resolved after Court of Claims decisions in 1895, and the Freedmen were paid under a 1896 decree of that Court. 267 F. Supp. 3d at 106-07 (discussing *Whitmire* litigation[3]); *see Cherokee Nation v. Whitmire*, 223 U.S. 108, 113-15 (1912). The 1890 Act's limited authorization for another person to file another lawsuit in another court over 130 years ago that has been long since resolved has no relevance to the Nation's tribal sovereign immunity in this suit.

iii. *Ex Parte Young* Is Not Available for Plaintiff's Third Claim.

Later in the Response, Plaintiff makes another pass at the Nation's tribal sovereign immunity, by arguing that if the Court were to interpret the Third Claim as a "constructive trust case," then she could bring it under *Young*. *See* Resp. at 17-19. But *Young* is only available against tribal officers when a plaintiff seeks prospective relief to remedy an ongoing violation of federal law. Memo. at 20 n.9 (citing *Vann II*, 534 F.3d at 749-50). The Third Claim fails all elements of this standard.

First, Plaintiff makes no claim against tribal officials. *See* Memo. at 32; *infra* at 15. The Third Claim is "[a]gainst Defendant Cherokee Nation only." Compl. at 9. A government or government agency is not a proper *Young* defendant. *Reddish v. WMATA*, No. 1:22-cv-2658 (RDM), 2023 WL 5289290, at *4 (D.D.C. Aug. 17, 2023); *White v. WMATA*, 303 F. Supp. 3d 5, 10-11 (D.D.C. 2018). Second, the Third Claim seeks retroactive relief, because it pleads that

[3] *See Whitmire v. Cherokee Nation*, 30 Ct. Cl. 138 (1895); *Whitmire v. Cherokee Nation*, 30 Ct. Cl. 180 (1895).

Plaintiff has "suffered economic damages of more than Ninety Million Dollars ($90,000,000.00)" and is "entitled to a judgment of *compensatory damages* for the amount alleged against Defendant Cherokee." Compl. ¶ 45 (emphasis added). A request for compensation is a request for retrospective relief. *See Lytes v. DC Water & Sewer Auth.*, 572 F.3d 936, 939 (D.C. Cir. 2009) (compensatory damages are "retrospective relief"). Third, the Third Claim does not allege a violation of federal law, as Plaintiff admits by relying on supplemental jurisdiction to seek to establish this Court's subject matter jurisdiction over that claim. *See* Resp. at 24. *Young* is not available for alleged violations of non-federal law. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984); *Miller v. Smith*, 952 F. Supp. 2d 275, 287 (D.D.C. 2013) (quoting *Ameritech Corp. v. McCann*, 297 F.3d 582, 586 (7th Cir. 2002)); *Farm-To-Consumer Legal Def. Fund v. Vilsack*, 636 F. Supp. 2d 116, 126 (D.D.C. 2009) (citing *LaShawn A. v. Barry*, 144 F.3d 847, 852 (D.C. Cir. 1998)).

Plaintiff does not help her case by suggesting that, in the alternative only, the Third Claim could be viewed as a request for a constructive trust. Resp. at 17. That would be unwarranted here, as a constructive trust is a remedy available only "when one person has fraudulently or wrongfully obtained the property of another," *United States v. Taylor*, 867 F.2d 700, 703 (D.C. Cir. 1989), under conditions where "the defendant (i) has been unjustly enriched (ii) by acquiring legal title to specifically identifiable property (iii) at the expense of the claimant or in violation of the claimant's rights," Restatement (Third) of Restitution § 55 cmt. a (2011). *See Mandley v. Backer*, 121 F.2d 875, 876 (D.C. Cir. 1941). The Complaint does not allege that the Nation has obtained title to specifically identifiable property that belongs to Plaintiff, much less under conditions that could justify a constructive trust. In any event, though, *Young* does not permit a suit for a constructive trust, which is a retrospective remedy that would require the government pay "an

accrued monetary liability." *Papasan v. Allain*, 478 U.S. 265, 278-81 (1986) (citation omitted); *id.* at 297-98 (Powell, J., concurring in part and dissenting in part) (explaining the suit, which alleged state official defendants had breached "an express/constructive trust," sought a "monetary remedy" and was "barred by the Eleventh Amendment"); *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 128 n.5 (2d Cir. 2019) (finding in case against tribal officers that "because an *Ex parte Young*-style suit is limited to prospective injunctive relief, it does not permit the type of constructive trust remedy for unjust enrichment also sought here by Plaintiffs"); *Auto. Club of N.Y., Inc. v. Port Auth.*, 706 F. Supp. 264, 272 (S.D.N.Y. 1989), *aff'd,* 887 F.2d 417 (2d Cir. 1989) (citing *Pa. Dep't of Envt. Res. v. Williamsport Sanitary Auth.*, 497 F. Supp. 1173, 1195 (M.D. Pa. 1980)); *Am. Shooting Ctr., Inc. v. Secfor Int'l*, No. 13CV1847 BTM(JMA), 2016 WL 3952130, at *2 (S.D. Cal. July 22, 2016).

B. Plaintiff Lacks Third Party Standing.

Plaintiff also lacks standing to assert claims on behalf of absent alleged heirs of Lumn W. and Beulah Pharr. Plaintiff correctly concedes that her ability to seek relief on behalf of those third parties is controlled by the doctrine of third party standing. Resp. at 13; *see* Memo. at 21-22. But Plaintiff then wrongly asserts that the Cherokee Nation Defendants "do not challenge Mrs. Hinton's own Article III standing." Resp. at 13.[4] To the contrary, Cherokee Nation Defendants clearly established that "Plaintiff makes no allegations that the alleged withholding of benefits to other alleged heirs affected her in any way, so she cannot show 'injury in fact' from alleged withholdings from absent third parties." Memo. at 22-23.

[4] Cherokee Nation Defendants have the right to challenge Plaintiff's standing at any time in the litigation, *see Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994) (citing *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 546-47 (1986)), and it is Plaintiff's obligation to establish her standing, *see Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (citing *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990), and *Warth v. Seldin*, 422 U.S. 490, 508 (1975)).

Plaintiff's own cases confirm that Cherokee Nation Defendant's argument is correct, by illustrating that for purposes of the Article III element of third party standing, a defendant's conduct toward the absent third party must also injure the plaintiff and cause them an injury in fact. *See* Resp. at 13. In *Powers v. Ohio*, 499 U.S. 400 (1991), the Court concluded that a prosecutor's preemptory striking of potential jurors based on race injured a criminal defendant by "cast[ing] doubt on the integrity of the judicial process" and "plac[ing] the fairness of a criminal proceeding in doubt." *Id.* at 411. For that reason, the defendant, who was himself subject to the judicial process and criminal proceeding that had been undermined by the preemptory strikes, had standing to challenge the practice on behalf of the struck jurors. *Id.* Plaintiff's other cases are in accord with *Powers*. *See Am. Immig. Lawyers Ass'n v. Reno*, 199 F.3d 1352, 1361-62 (D.C. Cir. 2000) (noting that groups of attorneys who challenged federal laws faced "no legal impediment" as a result of application of the challenged law to their clients, but deciding they lacked third party standing because their clients faced no "hindrance"); *Lepelletier v. FDIC*, 164 F.3d 37, 42-43 (D.C. Cir. 1999) (finding an independent money finder was injured by an application of federal law to his clients which impeded his ability to develop a business relationship with them). In contrast, Plaintiff never alleges that alleged withholding of benefits from other alleged heirs injured her, and she never addresses that deficiency in her Response. Since it is Plaintiff's burden to establish third party standing, *United States v. TDC Mgmt. Corp.*, 263 F. Supp. 3d 257, 272 (D.D.C. 2017), Plaintiff's failure to show she met this necessary requirement of third party standing is fatal for her claims on behalf of third parties.

Additionally, the Complaint does not make allegations that Plaintiff meets the other two elements of the third party standing test: the existence of a "close relationship" between herself

and the absent third parties; and that the absent third parties suffer a "hindrance" that prevents them from making their claims. *See* Memo. at 22-23.

To show the required "close relationship," Plaintiff must show 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). Plaintiff asserts in the Response that this relationship exists because "she is related to all of" the absent third parties "through the bloodline of her grandparents." Resp. at 13. But a blood relationship alone—even if it were alleged in the Complaint, which it is not—would not establish a "close relationship" for purposes of third party standing. *See Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 32-33 (D.D.C. 2010). A "close relationship" is also lacking because Plaintiff makes no allegation that the absent heirs and Plaintiff would be entitled to the same "economic benefits" under Cherokee Nation law. *See* Memo. at 31 ("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.').") She therefore fails to establish an "identity of interest" with the absent alleged heirs for that reason, as well.

Plaintiff must also show some hindrance to the third party's ability to protect his or her own interests. "[O]ne seeking to satisfy the hindrance requirement for third party standing need only demonstrate that there is some impediment to the real party in interest's ability to assert his own legal rights." *Al-Aulaqi*, 727 F. Supp. 2d at 31. Plaintiff asserts, in a non sequitur, that "it is reasonable for this Court to infer" that it will be "tedious" for heirs to determine that they are the heirs of Lumn W. and Beulah Pharr because "some of the descendants have passed." Resp. at 13-

14. Tedium is not a hindrance for purposes of third party standing. *See, e.g.*, *Turner*, 502 F. Supp. 3d at 362 (hindrance included potential employment retaliation or loss of livelihood or home); *see also Miller v. Albright*, 523 U.S. 420, 449-50 (1998) (O'Connor, J., concurring) (discussing Supreme Court case law on what constitutes hindrance). Plaintiff then asserts that the "complexity of the legal issues themselves" constitutes a hindrance. Resp. at 14. But the possibility that a lawsuit may involve complicated legal questions is at most a "normal burden[] of litigation," not a hindrance. *See Am. Immig. Lawyers Ass'n*, 199 F.3d at 1364; *see also Miller*, 523 U.S. at 449 (O'Connor, J., concurring) (hindrance is established by "insurmountable procedural obstacles" to suit).

C. There is no Supplemental Jurisdiction for Plaintiff's Third Claim.

Plaintiff now asserts the Court has supplemental jurisdiction over the Third Claim, Resp. at 14, which necessarily concedes that it is not a federal law claim, *see* Memo. at 24. This assertion is barred, as Plaintiff's Complaint specifically alleged that this Court has jurisdiction for a "common law" claim under 28 U.S.C. § 1331, the federal question jurisdiction statute. *See* Compl. ¶ 13; *see id.* (also relying on 28 U.S.C. § 1362, establishing federal question jurisdiction for claims brought by Indian tribes). The Court "may not . . . add theories of relief to [a plaintiff's] complaint that are not there," Memo. at 24 (quoting *Kialegee II*, 2022 WL 4547528, at *5), and a response to a motion to dismiss cannot amend a pleading, *Arbitraje Casa de Cambio*, 297 F. Supp. 2d at 170. Even if Plaintiff could make this assertion, Cherokee Nation Defendants have shown that this Court lacks supplemental jurisdiction over the Third Claim because the First Claim must be dismissed. *See* Memo. at 24-25; *supra* § I(A)-(B); *infra* §§ II-III. And, as Plaintiff appears to concede, if the First Claim cannot be maintained, there is no supplemental jurisdiction for the Third Claim. Resp. at 14 n.5.

II. Plaintiff Fails To State A Claim Against Cherokee Nation Defendants.

Plaintiff also fails to state a claim, and so her First and Third Claims should be dismissed as well under Rule 12(b)(6).

A. Plaintiff Lacks a Cause of Action.

Plaintiff did not allege a cause of action in her complaint and cannot use the response brief to rehabilitate that deficiency. *See Kialegee II*, 2022 WL 4547528, at *5; *Arbitraje Casa de Cambio*, 297 F. Supp. 2d at 170. Now, however, Plaintiff asserts that she "states a claim for relief" for the First Claim under the 1866 Treaty because the 1866 Treaty and the 1893 Act each establish a cause of action. Resp. at 15-16.[5] Plaintiff appears to argue further that she has a cause of action for the Third Claim under *Ex parte Young*, *if* that Third Claim is construed as a request for a constructive trust, Resp. at 17. Even if she had alleged these theories of relief in the Complaint, neither give her a cause of action.

As to the First Claim, Cherokee Nation Defendants and Plaintiff appear to agree that the 1866 Treaty could give Plaintiff a cause of action for the First Claim only if the text of the Treaty were to show an intention to establish an implied cause of action. *See* Memo. at 26-27; Resp. at 16 (stating as the only basis for a cause of action that the text of the treaty "implicitly suggests" a private cause of action). Cherokee Nation Defendants have shown that under the principles used to determine whether a statute contains an implied cause of action, the 1866 Treaty does not give Plaintiff a cause of action to bring her suit. Memo. at 27-30.

[5] This assertion is resolved under a different legal standard than whether the 1893 Act abrogates the Nation's tribal sovereign immunity, as "the question whether a statute withdraws sovereign immunity is 'analytically distinct' from whether a plaintiff has a cause of action." *Owens v. Republic of Sudan*, 864 F.3d 751, 807 (D.C. Cir. 2017) (quoting *FDIC v. Meyer*, 510 U.S. 471, 484 (1994)), *overruled on other grounds sub nom. Opati v. Republic of Sudan*, 140 S. Ct. 1601 (2020).

Plaintiff in response urges only the conclusory argument that it would be "illogical" for Article 9 to guarantee rights without a "judicial means to enforce such rights." Resp. at 16.[6] If that were enough to create an implied cause of action, every statute establishing substantive rights would have one. To the contrary, "Congress can impose substantive constraints upon a tribe without subjecting the tribe to suit in federal court to enforce those constraints . . . ." *Vann II*, 534 F.3d at 747; *see also id.* at 749 (finding that the 1866 Treaty imposes substantive obligations on the Nation without abrogating the Nation's tribal sovereign immunity from suit). The existence of a substantive right does not guarantee a cause of action. *See, e.g.*, *Cannon v. Univ. of Chi.*, 441 U.S. 677, 688 (1979); *Davis v. Passman*, 442 U.S. 228, 241 (1979). Congress itself acknowledged as much in the Civil Rights Act of 1866, ch. 31, 14 Stat. 27, where it established legal rights for Freedmen in Section 1 of the Act and then *expressly* authorized suit to enforce them in federal court in Section 3. Memo. at 28-29.

Plaintiff asserts further that *Nash* acknowledged that Section 10 of the 1893 Act created a private cause of action to enforce Article 9 of the 1866 Treaty. Resp. at 16. Nothing in Section 10 expressly or implicitly creates a cause of action, *cf.* Memo. at 27-30 (discussing and applying four-factor test from *Cort v. Ash*, 422 U.S. 66 (1975)), nor did *Nash* suggest that it did. In fact, as discussed *supra* at 4-5, Section 10 provided that *the United States* would set aside money to compensate the Freedmen and preserved the Freedmen's "rights to which they may be entitled under existing laws or treaties." 27 Stat. at 641. That does not establish a new private cause of

[6] Plaintiff incorrectly asserts that "Congress" "g[a]ve" rights in the 1866 Treaty, Resp. at 16. The Nation and the United States are mutual signatories to the treaty, which was ratified by the Senate, *see* Memo. at 27, 29, and is for those reasons subject to the Indian canons of construction and the rules of construction that apply to treaties generally, *see id.* at 26, 27-28. Application of those principles confirms that the 1866 Treaty does not include an implied a cause of action. *See id.* at 27-28.

action to enforce the 1866 Treaty, much less one against the Nation. Nor did it establish any new substantive rights except those which the Freedmen *already held* under then-existing laws or treaties—which do not include a cause of action to bring this suit.[7]

Plaintiff finally asserts that "the Third Claim for relief can easily be resolved un the [sic] *Ex parte Young*," Resp. at 17. To the extent this asserts *Young* provides Plaintiff a cause of action, Cherokee Nation Defendants have already comprehensively shown Plaintiff's claims are well outside the *Young* doctrine, Memo. at 20 n.9; *supra* at **, and Plaintiff did not allege in the Complaint that *Young* provides a cause of action, *see* Memo. at 25. So *Young* is unavailable here. Nor (as Plaintiff does not contest) is there any other federal cause of action for the tort of conversion, regardless of whether Plaintiff seeks damages (as her Complaint alleges) or a constructive trust (as she now asserts in the alternative). *See* Memo. at 25.

B. Plaintiff Does Not State a Claim.

Plaintiff otherwise fails to state a claim against the Nation under the 1866 Treaty. *See* Memo. at 30-31. Article 9 of the 1866 Treaty provides that Cherokee Freedmen are entitled to the rights of citizenship on the same terms as "native Cherokee." The Complaint, however, seeks compensation for alleged "economic benefits." Article 9 does not provide "economic benefits" for Cherokee citizens. As *Nash* explained, "the identity and scope of the 'rights' promised by Article 9 must be found in independent sources . . . ." 267 F. Supp. 3d at 122. The Complaint does not allege that the Nation violated any law other than the 1866 Treaty and identifies no law other

[7] The cause of action established in the 1890 Act does not authorize this suit, as it only allowed a trustee of all Freedmen, who was selected by them and approved by the Secretary of the Interior, to file suit in the Court of Claims no later than October 1891, *see supra* at **. *See also Hinck v. United States*, 550 U.S. 501, 507 (2007) (finding that a plaintiff could not rely on a federal statutory cause of action without complying with all elements of a "time-limited, plaintiff-specific [cause of action] provision, which also precisely defined the appropriate forum").

than the 1866 Treaty as establishing a right to the alleged "economic benefits" for which the Complaint seeks compensation. Therefore, the Complaint simply fails to state a claim for relief under the 1866 Treaty. In her Response, Plaintiff does not contend otherwise.

Plaintiff does not contest that she fails to state any claim at all against Defendant Chief Hoskin or John Doe Defendants. *See* Memo. at 32 (quoting Compl. at 5, 7, and 9). That requires dismissal of the suit against them for failure to satisfy Federal Rule of Civil Procedure 8(a). Memo. at 32.

III. Tribal Court Exhaustion Bars Plaintiff's Claims Against Cherokee Nation Defendants.

Finally, Plaintiff does not dispute that her First and Third Claims must be exhausted in the Nation's courts before they can be brought in federal court. *See* Memo. at 32-36. And Plaintiff does not attempt to meet her burden to establish a "substantial showing" that any of the exceptions to exhaustion apply. *See* Memo. at 34. Therefore, those claims should be dismissed under Rule 12(b)(6). Memo. at 32-33.

CONCLUSION

For the foregoing reasons, the Cherokee Nation Defendants' Motion to Dismiss should be granted.

Dated: December 18, 2023

Respectfully submitted,

By: */s/ Frank S. Holleman*

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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2023, I electronically filed the above and foregoing document with the Clerk of Court via the ECF System for filing.

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/s/ Frank S. Holleman
Frank S. Holleman