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| HHD-CV16-6072009-S | | |
| SCHAGHTICOKE TRIBAL NATION | : | SUPERIOR COURT |
| *PLAINTIFF*, | : | |
| | : | JUDICIAL DISTRICT OF |
| v. | : | HARTFORD |
| | : | |
| STATE OF CONNECTICUT, | : | |
| ROBERT KLEE, IN HIS OFFICIAL | : | |
| CAPACITY AS COMMISSIONER OF | : | |
| THE CONNECTICUT DEPARTMENT | : | |
| OF ENERGY & ENVIRONMENTAL | : | |
| PROTECTION, | : | |
| *DEFENDANTS* | : | FEBRUARY 14, 2017 |

**DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS**

In this action, Plaintiff Schaghticoke Tribal Nation ("STN") claims it represents the interests of the Schaghticoke tribe and demands—based on events that stretch back to before the State of Connecticut or the United States existed—that this Court either award STN "damages of not less than **$610,513,714**," *Compl.*, ¶ 56 (emphasis in *Compl.*), or order the General Assembly to place that amount in trust and dictate that those funds be used only for the benefit of STN. This Court should dismiss this action in its entirety.

The first impediment to STN's claims is that STN apparently does not have standing to bring them. This Court, the Appellate Court and the Supreme Court have all recognized that there is a hotly contested dispute over who has authority to bring claims on behalf of the Schaghticoke tribe. STN is one of at least three separate groups that claim that authority. The Supreme Court has made clear that where such disputes exist, the plaintiff must allege facts sufficient to establish both that it is a proper party and that it has authority to represent the tribe. STN's Complaint fails to meet that burden—it does not even allege, let alone establish, that STN is a proper party with authority to represent all the Schaghticoke. It simply ignores the existence of the other factions.

That alone requires dismissal of this action. But even if it did not, STN's claims would be doomed to fail. The Supreme Court has repeatedly held that sovereign immunity bars claims seeking monetary relief from the state, and that STN cannot avoid sovereign immunity by clothing monetary claims in the garb of declaratory or injunctive relief. Sovereign immunity plainly precludes this Court from ordering the state to pay STN over $610 million in damages or from ordering the General Assembly to place that amount in an account earmarked for STN. Sovereign immunity also bars this Court from ordering an accounting that would be a prelude to a monetary claim, particularly given that the relevant statute establishes that to the extent reporting regarding tribal funds is required there is no private right of action to enforce that requirement—any remedy STN has for any claimed deficiencies is political, not judicial.

## FACTUAL AND PROCEDURAL BACKGROUND

In its Complaint, STN purports to represent the interests of the historical tribe referred to as the Schaghticoke. *See* Conn. Gen. Stat. § 47-59a(b). However, this Court and Connecticut's appellate courts have determined on multiple occasions that the Schaghticoke is divided into multiple factions and that the tribe's leadership is the subject of an "ongoing and hotly contested dispute between the" so-called Schaghticoke Indian Tribe ("SIT")—which is not a party to this case—and Plaintiff STN (and potentially at least one other faction). *Schaghticoke Indian Tribe v. Rost*, 138 Conn. App. 204, 217 (2012) (Robinson, J.). That raises a standing issue that will be discussed in detail below.

Leaving aside the defects in STN's standing, STN alleges that "in 1736, the Connecticut General Assembly formally granted STN[1] a reservation of approximately 2,400 acres in the

[1] To be clear, any alleged grant or other rights discussed in the Complaint and throughout this Memorandum were those of the Schaghticoke, not of STN. However, to avoid confusion, Defendants will refer to STN when discussing the claims at issue.

Township of Kent," *Compl.*, ¶ 3, and later appointed Overseers to "manage, direct and superintend . . . Indians and their affairs." *Id*. at ¶ 4. STN alleges that in 1801, the General Assembly authorized the sale of land to reimburse the then-Overseer for funds he had "spent to support STN," *id*. at ¶ 26, and that in the same year Overseers exceeded the statutory authority the state had granted them by "transferring 1,129 acres—roughly *forty-five* percent of STN's land" and allegedly not giving STN the benefit of those transfers. *Id*. at ¶ 29 (emphasis in *Compl*.). According to STN, that "began a pattern of STN land being taken without just compensation by the State acting through its representatives, the Overseers," *id*. at ¶ 30, with the Overseers allegedly misleading the Courts responsible for reviewing their activities so the Overseers could "misappropriat[e] STN's funds to benefit themselves, their associates and non-STN parties." *Id*. at ¶ 33.

Based on the above facts and others that will be discussed in more detail in the argument section below, STN asks this Court to award STN "damages of not less than **$610,513,714**," *Compl.*, ¶ 56 (emphasis in *Compl.*), or, in the alternative, order the General Assembly to place that amount in a trust "in favor of STN" (as opposed to the Schaghticoke generally) "to ensure that those funds are used for the benefit of STN." *Id*. at ¶ 89(B)(b). STN's demands for monetary relief are based on claims under: the federal Fifth Amendment Taking Clause, as incorporated against the state through the Fourteenth Amendment Due Process Clause (Count One), the taking provision in article first, § 11 of the Connecticut Constitution (Count Two); the due process provision in article first, § 8 of the Connecticut Constitution (Count Three); and an alleged common law fiduciary duty (Count Four).[2]

[2] In addition to those explicit demands for monetary damages, STN also avers to—but does not properly plead—claims for a resulting or constructive trust. Those claims are tantamount to claims for damages, as will be discussed in more detail below.

In addition to its demands for monetary relief, STN also asks this Court to issue declaratory and injunctive relief against the Commissioner of the Connecticut Department of Energy and Environmental Protection ("the Commissioner") and the state ordering the Commissioner to settle the alleged STN Tribal Fund with the Comptroller and to report the results to the Governor, as set forth by Conn. Gen. Stat. § 47-66. *See* Count Five (against the Commissioner) and Count Six (against the state).

STN filed this action with a return date of November 15, 2016. Defendants timely appeared and—with STN's consent—moved for an extension of time through February 14, 2017 in which to respond to STN's Complaint (No. 101.00). This Court (Scholl, J.) granted Defendants' Motion. (No. 101.86).

**STANDARD FOR A MOTION TO DISMISS**

"A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court." *Gurliacci v. Mayer*, 218 Conn. 531, 544 (1991) (internal quotation marks omitted). A motion to dismiss is the proper vehicle to raise defects in standing, sovereign immunity and the lack of a private right of action. *See, e.g., Styslinger v. Brewster Park, LLC*, 321 Conn. 312, 316 (2016) (standing); *Giannoni v. Comm'r of Transp.*, 322 Conn. 344, 349–50 (2016) (sovereign immunity); *Gerardi v. City of Bridgeport*, 294 Conn. 461, 473 (2010) (private right of action). Where "the complaint is supplemented by undisputed facts . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint. . . . Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts]." *Giannoni*, 322 Conn. at 349–50 (quotation marks omitted).

## ARGUMENT

### I. STN CANNOT ESTABLISH STANDING TO BRING THIS ACTION

This case arises out of the State's relationship with an "indigenous tribe[]" that in modern times is referred to as "the Schaghticoke." Conn. Gen. Stat. § 47-59a(b). "Plaintiff STN . . . led by . . . Richard Velky" is the only Plaintiff in this case, which arises out of alleged events involving the Schaghticoke that span from colonial times to the present, key portions of which are alleged to have occurred in the early 1800s, soon after the United States became a Nation and Connecticut became a State. *Compl.*, ¶ 10. But STN and Mr. Velky cannot establish that they have standing to bring this case on behalf of the Schaghticoke, and therefore this Court lacks subject matter jurisdiction.

"It is a basic principle of law that a plaintiff must have standing for the court to have [subject matter] jurisdiction." *Golden Hill Paugussett Tribe of Indians v. Town of Southbury*, 231 Conn. 563, 571 (1995) ("*GHP*") (quotation marks omitted). "Standing is the legal right to set judicial machinery in motion" and STN "cannot rightfully invoke the jurisdiction of the court" unless STN has met its burden to establish standing. *Styslinger v. Brewster Park, LLC*, 321 Conn. 312, 316 (2016). To establish standing to bring this case, STN had the burden to allege facts sufficient to demonstrate two things: (1) that STN is "a proper party to request adjudication of the issues" and (2) that STN has "authority to represent the" Schaghticoke tribe. *GHP*, 231 Conn. at 571 (quotation marks omitted).

STN has not met its burden as to either requirement. As recently as 2012, the Appellate Court recognized "the ongoing and hotly contested dispute between the" Schaghticoke Indian Tribe ("SIT")—which is not a party to this case—and Plaintiff "STN over which is the legitimate governing body of the Schaghticoke Indians." *Rost*, 138 Conn. App. at 217; *see also Cuozzo v.*

*Town of Orange*, 315 Conn. 606, 615 (2015) (in deciding motion to dismiss, the court may consider *inter alia* "public records of which judicial notice may be taken" for the light they shed on the Complaint's allegations and the court "need not conclusively presume the validity of the allegations of the complaint" (quotation marks omitted)). In that decision, the Appellate Court noted the trial court's ruling that STN *and* SIT "collectively represent the Schaghticoke Indians," a finding STN apparently did not challenge on appeal. *Rost*, 138 Conn. App. at 213.[3] That judicial finding establishes that STN—acting alone—lacks standing to pursue claims on behalf of the Schaghticoke. *See, e.g.*, *Dana Inv. Corp. Bankr. Estate v. Robinson & Cole*, 2003 WL 231675, at *4 (Conn. Super. Ct. Jan. 9, 2003) (collateral estoppel applies to standing determinations); *see also Parker v. Comm'r of Correction*, 169 Conn. App. 300, 313–14 (2016) ("[A]lthough most defenses cannot be considered on a motion to dismiss, a trial court can properly entertain a ... motion to dismiss that raises collateral estoppel grounds." (quotation marks omitted)).

That should be dispositive but there are many more reasons to question STN's standing. Like the Appellate Court, the Supreme Court has recognized that the Schaghticoke "is divided into two factions," *Schaghticoke Tribal Nation v. Harrison*, 264 Conn. 829, 831 (2003); furthermore, Mr. Velky relied on that leadership dispute in defending himself against criminal charges arising out of an alleged altercation between Mr. Velky and one Karen Russell, "who is married to" Mr. Alan Russell, *State v. Velky*, 263 Conn. 602, 606 (2003), which latter has claimed himself to be "the tribal chairman of SIT." *Rost*, 138 Conn. App. at 208, n. 2.

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[3] Furthermore, in *Rost*, the trial court opened its decision, "vacating its earlier finding that STN, through its tribal council, was the recognized tribal leader." *Rost*, 138 Conn. App. at 209. In so ruling, the trial court stated that it was "'reopening my decision and clarifying my decision, that even if [Richard] Velky, [who testified on behalf of STN] in my analysis of the law, . . . is not the accepted and recognized tribal leader, nevertheless the" STN and SIT collectively represented the Schaghticoke. *Id*. at 217 & n.7.

This "ongoing and hotly contested" leadership dispute sheds light on STN's Complaint such that even if the earlier ruling that STN cannot independently represent the interests of the Schaghticoke were not decisive, STN could not allege sufficient facts to support either of the *GHP* standing requirements. *Id*. at 217. As to the first *GHP* requirement, the facts STN alleges do not establish that STN is "a proper party to request adjudication of the issues" it has raised in this case, which facts on their face seem to impact all descendants of the historical Schaghticoke whether they are part of STN, SIT or otherwise. *GHP*, 231 Conn. at 571 (quotation marks omitted).

STN makes no reference to the SIT faction—or any other faction—in its Complaint. There is no indication that the long-running leadership dispute between STN and SIT that the Appellate Court referenced in 2012 has been resolved, or that STN has otherwise somehow become the proper party to assert claims on behalf of all the Schaghticoke. To the contrary, separate factions have continued to claim leadership of the Schaghticoke in dealings with the Department of Energy and Environmental Protection as recently as January 2017. *Stevens Affidavit* (Exh. 1). In addition, in 2013, this Court found that it was "clear from the evidence" presented in yet another case "that there is a leadership dispute among the Schaghticoke Indians." *Schaghticoke Indian Tribe v. Hatstat*, 2013 WL 5422844, at *2, 56 Conn. L. Rptr. 789 (Conn. Super. Ct. Sept. 11, 2013) (Pickard, J.). Tellingly, the dispute at issue in *Hatstat* was between two "entirely different" entities "with entirely different members," both of which claimed to represent SIT and, by extension, "the Schaghticoke Indians." *Id*. This Court found that that dispute was itself distinct from SIT's "leadership dispute with an entirely different entity known as [Plaintiff] Schaghticoke Tribal Nation" that the Appellate Court had referenced in *Rost*. *Id*.

Thus, this Court has both held that STN lacks independent authority to represent the Schaghticoke and recently recognized "that there are three separate groups who claim to represent the Schaghticoke Indians." *Id*. Plaintiff STN claims to be one of those three groups, but it alleges no facts to establish that it is the proper party to assert the claims in this case. It appears highly likely that a significant portion of the alleged harm-impacted individuals and groups are not represented by STN and, in fact, have vehemently disputed STN's authority to act for them specifically and for the Schaghticoke generally. Speculation is not enough to satisfy the first *GHP* standing requirement. It is entirely possible that STN's claimed harm is factionally derivative, and it is well-established that when "the harms asserted to have been suffered directly by a plaintiff are in reality derivative of injuries to a third party, the injuries are not direct but are indirect, and the plaintiff has no standing to assert them." *Scarfo v. Snow*, 168 Conn. App. 482, 497 (2016) (quotation marks omitted).

Even if this Court were inclined to disregard the preclusive effect of its earlier ruling and to assume that the facts STN alleges are sufficient to meet *GHP*'s first "proper party" requirement[4] (it shouldn't), the Supreme Court has made clear that *GHP*'s second "authority" requirement is substantially more rigorous. "To demonstrate authority to sue . . . it is not enough for a party merely to show a 'colorable claim' to such authority." *GHP*, 231 Conn. at 572. "Rather, the party whose authority is challenged bears the burden of convincing the court that the authority exists." *Id*.

"The burden of proof for questions of authority is higher than that for questions of propriety because . . . questions [of authority] are more important." *Id*. at 573. Proper authority

[4] In *GHP*, unlike here, there was no issue of factionalization. Therefore, "it was not disputed that the [plaintiff] tribe" was a proper plaintiff and that the first requirement was met. *GHP*, 231 Conn. at 573.

is necessary "not only to ensure that the litigants fairly and vigorously represent the party's views" but "also because, if unauthorized lawsuits were allowed to proceed, future rights of the named parties might be severely impaired." *Id*. (quotation marks and citation omitted). For example, "[b]ecause of the doctrines of collateral estoppel (issue preclusion) and res judiciata (claim preclusion), parties named in an unauthorized suit might later be unable to relitigate issues decided in that suit or to bring new claims." *Id*.; *see also Golden Hill Paugussett Tribe of Indians v. Town of Trumbull*, 49 Conn. App. 711, 714-15 (1998) (holding that finding as to tribal decision-making in *GHP v. Town of Southbury* had collateral estoppel effect and barred relitigation of the issue in a separate suit). Thus, if this Court allows this suit to proceed with STN as Plaintiff, all of the Schaghticoke risk being bound by the result, even though STN is only one of three bitterly divided factions and the other factions and individuals are not parties to this suit and may not even be aware of it. *Hatstat*, 2013 WL 5422844, at *2 (discussing the division).[5]

Again, this Court has already held that STN alone lacks authority to represent the Schaghticoke and STN's Complaint alleges no facts that could undermine that ruling. Indeed, STN does not even make a conclusory allegation that it is authorized to represent the interests of the full Schaghticoke despite the "ongoing and hotly contested" leadership dispute. *Rost*, 138 Conn. App. at 217. Such requires dismissal of this action.[6]

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[5] Notably, STN did not provide notice to SIT or, for that matter, anyone else, pursuant to Practice Book § 17-56(b) even though it appears clear that other descendants of the Schaghticoke would have an interest in this action. *See* Practice Book § 17-56. That is not a ground for this Motion to Dismiss, but is grounds for a Motion to Strike.

[6] Although a factual hearing is sometimes necessary before a case may properly be dismissed on authority grounds, that is not true in this case. Here, jurisdiction depends "on the allegations in the complaint" read in light of judicially noticeable decisions by this Court and other courts and STN's failure to allege facts to establish its authority "oust[s] the court of jurisdiction." *Lemoine v. McCann*, 40 Conn. App. 460, 466 (1996). In addition, a factual hearing is appropriate only

## II. SOVEREIGN IMMUNITY BARS STN'S CLAIMS FOR MONETARY RELIEF

"The principle that the state cannot be sued without its consent, or sovereign immunity, is well established under our case law" and "has deep roots in this state and our legal system in general, finding its origin in ancient common law." *Chief Information Officer v. Computers Plus Centers, Inc.*, 310 Conn. 60, 79 (2013) (quotation marks omitted) ("*Computers Plus*"). "[S]overeign immunity provides a strong presumption that the state is immune from suit or liability." *Morneau v. State*, 150 Conn. App. 237, 250 (2014) (citing *Hicks v. State*, 297 Conn. 798, 801 (2010)). Reflecting that, the Connecticut Supreme Court has long recognized that sovereign immunity bars suits seeking monetary relief against the State except where the State, by appropriate legislation or constitutional provision, consents to be sued. *Markley v. Dept. of Public Utility Control*, 301 Conn. 56, 65 (2011). "Sovereign immunity rests on the principle and on the hazard that the subjection of the state and federal governments to private litigation might constitute a serious interference with the performance of their functions and with their control over their respective instrumentalities, funds and property." *Miller v. Egan*, 265 Conn. 301, 314 (2003).

The doctrine of sovereign immunity applies not only to the state itself, but also to its agencies, officers and agents. "[B]ecause the state can act only through its officers and agents, a

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where there is a material factual dispute. Given this Court's ruling holding that STN cannot independently represent the Schaghticoke and courts' multiple other findings that the Schaghticoke are divided into factions, it is difficult to imagine that STN would dispute that fact. In any event, if STN were able to credibly allege facts to establish its authority despite that dispute, it presumably would have done so. That said, if STN requests a factual hearing and the Court concludes that a hearing is necessary, Defendants respectfully submit that this Court should decide the issue of STN's authority before it addresses Defendants' remaining arguments in favor of dismissal and that Defendants should be able to challenge STN's additional jurisdictional allegations during that hearing. *See, e.g.*, *GHP*, 231 Conn. at 573 (discussing the harm that may be done to non-parties when a plaintiff without proper authorization is allowed to litigate issues).

suit against a state officer concerning a matter in which the officer represents the state is, in effect, against the state" for sovereign immunity purposes. *Markley*, 301 Conn. at 65.

There are three narrow exceptions to sovereign immunity, but the only general exception[7] applicable to claims seeking monetary relief exists where "the legislature, either expressly or by force of a necessary implication, statutorily waives the state's sovereign immunity." *Columbia Air Services v. Dept. of Transportation*, 293 Conn. 342, 349 (2009); *see also Computers Plus*, 310 Conn. at 80–81 ("We have expressly limited the exceptions to sovereign immunity for when a state official acts pursuant to an unconstitutional statute or in excess of his authority to actions seeking declaratory or injunctive relief."). A plaintiff seeking to invoke that exception bears the burden of identifying the claimed statutory waiver and alleging facts to show that it has strictly complied with the terms of that waiver.

### A. All of STN's Claims for Monetary Relief are Barred Given the Absence of any Legislative Waiver of Sovereign Immunity

STN does not identify any statutory waiver of sovereign immunity in its Complaint.[8] That alone should be dispositive. *See, e.g.*, *Gold v. Rowland*, 296 Conn. 186, 220-21 (2010). In any event, the only statutory waiver of sovereign immunity that could even theoretically be available to monetary claims such as STN's is the Claims Commissioner process. STN does not allege that it sought and obtained permission from the Claims Commissioner to bring any claim against Defendants. Therefore, sovereign immunity bars STN from obtaining any monetary recovery against Defendants, whether in the form of damages, fees or costs. *See, e.g.*, Conn.

[7] There is also a more specific exception for taking claims, which will be discussed below.

[8] "The principles governing statutory waivers of sovereign immunity are well established." *Allen v. Comm'r of Revenue Servs.*, 394 Conn. 292, 299 (2016). "[A] litigant that seeks to overcome the presumption of sovereign immunity [pursuant to a statutory waiver] must show that . . . the legislature, either expressly or by force of a necessary implication, statutorily waived the state's sovereign immunity.'" *Id.* (quotation marks omitted). STN references several statutes in its Complaint, but none of them waive sovereign immunity expressly or by necessary implication.

Gen. Stat. § 4-160(c) (requiring that a plaintiff bringing suit based on Claims Commissioner's authorization must "allege such authorization and the date on which it was granted"); *see also Miller*, 265 Conn. at 317 ("refus[ing] to permit an award of so trifling a sum as taxable costs against the state" absent a legislative waiver of sovereign immunity). The Supreme Court has repeatedly held that "[i]n the absence of a statutory waiver of sovereign immunity, the plaintiff may not bring an action against the state for monetary damages without authorization from the claims commissioner." *Columbia*, 293 Conn. at 351.

It is also clear that sovereign immunity bars STN's claims for damages based on alleged constitutional due process and open courts violations as well as STN's claim for damages based on an alleged breach of fiduciary duty. *See Compl.*, Count Three (due process); ¶ 66 (referencing the "open courts provision" of the Connecticut Constitution); Count Four (breach of fiduciary duty). The Supreme Court has consistently held that sovereign immunity generally bars all claims for monetary damages against state officials in their official capacities, regardless of whether those claims arise under the United States Constitution, the Connecticut Constitution or Connecticut common law. *See, e.g., Prigge v. Ragaglia*, 265 Conn. 338, 343–49 (2003) (holding that sovereign immunity barred myriad federal and state constitutional damages claims); *see also DaimlerChrysler Corp. v. Law*, 284 Conn. 701, 721-23 (2007) (holding that sovereign immunity bars damages claims, "even if the claims are brought pursuant to the United States constitution"); *Cimmino v. Marcoccia*, 149 Conn. App. 350, 353, 361 (2014) (sovereign immunity barred common law damages claims). Sovereign immunity bars STN's constitutional taking, common law constructive or resulting trust claims and accounting claims as well.

**B. Sovereign Immunity Bars STN's Taking Claims**

The Supreme Court has held that taking claims can be an exception to the general rule that sovereign immunity bars all claims seeking monetary relief, but that exception does not help STN here. As an initial mater, exceptions to sovereign immunity—whatever their basis—"*are few and narrowly construed under our jurisprudence.*" *Computers Plus*, 310 Conn. at 80 (quotation marks omitted, emphasis in *Computers Plus*).

Consistent with that principle, even where—as here—a plaintiff alleges a taking claim, "[t]o survive a motion to dismiss on the ground of sovereign immunity, a complaint must allege sufficient facts to support a finding of a taking of land in a constitutional sense." *Tamm v. Burns*, 222 Conn. 280, 284 (1992). In making that determination, the Court must be cognizant of whether the plaintiff's claims are more appropriately considered non-taking claims and "the plaintiff has resorted to a claim of an unconstitutional taking in order to obtain redress" from the Court and avoid sovereign immunity (and the Claims Commissioner). *Id*. at 289. "Before embarking on a consideration of whether [the Court] should take a more expansive view of the taking clause in article first, § 11 of our state constitution" than provided for under existing precedent, the Court "must be sure that no other remedy is available to compensate the plaintiff for the losses alleged." *Id*.[9] If "the plaintiff's claim does not fit the precedential mold for a constitutional taking claim, [the plaintiff] must exhaust the claims commission remedy, which is available for nonconstitutional claims, before proceeding further with [its] claim of a violation of

[9] Given the Supreme Court's explicit guidance in *Tamm* that a taking claim not clearly within the scope of existing precedent should not proceed where another remedy is available to STN, it is noteworthy that STN seeks damages based on multiple other monetary claims that must be pursued—if at all—before the Claims Commissioner, including a due process claim explicitly based on "Defendant State of Connecticut [allegedly] taking and selling [STN's] property without just compensation." *Compl*., ¶ 64.

its constitutional rights." *Id*. at 290; *cf*. *Gold*, 296 Conn. at 214 (holding that *dictum* from prior decisions should not be used to expand exceptions to sovereign immunity).

STN has not met—and cannot meet—its burden to allege a taking claim under existing precedent for several reasons, and that should be fatal to its taking claims under both article first, § 11 of the Connecticut constitution, *Compl.*, Count Two, and the Fifth and Fourteenth Amendments to the United States Constitution. *Id*., Count One; *see, e.g., Tamm*, 222 Conn. at 282 n.1, 290 (dismissing both federal and state taking claims where proper showing was not made); *see also New England Estates, LLC v. Town of Branford*, 294 Conn. 817, 834 (2010) (holding that where state law did not recognize protected property interest for taking purposes, federal taking claim would necessarily fail).

**1. STN Does Not Have a Protected Property Interest that Would Support a Taking Claim**

Article first, § 11 of the Connecticut Constitution provides that "[t]he property of no person shall be taken for public use, without just compensation therefor." STN's Complaint explicitly states that it "challenges not the validity of the land takings made the basis of this suit, but rather the State's failure to render just compensation." *Compl*., ¶ 60. But regardless of the purported basis for its claim STN has not alleged "sufficient facts to support a finding of a taking . . . in a constitutional sense," and therefore its claim cannot survive this Motion to Dismiss. *Tamm*, 222 Conn. at 284.

The Supreme Court has long held that "'[i]t is axiomatic that government action cannot constitute a taking when the aggrieved party does not have a property right in the affected property.'" *A. Gallo and Co. v. Commissioner of Environmental Protection*, 309 Conn. 810, 824 (2013) ("*Gallo*") (quoting *184 Windsor Ave., LLC v. State*, 274 Conn. 302, 320 (2005) ("*184 Windsor*")). It follows that "[i]n order to state a claim under the takings clause," STN "must first

establish that [it] possesses a constitutionally protected interest in the disputed property." *Gallo*, 309 Conn. at 824. Whether STN has met that burden "is a question of law" that is "properly decided by the trial court in the context of a motion to dismiss." *184 Windsor*, 274 Conn. at 320 n.20.

STN has not met that burden, and cannot meet it. To the extent STN's taking claim is based on its asserted entitlement to just compensation for a taking of its alleged interest in land, it is clear that the claim should fail. Courts have characterized the interest in land such as that in question as only a "right of occupancy" that is not subject to a taking claim. *See, e.g.*, *Tee-Hit-Ton Indians v. U.S.*, 348 U.S. 272, 279 (1955); *see also Seneca Nation of Indians v. New York*, 382 F.3d 245, 248 n.4 (2d Cir. 2004), *cert. denied*, 547 U.S. 1178 (2004); *Oneida Indian Nation v. New York*, 860 F.2d 1145, 1150 (2d Cir. 1988), *cert. denied*, 493 U.S. 871 (1989). "That description [right of occupancy] means mere possession not specifically recognized as ownership" by the state. *Tee-Hit-Ton*, 348 U.S. at 279. It is only permissive occupation. "That is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians." *Id*. Therefore, "[n]o case in this Court has ever held that taking of Indian title or use . . . required compensation" under the federal takings clause, *id*. at 281, which is generally interpreted to require the same analysis as article first, § 11 of the Connecticut Constitution. *See, e.g.*, *Bauer v. Waste Mgmt. of Connecticut, Inc.*, 234 Conn. 221, 250 n.16 (1995) (noting that the Court has "never interpreted" the state and federal taking "provisions to require different analysis"); *see also St. Regis Tribe of Mohawk Indians v. State*, 5 A.D. 2d 117, 122-23 (N.Y. App. Div. 1957), *aff'd*, 152 N.E.2d 411 (N.Y. 1958) (affirming grant of state's

motion to dismiss Indian taking claim based on *Tee-Hit-Ton*, reasoning that the state and federal taking provisions were "identical in scope and effect" and that "[t]he constitutional principles which underlie the freedom of action of the United States in this area apply with equal force to the government of New York within its own jurisdiction"). That should be dispositive of STN's taking claims to the extent they are based on the alleged taking of land.

STN's taking claims should fare no better to the extent they are based on an alleged protected property interest in a claimed "STN Tribal Fund." *Compl.*, ¶ 2; *see also id*. at ¶¶ 9, 34, 80 (referring to "the 'Schaghticoke Indian Fund'"); *id*. at ¶ 76 (alleging that "the State established a separate fund and account for STN funds"). As a threshold matter, as discussed above, STN had no protected property interest in the land that was allegedly sold. The placement of the proceeds from those land sales into a "state account" would not somehow create a protected interest where one did not previously exist. *See, e.g.*, *New England Estates*, 294 Conn. at 836 (holding that there was no protected property interest in permits for state or federal taking purposes where "[a]ny rights that [the plaintiff] had pursuant to the permits . . . were tied to its rights under the option contract" and the underlying option contract "did not give rise to a property interest for purposes of the takings clause").

Rather than creating a property interest protected for taking purposes, the placement of the proceeds from land sales into an account for the benefit of the Schaghticoke would simply reflect a legislative "policy of Indian gratuities for the termination of Indian occupancy of Government-owned land" that gave the legislature flexibility to act as it deems appropriate "rather than making [judicially enforced] compensation for [the land's] value a rigid constitutional principle." *Tee-Hit-Ton*, 348 U.S. at 291. That result would leave the policy

determination "with [the legislature], where it belongs" and requires dismissal of STN's taking claims. *Id*.

STN's taking claims based on a fund would still fail, even if STN's lack of a protected property interest in the underlying land that formed the basis for the fund was not dispositive. Although "money is certainly property," the Supreme Court has held that "[i]n order to state a claim under the takings clause, . . . a plaintiff must first establish that he or she possesses a constitutionally protected interest in the disputed property" and a "'clear entitlement' to the property." *Gallo*, 309 Conn. at 824 (quotation marks omitted). STN can establish neither.

The Supreme Court has "look[ed] for incidents of ownership to determine whether the plaintiffs had a property interest . . . that warranted constitutional protection" in funds placed in a private account pursuant to a statutory scheme. *Id*. at 838. "Incidents of ownership include (1) the right to use the property; (2) the right to earn income from the property and to contract over its terms with other individuals and (3) the right to dispose of, or transfer, ownership rights to another party." *Id*. (citations omitted).

STN does not have—and has never had—any of those incidents of ownership in the alleged STN Tribal Fund.[10] Like the plaintiff distributors in *Gallo* held not to have a protected property interest, STN has no ability "to withdraw or control the funds placed in" any STN Tribal Fund. *Id*. at 839. STN correctly acknowledges that "[t]he funds have always been with the State, prior to and through Conn. Gen. Stat. § 47-66." *Compl.*, ¶ 84.

Section 47-66 provides that "[t]ribal funds shall be under the care and control of the Commissioner of Energy and Environmental Protection with the advice of the Indian Affairs

[10] STN's allegation that the fund is called the "STN Tribal Fund" does not establish that STN has a protected property interest in any such fund. *See, e.g.*, *Gallo*, 309 Conn. at 839 (plaintiffs' demonstration "that the special accounts in which the funds were deposited were opened in their names . . . without more, does not establish that they had a property interest in the" funds).

Council [("the IAC[11]")] and may be used for the purposes set forth in section 47-65." Conn. Gen. Stat. § 47-66. Section 47-65, in turn, allows the Commissioner—"with the advice of the Indian Affairs Council"—to grant petitions by residents of reservation buildings to *inter alia* use tribal funds to "make major repairs and improvements to the exterior" and certain key systems of reservation buildings that are not privately owned as such repairs and improvements "are necessary to insure habitable living conditions." Conn. Gen. Stat. § 47-65(b). Section 47-65 also provides that the IAC (without the Commissioner's involvement) "may, upon petition of an Indian resident without sufficient means to support himself, provide assistance in an amount necessary to maintain a standard of living in the home compatible with the well-being of the resident" and "shall provide other services as it deems necessary to insure the well-being of all persons residing on the reservation." Conn. Gen. Stat. § 47-65(c). Thus, the Commissioner and the IAC—not STN—have the exclusive ability to withdraw or control how tribal funds are used and STN has "no property interest in the [tribal funds] because [it] possesses none of the normal interests of ownership." *Gallo*, 309 Conn. at 839.

*Gallo* should be dispositive. There, the Supreme Court held that the plaintiffs lacked a protected property interest even though the funds at issue were placed in private accounts at banks "to the credit of the plaintiffs" and the plaintiffs "maintained transactional authority over the accounts." *Id*. at 819. Here, STN's claim of a protected property interest is even weaker; rather than being in private accounts in private banks, the tribal "funds have always been with the State" in a public account over which the state has transactional authority. *Compl.*, ¶ 84. STN has no protected property interest for taking purposes and this Court should dismiss its claims.

[11] The IAC consists of eight members: one representative of the Schaghticoke, one representative for each of the four other tribes recognized by the State, and three other persons "not of Indian lineage" appointed by the Governor. Conn. Gen. Stat. § 47-59b.

### 2. STN's Taking Claims Must Fail to the Extent they are Based on Events that Occurred Before the Relevant Constitutional Provisions Existed or Were Incorporated

STN's taking claims are primarily based on article first, § 11 of the Connecticut Constitution, *Compl.*, Count Two, and the Fifth Amendment to the United States Constitution, as incorporated against the states through the Due Process Clause of the Fourteenth Amendment. *Id*, Count One.[12] But STN's taking claims are based on events that occurred before 1818 when article first, § 11 of the Connecticut Constitution came into existence and before 1896 when the United States Supreme Court first held that the Fifth Amendment's just compensation requirement applied to the states. *See The Constitution of Connecticut (1818)* (the first enactment of article first, § 11); *see also Adamson v. People of State of California*, 332 U.S. 46, 79–80 (1947) (Black, J., dissenting) (noting that "in 1896" the Supreme Court effectively overruled prior precedent by holding "that the Fourteenth Amendment forbade a state from taking private property for public use without payment of just compensation" (discussing *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226 (1896)). For example, STN alleges that "[i]n 1801, the State exceeded its statutory authority, taking and selling 1,129 acres—roughly *forty-five percent* of STN's total land—far in excess of what was purportedly needed to discharge STN's alleged debt to the State." *Compl.*, ¶ 6 (emphasis in *Compl.*); *see also id*. at ¶ 7 (referencing events between 1801 and 1918); *Id*. at ¶ 26 (referencing events beginning in 1801); *Id*. at ¶ 29 (referencing same alleged 1801 taking referenced in ¶ 6); *Id*. at ¶ 30 (referencing a total of 91 mortgages, 21 dated before 1818 and 87 before 1896).

[12] The Fifth Amendment itself "serves as a limitation only on the powers of the United States government and affords no ground for relief against the state of Connecticut." *Tamm*, 222 Conn. at 283 n.1.

That allegation alone establishes that even if STN had a protected interest (and it did not, for the reasons discussed above), well over half of the land on which STN bases its taking claims[13] was taken well over a decade before article first, § 11 of the Connecticut Constitution existed and nearly a century before the federal just compensation requirement applied to the states. That should be fatal to STN's taking claims to the extent they rely on actions the state and its officials allegedly took before the laws on which STN's claims rely were enacted or applied. *See, e.g., Paragon Const. Co. v. Dep't of Pub. Works*, 130 Conn. App. 211, 221 n. 10 (2011) (noting "that the appellate courts of this state have ordered the dismissal of *portions of a count* of a complaint on the basis of sovereign immunity" (emphasis in *Paragon*)).[14]

STN apparently understands that its constitutional taking claims are defective because no constitutional taking provisions were in operation for much—and perhaps all—of the critical time period, and seeks to avoid the consequences of that by asserting that "Connecticut common law prior to 1818 provided damages for the violation of rights substantially similar to Article One, Section Eleven." *Compl.*, ¶ 59. STN does not offer any specifics as to the supposed similar common law right it seeks to invoke, and that alone warrants dismissal—"to circumvent the strong presumption of sovereign immunity in an action for monetary damages, the burden is on" STN to "show that" its claims come within an applicable waiver. *DePietro v. Dep't of Pub. Safety*, 126 Conn. App. 414, 418 (2011).

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[13] STN alleges that its reservation began as 2,400 hundred acres, and is now 400 acres. *Compl.*, ¶ 1. Therefore, STN's taking claims are based on approximately 2,000 acres, 1,129 (56 %) of which STN alleges were taken in 1801. *Id*. at ¶ 6.

[14] Although limitations on a government's taking authority are now an established part of our state and federal jurisprudence, "[t]he principle that the state necessarily owes compensation when it takes private property was not generally accepted in either colonial or revolutionary America." Treanor, *Note: The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 694 (1985).

STN's generic reference to an unspecified common law right falls woefully short of meeting that burden. As discussed above, Connecticut's appellate courts have consistently held that sovereign immunity bars common law claims unless the Claims Commissioner grants permission to sue. *See, e.g., Cimmino*, 149 Conn. App. at 353. STN's Complaint offers no basis to treat its putative common law claims differently—even in the context of constitutional takings claims, the Appellate Court has held that "[w]here our statutes provide an efficacious means for assuring just compensation, that procedure will be followed" and that "[o]nly when the statutory procedure is inadequate to achieve this goal does a property owner have recourse to common law remedies." *Russo v. Town of E. Hartford*, 4 Conn. App. 271, 274 (1985). The Supreme Court has repeatedly held that it "know[s] of [no authority] standing for the proposition that recourse to the" statutory procedure for claims before the "claims commissioner is an inadequate remedy as a matter of law" and there is no reason to reach a contrary conclusion here. *184 Windsor Ave.*, 274 Conn. at 313 (quotation marks omitted). Therefore, STN's opaque references to some improperly pled and unidentified common law claim "substantially similar" to a constitutional takings claim cannot avoid dismissal. *Compl.*, ¶ 59.

**C. Sovereign Immunity Bars STN's Constructive or Resulting Trust Claims**

In Counts Three and Six of its Complaint, STN references claims for a constructive or resulting trust.[15] *Compl.*, ¶ 88. The trust claims are contingent on STN prevailing on its other underlying claims. STN cannot prevail on those predicate claims, for the reasons discussed elsewhere in this Memorandum. That alone requires dismissal. But sovereign immunity would bar the trust claims, even if they had independent viability. With its trust claims, STN is asking

[15] Those claims are part of a Count that appears to include several different claims, and therefore are not properly pleaded. Practice Book § 10-26. Defendants nonetheless will address them to the extent possible, to assist the Court. Should any claims survive this Motion to Dismiss, Defendants reserve their rights to object on those and other grounds.

this Court to order an accounting, force the state to place "at least six hundred ten million, five hundred thirteen thousand, seven hundred fourteen (**$610,513,714.00**) dollars" into a "Schaghticoke Indian Fund" and then "impos[e] a resulting or constructive trust in favor of STN, to protect its interest in the subject funds and to ensure that those funds are used for the benefit of STN." *Compl*., ¶ 89(A) & (B) (emphasis in *Compl.*).

It bears repeating that "[s]overeign immunity rests on the principle and on the hazard that the subjection of the state and federal governments to private litigation might constitute a serious interference with the performance of their functions and with their control over their respective instrumentalities, funds and property." *Miller*, 265 Conn. at 314. It is difficult to imagine a more "serious interference with the performance" of the General Assembly's functions and its control of the state's "funds" than to have this Court order the General Assembly to place at least "**$610,513,714.00**" into a specific account and use it only for the benefit of STN, the plaintiff in this "private litigation." *Compl.*, ¶ 89(A) (number) (emphasis in *Compl.*); *Miller*, 265 Conn. at 314 (other quoted phrases).

This Court cannot grant STN the accounting it demands, for the reasons set forth elsewhere in this Memorandum. *See* Sections II(D) and IV below. But even if this Court could do so, sovereign immunity would bar this Court from imposing a trust that forced the state to place over $610 million—or, for that matter, any amount—into a specific fund and use it only for enumerated purposes dictated by this Court. *See Miller*, 265 Conn. at 317 (sovereign immunity bars even "award of so trifling a sum as taxable costs against the state" absent a legislative waiver).

STN may argue that sovereign immunity does not bar its trust claims because they seek declaratory and injunctive relief rather than damages. But that argument would lack any merit.

STN's demands for declaratory and injunctive relief are "really tantamount" to demands "for damages." *St. George v. Gordon*, 264 Conn. 538, 550 n.12 (2003), *superseded by statute on other grounds as stated in Flanagan v. Blumenthal*, 100 Conn. App. 255, 260 (2007). STN asks this Court to establish that STN "is entitled to" a certain amount of funds—to be determined by this Court—and to order that those funds be removed from the General Fund, placed in a specific account and held for STN's benefit only. *St. George*, 264 Conn. at 550 n.12. Regardless of the label STN places on its trust claims, the Supreme Court has made clear that they should be "construe[d]" as claims "for monetary damages" for sovereign immunity purposes and therefore the exceptions to sovereign immunity for non-monetary claims "are not applicable." *Id*. It is well-established that STN cannot "sidestep the defense of sovereign immunity" by putatively "seek[ing] equitable rather than monetary relief." *Alter & Assocs., LLC v. Lantz*, 90 Conn. App. 15, 17 (2005); *see also DaimlerChrysler Corp. v. Law*, 284 Conn. 701, 712 n.6, 721–23 (2007) (holding that "[t]he plaintiff's request for relief—an order that the defendant refund all sales taxes for which the plaintiff had submitted a claim for refund—must be characterized as a claim for damages").

**D. Sovereign Immunity Bars STN's Demands for an Accounting**

Counts Five and Six putatively seek declaratory and injunctive relief requiring the Commissioner to settle the STN's claimed account pursuant to § 47-66. But, as discussed above, "[t]he mere framing of the complaint as one for declaratory judgment does not, in and of itself, make it so" for sovereign immunity purposes. *Bloom v. Dep't of Labor*, 93 Conn. App. 37, 41 (2006). STN's Complaint makes clear that although Counts Five and Six demand an accounting, STN "ultimately is seeking money damages." *Id*. "The exception to the doctrine of sovereign immunity for actions by state officers in excess of their statutory authority applies to actions

seeking declaratory or injunctive relief, not to actions for money damages." *Id*. The ultimate purpose of STN's claims in Counts Five and Six is "to collect damages" and sovereign immunity bars them. *Id*.[16]

## III. SOVEREIGN IMMUNITY BARS STN'S CLAIMS FOR NON-MONETARY RELIEF

As discussed above, "[t]he doctrine of sovereign immunity provides a strong presumption that the state is immune from suit or liability." *Morneau*, 150 Conn. App. at 250 (citing *Hicks*, 297 Conn. at 801). Therefore, all of STN's claims are barred unless STN has alleged claims and facts that fit within one of the three narrow exceptions to sovereign immunity:

> (1) when the legislature, either expressly or by force of a necessary implication, statutorily waives the state's sovereign immunity; (2) when an action seeks declaratory or injunctive relief on the basis of a substantial claim that the state or one of its officers has violated the plaintiff's constitutional rights; and (3) when an action seeks declaratory or injunctive relief on the basis of a substantial allegation of wrongful conduct to promote an illegal purpose in excess of the officer's statutory authority.

*Columbia*, 293 Conn. at 349 (quotation marks and citations omitted). The Supreme Court has "imposed specific pleading requirements" STN must satisfy to invoke "the second and third exceptions." *Law*, 284 Conn. at 721. "For a claim made pursuant to the second exception, complaining of unconstitutional acts, we require that [t]he allegations of such a complaint and the factual underpinnings if placed in issue, must clearly demonstrate an incursion upon constitutionally protected interests." *Id*. (quotation marks omitted). "For a claim under the third exception, the plaintiffs must do more than allege that the defendants' conduct was in excess of their statutory authority; they also must allege or otherwise establish facts that reasonably support those allegations." *Id*. (quotation marks omitted). "In the absence of a proper factual

[16] These counts are also subject to dismissal for other reasons that will be discussed in more detail in Sections III(B) and IV below.

basis in the complaint to support the applicability of these exceptions, the granting of a motion to dismiss on sovereign immunity grounds is proper." *Id*.

Counts Three and Six of STN's Complaint seek declaratory and injunctive relief. Sovereign immunity bars those claims.[17]

### A. Count Three Does Not Provide a Proper Basis for Prospective Relief and is Not Sufficiently Substantial to Overcome Sovereign Immunity

Count Three apparently attempts to invoke the second narrow exception to sovereign immunity, which is available "when an action seeks [prospective] declaratory or injunctive relief on the basis of a substantial claim that the state or one of its officers has violated the plaintiff's constitutional rights." *Columbia Air Servs.*, 293 Conn. at 349 (quotation marks and citations omitted). But Count Three does not provide a basis for prospective relief based on a substantial constitutional claim. Therefore, sovereign immunity bars it.

The gravamen of STN's allegations in Count Three appear to be that "STN was given no opportunity to be heard prior to Defendant State of Connecticut taking and selling its [presumably STN's] property without just compensation" in violation of due process, *Compl.*, ¶ 64, and that STN also has a claim under "the open courts provision of Article One, Section Ten of the Connecticut Constitution" because unspecified "Connecticut common law, prior to 1818" allegedly provided a remedy for violation of these rights. *Id*. at ¶ 66.[18] STN's constitutional claims in Count Three are based on past conduct, namely, the alleged taking and selling of land "[b]eginning in 1801," *Compl.*, ¶ 26, and extending to 1918. *Id*. at ¶¶ 6-7. Based on those allegations, STN seeks "declaratory relief in the form of a judgment declaring the State has

[17] Count Five is subject to dismissal on private right of action grounds, and will be discussed in more detail in Section IV below.

[18] Again, STN improperly combines two separate claims into a single count, but Defendants will respond as best they can to assist the Court while reserving all rights to object to STN's defective pleading at later stages of this litigation should they be necessary.

violated STN's constitutional rights, and injunctive relief including an Order by this Court establishing and directing a resulting or constructive trust." *Id*. at ¶ 89(B)(a).

STN's demand for injunctive relief establishing and directing a resulting or constructive trust is tantamount to a claim for money damages and sovereign immunity bars it for the reasons discussed in Section II(C) above. Sovereign immunity also bars STN's demand for a declaration that the State violated STN's due process and open courts rights by "taking and selling" STN's "property without just compensation," *id*. at ¶ 64, for multiple reasons.

The first reason is that to invoke the second exception to sovereign immunity, STN's Complaint must state "a *substantial* claim that the state or one of its officers has violated the plaintiff's constitutional rights" and "the allegations of the complaint and the facts in issue must *clearly demonstrate* an incursion upon constitutionally protected interests." *Markley*, 301 Conn. at 67–68 (quotation marks omitted; emphasis in *Markley*). STN's Complaint falls far short of meeting that burden.

Count Three references two constitutional provisions: the due process provision of article first, § 8 and the open courts provision of article first, § 10. It does not provide a factual basis for a substantial claim under either.

As an initial matter, STN does not give any indication of what alleged common law right existing in 1818 forms the basis for its open courts claim. That does not approach STN's burden to allege "a *substantial* claim" supported by allegations and facts that "*clearly demonstrate* an incursion upon constitutionally protected interests." *Markley*, 301 Conn. at 67–68 (quotation marks omitted; emphasis in *Markley*). Therefore, STN's open courts claim must be dismissed.

STN's due process claim should fare no better. The primary alleged taking and sale STN's claims rely on was the 1801 taking and sale of "1,129 acres—roughly *forty-five percent* of

STN's total land." *Compl.*, ¶ 6 (emphasis in *Compl.*). But the due process provision of article first, § 8 did not exist in 1801. That alone renders STN's claim insubstantial, at least to the extent it is based on that transaction or any others before the relevant constitutional provision was in place. *See, e.g.*, *Paragon*, 130 Conn. App. at 221 n. 10 (dismissing portion of count on sovereign immunity grounds). The lack of substance of STN's due process claim is further illustrated by STN's acknowledgement that the 1801 taking and sale was subject to oversight by the General Assembly, *Compl.*, ¶ 26, and that under subsequent statutes "the State Overseers were required to present an accounting to the Connecticut Circuit Court or Superior Court in Litchfield or New Milford." *Id.* at ¶ 33. That was ample process.

More fundamentally, STN does not allege that any future takings and sales of STN land without due process are remotely likely. That is not surprising, since Conn. Gen. Stat. § 47-60(a) expressly provides that "[a]ny reservation land held in trust by the state on October 1, 1989, shall continue to be held in trust in perpetuity to prevent alienation and to insure its availability for future generations of Indians." That requires dismissal of STN's claim for declaratory relief.

The Supreme Court has drawn a clear distinction between claims for monetary relief—which generally "seek to remedy past wrongs"—and claims for declaratory relief, which are generally of a "prospective nature." *Fin. Consulting, LLC v. Comm'r of Ins.*, 315 Conn. 196, 213 (2014). Sovereign immunity bars all retrospective monetary claims unless the General Assembly has explicitly authorized them. *Miller*, 265 Conn. at 315.

By contrast, the Supreme Court has judicially created exceptions to sovereign immunity for prospective declaratory and injunctive relief, emphasizing that those exceptions must be "*narrowly construed*." *Computers Plus*, 310 Conn. at 80 (quotation marks omitted; emphasis in *Computers Plus*); *see, e.g., Univ. of Connecticut Chapter AAUP v. Governor*, 200 Conn. 386,

388 (1986) (the Court has recognized "a narrow exception for actions seeking prospective injunctive relief when the relief granted avoids undue interference with governmental functions"). The Court created those exceptions because prospective declaratory and injunctive relief would *inter alia* ensure that state officials' future actions complied with constitutional requirements. *See, e.g.*, *Miller*, 265 Conn. at 315 (discussing *Horton v. Meskill*, 172 Conn. 615, 623 (1977), where the Supreme Court held that sovereign immunity did not bar declaratory relief holding that officials "*were acting* pursuant to an unconstitutional statute or in excess of their statutory authority *in implementing* the [education] system" (emphasis added)).

The declaratory relief STN seeks holding that the State violated due process in taking and selling land approximately a century or more ago has no prospective component. STN alleges no facts to support a conclusion that the Commissioner will take and sell Schaghticoke tribal land in the future in a way that violates STN's due process rights, and it cannot credibly make any such allegations given that Conn. Gen. Stat. § 47-60(a) explicitly states that existing reservation land "shall continue to be held in trust in perpetuity." Therefore, sovereign immunity bars STN's claim for declaratory relief. For similar reasons, STN lacks standing because the declaration it seeks would not "result[] in practical relief," *Milford Power Co., LLC v. Alstom Power, Inc.*, 263 Conn. 616, 625–26 (2003), and—even if STN could overcome that—this Court should exercise its discretion to hold that declaratory relief is not appropriate. *See, e.g.*, *Connecticut Sav. Bank v. First Nat. Bank & Trust Co.*, 133 Conn. 403, 410 (1947).

**B. Sovereign Immunity Bars Count Six Directly Against the State**

Count Six seeks declaratory and injunctive relief directly against the State, claiming *inter alia* "that the State has violated" Conn. Gen. Stat. §§ 47-65 and 47-66 "by failing to annually account for and settle STN funds." *Compl.*, ¶ 89(B)(c). Sovereign immunity bars those claims.

As an initial matter, it is the Commissioner—not the State *qua* State—who has the obligation to "annually settle his accounts of the affairs of each tribe" under Conn. Gen. Stat. § 47-66. To the extent STN has claims based on the Commissioner's actions or inactions under the statute, those claims must be directed against him (as they are in Count Five, which will be discussed in Section IV below). The Appellate Court has made clear that the excess of statutory authority exception to sovereign immunity does not apply to claims directly against the state or its agencies. *See, e.g., Hanna v. Capitol Region Mental Health Ctr.*, 74 Conn. App. 264, 270 n.7 (2002); *see also Ware v. State*, 118 Conn. App. 65, 76–77 (2009) (holding that sovereign immunity barred claims directly against the State where there was "no substantial allegation that a state officer was acting pursuant to an unconstitutional enactment or in excess of his statutory authority," indeed "there [wa]s no allegation against a state officer at all" and "[t]he sole defendant in this action is the state of Connecticut").

## IV. SECTION 47-66 DOES NOT GRANT A PRIVATE RIGHT OF ACTION

Count Five seeks declaratory and injunctive relief against the Commissioner. Although this Count—like the others—is not properly pleaded, it appears that the gravamen of the Count is that the Commissioner acted in excess of his statutory authority by declining "to provide an accounting and related documentation as required by Conn. Gen. Stat. § 47-66" at STN's request. *Compl*., ¶ 77. But § 47-66 does not grant STN a private right of action.

It is a "well settled fundamental premise that there exists a presumption in Connecticut that private enforcement does not exist unless expressly provided in a statute." *Provencher v. Town of Enfield*, 284 Conn. 772, 777 (2007). Section 47-66 does not expressly provide STN with the authority to enforce its requirements. Rather, the statute only provides that:

> Tribal funds shall be under the care and control of the Commissioner of Energy and Environmental Protection with the advice of the Indian Affairs Council and may be used for the purposes set forth in section 47-65. Said commissioner shall annually settle his accounts of the affairs of each tribe with the comptroller, and his report to the governor shall furnish, with respect to each tribe, a statement of the amount and condition of its fund, an estimate of the value of its lands and the income annually received and the expenditures made by said commissioner from such fund. Said commissioner may maintain an action in his name to recover any property misappropriated from a reservation.

Conn. Gen. Stat. § 47-66. Therefore, in order to overcome the presumption against private enforcement, STN "bears the burden of demonstrating that such an action is created implicitly in the statute," *Provencher*, 284 Conn. at 777-78, by "meet[ing] the threshold showing that none of the three factors" set forth in *Napoletano v. Cigna Healthcare of Connecticut, Inc.*, 238 Conn. 216, 249 (1996) "weighs against recognizing a private right of action." *Provencher*, 284 Conn. at 779 (quotation marks omitted). Those factors are whether: (1) the plaintiff is "one of the class" for whose "benefit the statute was enacted"; (2) there is "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one"; and (3) "it is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff." *Gerardi v. City of Bridgeport*, 294 Conn. 461, 468–69 (2010) (quotation marks omitted).

STN's burden is heavy. "The stringency of the [*Napoletano*] test is reflected in the fact that, since this court decided *Napoletano*, we have not recognized an implied cause of action despite numerous requests." *Id.* at 469–70 & n.5 (citing multiple cases). STN cannot make the threshold showing necessary here.

The Supreme Court has foreclosed STN from "demonstrat[ing] that prong two" of the *Napoletano* analysis—whether there is an indication of legislative intent to either deny or grant a private right of action—"does not weigh against" STN. *Provencher*, 284 Conn. at 786. That

alone "is fatal to [STN's] claim." *Id.*[19] Specifically, in *Albany Hill Problem Solving Revitalization Ass'n v. King*, 277 Conn. 238, 246-54 (2006), the Supreme Court held that the claimed beneficiaries of housing statutes intended to address racial discrimination and poverty did not have a private right of action for declaratory and injunctive relief to enforce the statutes' requirements, including their "strong reporting requirements." *Id.* at 254. Those reporting requirements were intended to "enable legislative and executive oversight," not private enforcement. *Id.* "Such an enforcement mechanism entrusted to the other two branches of government counsels strongly against finding a legislative intent to provide for judicial enforcement of the directive through a private cause of action." *Id.*

A similar enforcement mechanism is present here. Section 47-66 provides that the Commissioner shall settle his accounts with the Comptroller and report to the Governor. Similar to the reporting requirements held not to support a private cause of action in *King*, § 47-66's settlement and reporting requirements allow other parts of the executive branch—rather than the judicial branch—to monitor statutory compliance. *Id.* at 254 n.13. *King* establishes that STN cannot make the stringent threshold showing necessary to satisfy *Napoletano*'s second prong and that alone requires dismissal. *See, e.g.*, *Provencher*, 284 Conn. at 786.

STN also cannot make its threshold showing as to *Napoletano*'s third prong: whether implying a private remedy would be consistent with the underlying purposes of the legislative scheme. *King*, 277 Conn. at 255. Chapter 824—which includes § 47-66—has three references to authority to pursue court actions. The first, and most important for present purposes, is in

[19] STN's inability to meet its burden under prongs two and three means that STN's claims must be dismissed even if the Court assumes that STN is an intended beneficiary of the statutory requirements that the Commissioner settle with the Comptroller and report to the Governor. The Supreme Court has repeatedly held that no private cause of action existed, even where "the plaintiffs [were] clearly within the class of persons who were intended to be protected by the statute." *Gerardi*, 294 Conn. at 471; *see also Provencher*, 284 Conn. at 782-83.

§ 47-66 itself, which provides that the Commissioner—not the tribes—"may maintain an action in his name to recover any property misappropriated from a reservation." That grant of authority to the Commissioner juxtaposed against the lack of any comparable grant of authority for tribes to bring an action to challenge a failure to settle and report is highly probative, and should be decisive. It demonstrates that the legislature was "fully cognizant" that court action may be necessary for some purposes, but declined to grant tribes the right STN now seeks to assert. *See, e.g.*, *Provencher*, 284 Conn. at 785 ("It is without debate that the legislature could have added language . . . to indicate that a private cause of action was indeed contemplated.").

The other references to court proceedings in Chapter 824 further support the conclusion that § 47-66 was not intended to provide a private right of action. Both § 47-66i and § 47-66j allow for parties to intra-tribal disputes over tribal leadership and membership, respectively, to seek Superior Court review. That demonstrates that the legislature's decision not to allow for judicial review of the Commissioner's compliance with § 47-66's settlement and reporting requirements was intentional.

To the extent the Commissioner's alleged failure to comply with § 47-66 raises concerns, it is for the Comptroller and the Governor to decide how to address them. The Supreme Court has expressly rejected the argument that "because the defendant has failed to comply with . . . mandated reporting requirements and the [receiving branch] has failed to take action to ensure . . . compliance, judicial enforcement is appropriate." *King*, 277 Conn. at 258. Such an argument "misconstrues the court's role in applying the *Napoletano* test." *Id*. The Court "do[es] not decide whether the legislature *should* have supplied a private right of action; rather, we consider whether and how remedies were provided as an indication of the legislature's intent to confer a private right of action." *Id*. (emphasis in *King*). To the extent the Comptroller and the Governor

have "chosen not to demand compliance with the [settlement and] reporting requirements and thereby ha[ve] failed to monitor the [Commissioner's] efforts," STN's "remedy is political, not judicial." *Id*. STN cannot make the required threshold showing as to any of the three *Napoletano* prongs and therefore cannot pursue a claim under § 47-66.

## V. CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court grant this Motion and dismiss this action in its entirety.

DEFENDANTS,

STATE OF CONNECTICUT

COMMISSIONER ROBERT KLEE

By: */s/ Robert J. Deichert*

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## CERTIFICATION OF SERVICE

I hereby certify, pursuant to Practice Book §§ 10-12 through 10-17 that a copy of the above was mailed via first class mail postage pre-paid on February 14, 2017 or e-mailed to all counsel and *pro se* parties of record:

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# EXHIBIT 1

HHD-CV-16-6072009-S

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| SCHAGHTICOKE TRIBAL NATION | : | |
| | : | SUPERIOR COURT |
| *PLAINTIFF* | : | |
| | : | JUDICIAL DISTRICT OF |
| *v.* | : | HARTFORD |
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| STATE OF CONNECTICUT, ROBERT KLEE, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE CONNECTICUT DEPARTMENT OF ENERGY & ENVIRONMENTAL PROTECTION, | : | |
| *DEFENDANTS* | : | FEBRUARY 14, 2017 |

**AFFIDAVIT OF GRAHAM J. STEVENS**
**IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

Graham J. Stevens, having been duly sworn, deposes and states the following:

1. I am over eighteen years of age and understand the nature and obligations of an oath.
2. I make this Affidavit in support of the defendants' Motion to Dismiss.
3. I am currently employed as the Office Director of the Office of Constituent Affairs and Land Management within the Office of Planning and Program Development of the Bureau of Central Services of the Connecticut Department of Energy and Environmental Protection (the "DEEP"). I have been employed by the DEEP for 17 years.

4. I have a Bachelor's of Arts degree in Environmental Geography from Clark University and a Master's of Science degree in Water Resources from the University of Connecticut.
5. The responsibilities of my employment include assisting the Commissioner with respect to the DEEP's superintendence over Indian affairs and reservation lands within the State of Connecticut.
6. I am the lead staff member of the DEEP assigned to assist in the State's defense of this litigation initiated by the Schaghticoke Tribal Nation ("STN").
7. I am also currently, and have been since 2016, the DEEP employee who is the designated contact person to receive communications regarding tribal entities in the State. Furthermore, I had previously served in a supervisory capacity to the prior designated contact person since 2011.
8. Based on my personal knowledge and experience, there is more than one entity that claims to represent the interest of the indigenous tribe of Indians known as the Schaghticoke, as identified in subsection (b) of section 47-59a of the General Statutes ("the Schaghticoke").
9. Plaintiff STN, led by Mr. Richard Velky, is the sole plaintiff in this case, *Schaghticoke Tribal Nation v. State of Connecticut, et al.*

10. Another entity, however, known as the Schaghticoke Indian Tribe ("SIT"), which is not a party to this case, also claims to be the legitimate governing entity of the Schaghticoke through its leader, Mr. Alan Russell.

11. It is unclear to the DEEP whether Mr. Velky, Mr. Russell, both or neither, represent(s) the Schaghticoke, nor has the DEEP taken a position as to who is(are) the proper representative(s) of the Schaghticoke .

12. I have personally received communications from both Mr. Velky and Mr. Russell with respect to tribal affairs, each claiming independently to represent the Schaghticoke.

13. The DEEP has had to deal with both factions now for many years on matters involving the Schaghticoke reservation land in Kent, Connecticut.

14. One such recent example of leadership uncertainty relates to the DEEP's actions with respect to a deteriorated structure located on the Schaghticoke reservation and its anticipated demolition. On January 13, 2017, I wrote letters to Mr. Russell and Mr. Velky alerting them to the DEEP's intention to demolish the deteriorated structure. From that date to present, I have received divergent communications from Mr. Velky and Mr. Russell regarding the disposition of the deteriorated structure.

15. Previously, there was a similar situation involving another structure on the Schaghticoke reservation land in Kent, the so-called "Pavilion" or

"Longhouse," a tribal community structure. In the case of that structure, I wrote one letter addressed to both Mr. Russell and Mr. Velky seeking input on the DEEP's offer to remove the remnant structure that had been subject to a suspected arson. Unlike in the previous case, both factions ultimately sought the DEEP's assistance in removing the remnant structure. Mr. Velky, however, in his response, pointedly objected to the DEEP's communications to Mr. Russell regarding matters involving the Schaghticoke.

16. Although these factional issues continue to make the execution of the DEEP's responsibilities more difficult, the DEEP has continued to attempt to discharge its responsibilities, as it has no authority to resolve tribal leadership disputes. The DEEP has repeatedly informed both factions of its lack of authority to resolve leadership disputes and has clearly addressed this matter with STN in a correspondence dated April 14, 2008 issued from the office of then Commissioner Gina McCarthy.

Graham J. Stevens

STATE OF CONNECTICUT )

) *ss.* Hartford, Connecticut

COUNTY OF HARTFORD )

Personally appeared before me Graham J. Stevens of the Connecticut Department of Energy and Environmental Protection, the subscriber, and made oath to the truth of the matters contained in this affidavit.

Subscribed and sworn to before me this 14th day of February, 2017.

Michael W. Lynch
Commissioner of the Superior Court