IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DANIEL A. HORWITZ, Plaintiff v. U.S. DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, ET AL., Defendants	)))))))))))	Case No.: 3:24-cv-1180 JUDGE GIBBONS

REPLY IN SUPPORT OF MOTION TO DISMISS

The United States District Court for the Middle District of Tennessee, and Chief District Judge William L. Campbell, District Judge Aleta A. Trauger, District Judge Waverly D. Crenshaw, Jr., and District Judge Eli Richardson, in their official capacities (collectively "Defendants"), by and through counsel, respectfully submit this reply in support of their Motion to Dismiss.

I. Plaintiff has not pled a waiver of sovereign immunity or that his claims are not barred by sovereign immunity, and accordingly, his Complaint should be dismissed.

A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (*quoting United States v. King*, 395 U.S. 1, 4, (1969)). Plaintiff bears the burden of proving that the Court possesses subject matter jurisdiction, and, in this case, that includes identifying a waiver of sovereign immunity for all claims against all Defendants. [*See* Doc. No. 31-1, PageID #:

231-32]; *see also Freeman v. Sullivan*, 954 F. Supp. 2d 730, 753 (W.D. Tenn. 2013). Plaintiff does not refute in his response to Defendants' motion that none of the statutes cited in his Complaint waive the United States' sovereign immunity. [*See* Doc. No. 31-1, PageID #: 232-34.] Instead, in Plaintiff's response he explained for the first time that he purports to bring his claims under *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 687-88 (1949), and *Dugan v. Rank*, 372 U.S. 609, 620 (1963). Plaintiff alleges that pursuant to the legal fiction discussed in those two cases sovereign immunity is not implicated in this action. [*See generally* Doc. No. 34.] *Larson* and *Dugan*, however, have purchase only when a federal official is sued in his or her official capacity for injunctive or declaratory relief for alleged unconstitutional actions *and* when the relief being sought does not require "affirmative action by the sovereign." *Larson*, 337 U.S. at 689-90, 691, n.11; *Dugan*, 372 U.S. at 620, 621-22.

Plaintiff's plan to pursue his claims against Defendants under *Larson* and *Dugan* suffers from two problems. First, the United States District Court for the Middle District of Tennessee is a Defendant. The Court is an entity and a part of the judicial branch of the federal government, not a federal official. The Court does not have an individual or official capacity and cannot be sued under *Larson* and *Dugan.*

Second, Plaintiff's requested relief would require "affirmative action by the sovereign." *Larson*, 337 U.S. at 691, n.11. In *Larson*, the Supreme Court detailed the limited situations in which a claim may be asserted against a federal official in his or her official capacity and not be considered a claim against the government, and it limited that exception with another exception:

> "Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property."

337 U.S. at 691 n.11. Courts have struggled to clearly define when a plaintiff's claim nominally against a government official becomes one against the government seeking affirmative action, *see, e.g.*, *Dotson v. Griesa*, 398 F.3d 156, 177 n.16 (2d. Cir. 2005), but the focal point is "the effect of the action upon the sovereign." *Ogletree v. McNamara*, 449 F.2d 93, 100 (6th Cir. 1971). Here, Plaintiff seeks declaratory and injunctive relief that would require the Court to re-write, not just refrain from enforcing, Local Rule 83.04. For example, Plaintiff requests an injunction so that Plaintiff is permitted to speak about his pending cases "unless a party to the litigation provides actual evidence that (1) Plaintiff's speech is substantially likely to materially prejudice an impending trial and (2) restricting Plaintiff's speech is the least-restrictive means of ensuring a fair trial." [Doc. No. 1, PageID #: 35.] Plaintiff also seeks a declaration that LR 83.04 "may be applied only when a judge or party seeking to restrict an attorney's speech has shown, with evidence, that restricting that speech is necessary to prevent materially prejudicing another[] party's right to a fair trial." [*Id.*, PageID #: 34-35.] Plaintiff seeks affirmative relief that is not permitted under the exceptions to sovereign immunity set out in *Larson* and *Dugan*.

But looking at the bigger picture, Plaintiff has committed the same error that the *pro se* plaintiff did in *Smith v. Kreiger*, 389 F. App'x 789, 792 (10th Cir. 2010). Plaintiff

claims that Smith's case was dismissed because he did not cite the appropriate standard. [Doc. No. 34, PageID #: 262.] That is correct. Smith's claims for declaratory and injunctive relief against a federal judge were dismissed for failure to plead a waiver of sovereign immunity or that *Larson* (or any other case) brought his claims outside the scope of sovereign immunity. *Kreiger*, 389 F. App'x at 792, 795. Plaintiff has committed the same error here. He neither pled in his Complaint a valid waiver of sovereign immunity nor a justification for why his claims are not subject to sovereign immunity despite being against the federal judiciary. Plaintiff's Complaint should be treated similarly and dismissed.

CONCLUSION

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

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2025, I filed this document via CM/ECF, which automatically provides service to all counsel of record:

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