HHD-CV16-6072009-S

SCHAGHTICOKE TRIBAL NATION, *Plaintiff*, v. STATE OF CONNECTICUT, and ROB KLEE, in his official capacity as Commissioner of the Connecticut Department of Energy and Environmental Protection *Defendants*.	:	SUPERIOR COURT JUDICIAL DISTRICT OF HARTFORD MAY 15, 2017

PLAINTIFF'S MEMORANDUM IN OPPOSITION
TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiff Schaghticoke Tribal Nation ("STN"), a Connecticut Native American tribe with one of the oldest tribal reservations in this country, seeks relief from the State of Connecticut's ("State")[1] unconstitutional taking of STN's land, willful mismanagement of STN's land and misappropriation of STN's funds in breach of the State's statutory fiduciary duties.

The State challenges STN's standing to bring suit, based on a purported "leadership dispute." STN, however, has standing to bring this lawsuit, a fact previously acknowledged by the State at least twice. The Court should outright deny the State's request to dismiss on the basis of standing, as the State is wrong on both the facts and the law. If, however, the Court does not reject the State's standing challenge, an evidentiary hearing must be held and a ruling on the State's motion to dismiss should be delayed until after that hearing and a ruling on standing.

As to STN's federal and state constitutional takings claims (Counts I and II), the State acknowledges such claims do not require the State permission to sue, and are not barred by sovereign immunity. (Defendants' Memorandum in Support of its Motion to Dismiss ("Br." or "Motion") pp. 13-14.) Relying on *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955), the State claims that STN does not have a protective interest in its land that would support a takings claim. Yet this is a question of fact not appropriate for a motion to dismiss, and in any case STN was granted a protectable property interest in its land by the Connecticut General Assembly. The State's reliance on *Tee-Hit-Ton* is misplaced, since that case only prohibits taking claims based on "aboriginal title."

The State also incorrectly claims that STN did not properly plead "substantial" claims of

[1] Because Defendant Klee was named in his official capacity, STN refers to the defendants collectively as the "State" herein, unless otherwise noted.

a constitutional due process violation (Count III) because it did not allege facts clearly demonstrating an incursion upon STN's constitutionally protected interests. (Br. pp. 25-26.) STN has, however, adequately alleged these claims by, among other things, detailing the State's obligations to STN, the dates and acres of the State's takings of STN's property, and the specific injuries sustained to STN as a result. Nor is there any basis to limit STN's constitutional claims to 1896, when the Fifth Amendment was first applied to the states, because (among other things) STN still has claims under article first, §§ 8 and 11 of the Connecticut Constitution from at least 1818, and prior to that time has rights under common law.

The State also challenge's STN's claims for breach of fiduciary duty (Count IV) and equitable relief (Counts V and VI) on the grounds that STN's requests for an accounting and a resulting or constructive trust are purportedly "tantamount" to its claims for money damages and all are barred under sovereign immunity. But courts have recognized that money damages for a breach of fiduciary duty are not barred in the context of Native American claims. Even if they are, however, STN is entitled to plead in the alternative, and under Connecticut law, requests for an accounting or a resulting or constructive trust are not dressed-up claims for money damages, but proper claims for equitable relief which are not barred by sovereign immunity.

The States two remaining arguments are likewise without merit. The State claims that STN's request for declaratory and injunctive relief in Count VI may not be brought against the State (*qua* State), and instead may only be directed at the Commissioner, however the State's purported authorities are inapposite. Further, claims against a state official in his or her official capacity are "in effect" claims against the State, and are treated as if they were solely against the state as a defendant. The State also claims that Count V, which seeks declaratory and injunctive relief ordering, *inter alia*, the Commissioner to perform an accounting, is barred because the

relevant statutes provides no private right of action. Yet as a beneficiary, STN has the right to compel its fiduciary – the State – to perform an accounting under common law, and thus there is no need to enforce any statute. Accordingly, the State's Motion should be denied in its entirety.

FACTUAL BACKGROUND

A. The State Creates A Fiduciary Relationship Between Itself and STN

STN is a Native American tribal nation, led by Chief Richard Velky, with ties to Connecticut dating back to colonial times. (Compl. ¶¶ 1, 10.) STN was formally recognized by the State when Connecticut became part of the United States, and has continuously remained a State-recognized tribe since that time. (*Id.* ¶ 10.) From 1757 through the present day, the colony and then the State of Connecticut has had a duty to care and maintain the STN land and tribal funds for the best interest of STN. (*Id*. ¶ 4.) In 1757, the Connecticut General Assembly appointed a representative to act for the State as an "Overseer" of STN. (*Id*. ¶¶ 4, 19.) This State official was to "manage, direct and superintend said Indians and their affairs and give this Assembly such information concerning them from time to time as he shall think proper and necessary." (*Id*. ¶ 19.) The appointment of subsequent Overseers in 1772 and 1773 designated them as "Guardians of Indian lands." (*Id*.)

In 1821, the position of Overseer became codified by statute. (*Id*. ¶ 20.) The Overseer was to be appointed by the State Senate and House of Representatives to act on behalf of the State for "the care and management of [Indian] lands . . . to see that they are husbanded for the best interest of the Indians, and applied for their use and benefit." Conn. Gen. Stat. Title 50, §§ 1-2 (1821). The relevant statutes have charged the Overseer, and most recently the State Department of Energy and Environmental Protection ("State Department"), with the duty to act on behalf of the State to care for Indian land and funds. (Compl., ¶¶ 21, 23.) Today, under Conn. Gen. Stat. § 47-65(a), the "Commissioner of Energy and Environmental Protection with

the advice of the Indian Affairs Council shall have the care and management of reservation lands." (*Id*. ¶¶ 5, 23.) Conn. Gen. Stat. § 47-66 codifies the State's duty to care for tribal funds. (*Id.*)

Based on these statutes, and the State's role as a fiduciary to STN, the State was and is duty bound to act with the highest degree of trust and confidence towards STN, and was and is required to use its superior knowledge, skill, and expertise for the benefit of STN. (*Id*. ¶ 25.)

B. The State Exceeds Its Statutory and Constitutional Authority, And Breaches Its Fiduciary Duty, By Taking STN's Lands Without Just Compensation, And Squandering STN's Tribal Funds

In April 1801, a committee appointed by the State General Assembly recommended the sale of STN land to satisfy STN's $400 debt, finding that it would be of "essential benefit to [STN] and to the public." (*Id*. ¶ 26.) Thereafter, the General Assembly, finding that STN "own a piece of land in the western part of Kent" which could be sold to resolve the purported debt and to support STN, authorized and empowered Overseers to sell an amount of that land sufficient to "[d]ischarge the said [$400] Debt and also to erect for the use of the [STN] six houses or Wigwams on which may in the whole be expended not exceeding Two Hundred Dollars . . . ." (*Id*. ¶ 27.) The Overseers would exceed this statutory authority by, among other things, selling enough STN land to generate $4,332.99 in proceeds – more than ten times the amount they were authorized to collect. (*Id*.)

The General Assembly further directed that as to these land takings and sales, "the residue thereof [was] to remain or place on Interest for [STN's] benefit," and authorized further that "for the residue of the purchase Money of the Land so sold, a Term of Credit may be given at the discretion of [the Overseers], the same being well secured by Mortgage or otherwise and the Interest thereof" paid to compensate STN for the land sold. (*Id*. ¶ 28.) For these land sales, the Overseers were required to "render their Account of such Sale, expenditures, and expenses

[sic] to this or some future Session of the [General] Assembly." (*Id*.)

Although the Overseers had fiduciary obligations under the operative statutes to properly manage STN land and tribal funds, they repeatedly mismanaged STN's property and acted in excess of their statutory duties. (*Id*. ¶ 29.) For instance, on September 1, 1801, two Overseers transferred 1,129 acres – roughly forty-five percent of STN's total land – for $4,332.99, of which $3,000 in purported mortgages were recorded in the Kent land records. (*Id*.) Even though one of the purchasers, Ephraim Beardsley, had a mortgage for $1,000, the Overseer allowed Beardsley to only repay $840 in principle, and received a release of the mortgage recorded in Kent Land Records. (*Id*.) If that $840 was collected by the Overseer, it was never paid to STN. (*Id*.) Further, there is no record that the other two purchasers repaid the principle and interest owed on their mortgages, though both mortgages were released. (*Id*.) As a result, STN land was taken not only without the requisite just compensation, but without any compensation at all. (*Id*.) Based on the principal amount, and adding compounded interest at a conservative rate of 6%, STN is due just compensation in excess of $600 million as to these three takings alone. (*Id*.)

Thus began a pattern of STN land being taken without just compensation by the State acting through its representatives, the Overseers. (*Id*. ¶ 30.) At least 91 mortgages, totaling more than $45,000, were made in this manner throughout the 19th century, as reflected in the land records of Kent, Sherman, and New Milford. (*Id*.) STN did not receive the benefit of the mortgages or notes generated from the taking of their land. (*Id*. ¶¶ 30, 31.) Simply put, the State took STN's land, promised to pay for that land through sale proceeds, and never did so.

Although the State Overseers were required to present an accounting to the Connecticut Circuit Court or Superior Court in Litchfield or New Milford, these intermittent "accountings" did not properly document the "STN bank" activities. (*Id*. ¶ 33.) Rather, it is apparent that the

State Overseers misappropriated STN's funds to benefit themselves, their associates and non-STN parties. The State has refused to account for the unpaid funds. (*Id*.)

C. STN In The Present Day

STN – led by Chief Velky – is the successor to the historical Schaghticoke Tribe. (*Id.* ¶ 10.) STN was recognized by the State when Connecticut became part of the United States, and has continuously remained a State-recognized tribe since that time. (*Id.* ¶ 10.)

In its Motion, the State raises a leadership dispute with an organization that calls itself Schaghticoke Indian Tribe ("SIT"), but the State does not explain the origination of this entity. In 1985 Alan Russell, a former STN chairman, was voted out of office in an election supervised and validated by the Connecticut Indian Affairs Council; sanctioned by the STN Tribal Council for infractions, including assault and misuse of STN property for personal gain; and had his voting rights revoked. (Exhibit 1, May 12, 2017 Affidavit of Chief Richard Velky ("Velky Aff.") at ¶ 4 .") In response, he and his family left STN and, claiming that he was still the actual chairman of the Tribe, started a brand new group he called Schaghticoke Indian Tribe, or "SIT." (*Id.*) Mr. Russell formally disassociated himself with STN on October 24, 1997. Since that time SIT – which is simply Mr. Russell and a handful of other disgruntled former STN members – has done little more than occasionally engage in litigation. (*Id.*) As demonstrated below, the State itself has disavowed this supposed "dispute" on at least two occasions, and instead recognized Chief Velky as the true leader of the Schaghticoke Tribe. It is only in the context of trying to avoid a $610 million lawsuit that the State conveniently proclaims leadership confusion.

LEGAL STANDARD ON A MOTION TO DISMISS

The standard of review for a court's decision on a motion to dismiss is well settled. "A motion to dismiss tests, *inter alia*, whether, on the face of the record, the court is without jurisdiction." *Cogswell v. American Transit Ins. Co*., 282 Conn. 505, 516 (2007). "When a . . .

court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light." *Id.* Thus, a court must "take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." *Id.* The motion to dismiss "admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone." *Id.* "The complaint, to survive the defense of sovereign immunity, must allege sufficient facts to support a finding of a taking of [property] in a constitutional sense. . . ." *Horak v. State*, 171 Conn. 257, 261 (1976).

ARGUMENTS

I. STN HAS STANDING TO BRING THIS SUIT

STN has properly pleaded it has standing to bring this suit by alleging, among other things, that its Chief is Richard Velky, that "STN's lands originally extended through portions of Connecticut surrounding the Housatonic River," and that STN was recognized by the State when Connecticut became part of the United States of America, and has continuously remained a State-recognized tribe since that time. (Compl. ¶ 10.) In its Motion, the State claims that a purported "leadership dispute" with SIT somehow means that STN does not have authority to represent itself. (Br. pp. 5-9.) But the State is wrong on both the facts and the law.

"[I]t is well established that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." *Novak v. Levin*, 287 Conn. 71, 79 (2008). "[I]n ruling [on] whether a complaint survives a motion to dismiss, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader[.]" *Windels v. Envtl. Prot. Comm'n of Town of Darien*, 284 Conn. 268, 290 (2007). "Standing is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive

rights." *Harris v. Zoning Comm'n of Town of New Milford*, 259 Conn. 402, 409–10 (2002). Thus, "standing does not hinge on whether the plaintiff will ultimately be entitled to obtain relief on the merits of an action, but on whether he is entitled to seek the relief." *Pinchbeck v. Dep't of Pub. Health*, 65 Conn. App. 201, 205 (2001).

Applying those principles, the cases cited by the State in its Motion, along with written statements made by the State – including those made by Defendant Klee's predecessor acknowledging STN's status as the recognized Schaghticoke Tribe and Chief Richard Velky as the Tribal Leader – STN has sufficiently alleged, if not outright established, the requisite standing. While the State points to *dicta* referencing a "hotly contested" leadership dispute between STN and a splinter group, the *State* has never argued, nor even considered, the Schaghticoke Tribe's leadership to be disputed – until it was sued for $610 million. In fact, when STN sued the State last year, challenging a state gaming statute, the State never challenged STN's standing based on a "hotly contested" tribal leadership.

The State claims that STN should be barred from bringing suit because of SIT's existence. But the State has recognized STN as the Schaghticoke Tribe since Mr. Russell's departure and the formation of SIT. (*See* p. 6, above.) On June 14, 2000, DEP Commissioner Arthur J. Rocque, a predecessor of Defendant Klee's, wrote to STN Chief Richard Velky, confirming that the State recognized STN:

> "Questions over [Tribal] leadership, however, are critical to the discharge of our statutory responsibility relating to tribes and, when disputes arise, we rely on advice from the Connecticut Indian Affairs Council (CIAC). Inasmuch as you have represented the Schaghticoke Tribe in matters before this Department for approximately thirteen years and inasmuch as the CIAC has not accepted a challenge to the Schaghticoke Tribal seat, I see no reason to question the validity of your leadership at this time.
>
> It is therefore the intent of this Department to continue to communicate with the tribe principally through you as Chief until such time as another individual claims

> leadership of the Schaghticoke Tribe and is able to present verifiable evidence of that claim."[2]

That letter, and the State's position, remain in effect today, and flatly contradict the self-serving, litigation-driven affidavit submitted by the State, which claims that the State has "not taken a position as to who is (are) the proper representative(s) of the Schaghticoke." As such, the State's affidavit does not support dismissal because it contains disputed facts. *See Ferreira v. Pringle*, 255 Conn. 330, 346-347 (2001) (affidavits are insufficient to determine facts unless they disclose that no genuine issue as to a material fact exists); *Gordon v. H.N.S. Mgmt. Co.*, 272 Conn. 81, 92 (2004) (where a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts).

The State – despite previously acknowledging Chief Velky speaks for the Schaghticoke Tribe – disingenuously claims that *Schaghticoke Indian Tribe v. Rost*, 138 Conn. App. 204 (2012), "establishes that STN – acting alone – lacks standing to pursue claims on behalf of the Schaghticoke." (Br. p. 6.) But the State misrepresents the findings in *Rost*. Not only did that case *not* so hold, it did the opposite – it upheld the judgment STN achieved "acting alone," found that the case was properly pursued on behalf of the Schaghticoke Indians (who had a shared interest against a trespasser), and found that the defendant had no standing to assert that SIT's absence warranted reversal. *Id.* at 209, 218-19.

In *Rost*, SIT moved to open a judgment in favor of STN against a trespassing defendant, but in its absence, the court had made a determination that STN was the governing authority of the Schaghticokes. The court opened the matter for the limited purpose of withdrawing its

[2] *See* Exhibit 2; *see also* Exhibit 3, July 21, 1999 letter from State of Connecticut Indian Affairs Coordinator identifying STN as the Schaghticoke Tribe and Richard Velky as "Tribal Chairman and Chief" since 1987.

finding on governance, since the issue of who was "in charge" was neither before the court, nor necessary for the judgment against the defendant. *Id.* at 209.

Rost went on to *uphold* the judgment that STN alone had obtained against the defendant, and in doing so rejected defendant's argument that judgment was improper given SIT's absence from the proceedings. *Id.* at 218-19. The court first noted that the *defendant* was not a proper party to raise that argument, and did not have standing to do so:

> "The general rule is that one party has no standing to raise another's rights. . . . When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue . . . . [Standing is] ordinarily held to have been met when a complainant makes a colorable claim of direct injury he . . . is likely to suffer . . . ."

Id. at 218 (citation omitted, internal quotation marks omitted.). *Rost* then found that the defendant had failed to explain how including SIT in the proceeding "would have benefitted defendant," or how defendant was "personally aggrieved" by SIT's absence. *Id.* at 219. Thus, the court rejected defendant's standing to assert that SIT's absence warranted reversal, as this Court should do here. In sum, *Rost* has no preclusive effect, and indeed supports STN's position.

It is upon the false reading of *Rost* that the State anchors its arguments regarding the two-prong standing requirement of *Golden Hill Paugussett Tribe of Indians v. Town of Southbury*, 231 Conn. 563 (1995) ("*GHP*"). Under *GHP*, STN has to allege facts sufficient to show that it is (1) a proper party to request adjudication of the issues, and (2) that it has authority to do so. *Id.* at 571. The State's arguments that STN does not meet either prong because of the purported "preclusive effect" of *Rost* (Br. pp. 8-9) thus fail, as there is no such effect.

And STN meets the *GHP* test for standing. As to the first prong, under *GHP*, "a complaining party can show that it is a 'proper party' when it 'makes a colorable claim of [a] direct injury [it] has suffered.'" 231 Conn. at 572. In asserting that STN is not a "proper party," the State speculates – without any authority – that it is "highly likely" that some "portion of the

alleged harm-impacted individuals" are not represented by STN. (Br. p. 8.) Even if that were true (and it is not) that would mean logically the converse is true – some "portion of the alleged harm-impacted individuals" *are* represented by STN and thus standing is proper. In *GHP*, plaintiff was a proper party because the tribe had a property claim, even though there was a dispute as to who could pursue that claim. 231 Conn. at 573. This is consistent with Connecticut law, where standing is "ordinarily held to have been met when a complainant *makes a colorable claim of direct injury. . . .*" *Delio v. Earth Garden Florist, Inc.*, 28 Conn. App. 73, 78 (1992) (emphasis added). STN's allegations of damages resulting from the State's wrongful actions as well as the State's own recognition of STN's authority to act for the tribe in the 2000 and 1999 letters (Compl. ¶¶ 27-34; *supra* pp. 6-7, 9) clearly show STN is a proper party.

As to the second prong, the State recognizes that absent a preclusive effect from *Rost*, the Court may "assume that the facts STN alleges are sufficient to meet" the *GHP* standing requirement. (Br. p. 8.) Without *Rost*, the State's only remaining argument is that a leadership dispute warrants dismissal. The State made the same argument in *GHP* regarding *GHP's* second prong. The court rejected that argument, holding that "if, as the State desired, the suit had been dismissed because there was a 'dispute' about who was authorized to sue on behalf of an Indian tribe, the tribe might forever be foreclosed" from pursuing its claims. *GHP*, 231 Conn. at 578. As it was in *GHP*, the State's argument should be rejected.

Likewise, the Second Circuit recently rejected this same "lack of authority" standing challenge in *Cayuga Nation v. Tanner*, 824 F.3d 321 (2d Cir 2016). There, the defendant sought to dismiss the case on the basis the plaintiff had no authority to have filed suit on behalf of Cayuga Nation. The Second Circuit roundly rejected the "no authority" argument based on disputed leadership:

> To conclude that the case may go forward only if those who filed it were authorized to do so under tribal law either would require the court to answer disputed questions of tribal law – the very thing that federal courts are forbidden to do – or else would prevent the tribe from suing at all, thus rendering the tribe helpless to defend its rights in court. The Village's position would mean that whenever any faction within a tribe asserted a claim to leadership under tribal law that is inconsistent with the claim of authority made by those who filed the lawsuit, the resulting internal division would raise a question of tribal law that the district court would need to resolve to hear the suit, but that the court lacked jurisdiction to answer. **That result would be convenient for litigants engaged in disputes with the tribe, but disastrous for the tribe's right**.…We cannot conclude…that the possibility that [plaintiff's] actions run contrary to tribal law requires dismissal of this lawsuit. Such a conclusion would again lead to an untenable result: **tribes could be thrown out of federal court by the mere suggestion that the individual or group of individuals initiating litigation on behalf of the tribe had overstepped their tribal authority**.

Id. at 328, 330 (emphasis added).[3]

In any event, on June 7, 2016, STN passed Tribal Resolution CEV-16 authorizing the filing of this lawsuit. *See* Ex. 4. STN's allegations and documentary evidence along with the above authorities and State's own admissions clearly satisfy *GHP*'s second prong.

To the extent there is any doubt as to STN's standing, *Schaghticoke Tribal Nation v. Harrison*, 264 Conn. 829 (2003) – a case the State relies on (Br. p. 6) – requires that this Court, like the court in *GHP*, hold an evidentiary hearing prior to any ruling dismissing the case. In *Harrison*, defendant alleged that STN did not have authority to sue because of SIT. The Supreme Court held that "[b]ecause the trial court in this case did not hold an evidentiary hearing prior to determining that the plaintiff was not authorized to bring an action on behalf of the tribe," granting defendant's motion to dismiss was improper. *Harrison*, 264 Conn. at 833.

[3] The State may point to the fact that the Bureau of Indian Affairs had recognized the tribal leadership of the federally-recognized Cayugas. However, as previously shown, the State has recognized the tribal leadership of the State-recognized Schaghticokes. *See* Conn. Gen 47-59a and the 1999 and 2000 statements by the State recognizing STN's tribal leadership of the Schaghticoke, Exhibits 2, 3. Those proclamations by the State remain in effect today. The State has contradicted itself only in the context of challenging STN's federal recognition (Compl. ¶¶ 43-51) and defending against a $610 million lawsuit.

Thus, this Court can either (a) reject the State's standing challenge, or (b) hold an evidentiary hearing. Either way, a determination of standing must occur before this Court can address any other bases of the State's Motion. When "the absence of jurisdiction" is raised, "cognizance of it must be taken and the matter passed upon *before it can move one further step in the cause*; as any movement is necessarily the exercise of jurisdiction . . . As a result, [a] trial court [is] required to address [a] jurisdictional challenge before ruling on other motions . . ." *Fairchild Heights Residents Ass'n, Inc. v. Fairchild Heights, Inc*., 131 Conn. App. 567, 568-69 n.2, (2011), *aff'd in part and rev'd in part on other grounds*, 310 Conn. 797, (2014) (emphasis added). While this requirement to conduct a hearing is non-discretionary (contrary to the State's implication, Br. p. 9, n.6), the State itself has asked that in the event of a hearing, the Court should decide standing before addressing the other purported bases for dismissal. (*Id*.) The law requires what the State suggests.

II. SOVEREIGN IMMUNITY DOES NOT BAR STN'S CONSTITUTIONAL TAKINGS CLAIMS (COUNTS I AND II)

The State concedes – as it must – that constitutional taking claims do not require permission from the State to sue and are not barred by Sovereign immunity. (Br. pp. 13-14.)[4] These premises are well-established. "Where the state takes property no specific permission to sue is necessary." *Anselmo v. Cox*, 135 Conn. 78, 81, *cert denied*, 335 U.S. 859 (1948); *Tamm v. Burns*, 222 Conn. 280, 283 (1992) (constitutional takings claim for money damages may brought against the state without the state's consent); *Gold v. Rowland*, 296 Conn. 186 (2010) (*"Gold II"*) (Palmer, J., dissenting, n.14: "[T]here is nothing in our law that requires exhaustion of administrative remedies prior to commencing a claim of an unconstitutional taking.");[5]

[4] Thus, the State's reference to the bar on money damages in other circumstances (Br. pp. 10-12) is inapposite.

[5] The State's lead case on permission to sue is *Gold II*. But the majority's opinion on *Gold II* did not opine upon, or even address, the issue of permission. Only the dissent spoke to that issue, in a footnote, accurately noting that

Schaghticoke Tribe of Indians v. Kent Sch. Corp., 423 F. Supp. 780 (D. Conn. 1976). And both the United States Supreme Court and the Connecticut Supreme Court have found that the Takings Clause trumps sovereign immunity, and money damages are allowed. *Textron, Inc. v. Wood*, 167 Conn. 334, 342 (1974) ("[T]he doctrine of sovereign immunity is not available to the state as a defense to claims for just compensation arising under article first, § 11, of the Connecticut Constitution."); *Trumbull v. Ehrsam*, 148 Conn. 47, 55-56 (1961) ("When possession has been taken from the owner, he is constitutionally entitled to any damages which he may have suffered . . . ."); *United States v. Dickinson*, 331 U.S. 745, 748 (1947); *United States v. Klamath and Moadoc Tribes*, 304 U.S. 119 (1938); *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 316, n.9 (1987); *see also DLX, Inc. v. Kentucky*, 381 F.3d 511, 527-28 (6th Cir. 2004) (Takings Clause requires states to provide a judicial remedy in state court).

All that is required by *Tamm* and its progeny is that "to survive a motion to dismiss on the ground of sovereign immunity, a complaint 'must allege sufficient facts to support a finding of a taking in a constitutional sense.'" *Tamm*, 222 Conn. at 284. Here, STN has meticulously laid out each taking with specific details as to dates and acres of the State's taking, including supporting mortgage documentation, STN's specific injuries, including the presumed principal and interest misappropriated by the State, as well as the State's obligations to STN. (Compl. ¶¶ 29-30.) This more than satisfies *Tamm's* pleading requirement.

The State's first basis for dismissal is its argument that STN does not have a "constitutionally protected interest" in the property that was taken, but instead had merely a

nothing in Connecticut law requires that a plaintiff seek and obtain permission from the State before bringing a constitutional taking claim.

"right of occupancy," and therefore cannot bring a takings claim. (Br. p. 15.) But as an initial matter, the State raises questions of fact as to the nature of STN's land rights that are not properly adjudicated on a motion to dismiss. STN has properly plead that it has rights to the land (Compl. ¶ 3, 17-18, 27) and for the purposes of this motion, the Court must accept those facts as true, and view them in the light most favorable to the plaintiff. *See Weiss v. Smulders*, 2012 WL 1592018, at *4 (Conn. Super. Ct. Apr. 12, 2012); *Poulos v.* Jones, 2000 WL 33124391, at *5 (Conn. Super. Ct. Dec. 28, 2000) (construing the complaint in the manner most favorable to the nonmovant, denying motion to dismiss because plaintiff plead he was enforcing his own rights in the property and thus had standing).

Even if the Court did consider the State's arguments (which it should not), the State does not establish that STN's land rights are somehow insufficient. The State relies on the Supreme Court's holding in *Tee-Hit-Ton Indians*, 348 U.S. 272. However, though *Tee-Hit-Ton* discussed the difference between recognized permanent ownership of land and right of use or occupy ownership or aboriginal ownership, its holding is limited to claims involving "aboriginal" title – namely, lands held from time immemorial. 348 U.S. at 277-279, 288-289.

Conversely, where, as here, the government takes property granted to a tribe by treaty, statute, or legislative act, tribes *are* entitled to just compensation for that taking. *See, e.g.*, *United States v. Sioux Nation of Indians*, 448 U.S. 371, 421-22 (1980) (tribe with "recognized title" to land is entitled to just compensation for the taking); *United States v. Shoshone Tribe of Indians of Wind River Reservation in Wyoming*, 304 U.S. 111, 116-18 (1938) (tribe entitled to compensation in relevant part because the "principal purpose of the treaty was that the Shoshones should have, and permanently dwell in, the defined district of country"); *United States v. Creek Nation*, 295 U.S. 103, 109-111 (1935) ("The Creek Tribe had a fee-simple title,

not the usual Indian right of occupancy with the fee in the United States," and the land appropriation was done in a way that implied an "undertaking by [the United States] to make just compensation to the tribe."); *Yankton Sioux Tribe of Indians v. United States*, 272 U.S. 351, 359 (1926) ("[S]ince the Indians are the owners of it in fee, they are entitled to just compensation as for a taking under the power of eminent domain."); *Minnesota Chippewa Tribe v. United States*, 315 F.2d 906, 911 (Ct. Cl. 1963) (Indians had recognized title to the land as shown by the "legislative purpose, gleaned from the enactment [of the treaty], to acknowledge Indian ownership."); *see also Miami Tribe of Okl. v. United States*, 281 F.2d 202, 212 (Ct. Cl. 1960), *cert. denied*, 366 U.S. 924, (1961), *overruled in part on other grounds by Pawnee Indian Tribe v. United States*, 301 F.2d 667, (Ct. Cl. 1962), *cert. denied*, 370 U.S. 918 (1962) (Indians are entitled to just compensation when the government takes "property rightfully belonging to an Indian tribe" and gives it to some other party); *Fort Berthold Reservation v. United States*, 390 F.2d 686, 694-95 (Ct. Cl. 1968) (taking occurred when tribe was paid $2.50 an acre for land and government did not make a good faith effort to give tribe fair value for their land).[6] Indeed, the *Tee-Hit-Ton* case recognized that very distinction between aboriginal land and that granted by statute or treaty. 348 U.S. at 277-287, 288-289.

Here, STN is entitled to just compensation because unlike the land in *Tee-Hit-Ton*, the Schaghticoke's land was statutorily "grant[ed]" to the Tribe by legislative acts of the Connecticut General Assembly. For example, in 1752 the General Assembly of Connecticut divided the land into twenty-five parcels, and granted STN ownership of parcel 25 and part of parcel 24:

[6] While these are federal Fifth Amendment cases, their holdings apply equally to takings claims under article first, Section 11 of the Connecticut Constitution, as the State admits in citing to *Bauer*. (Br. p. 15.) Moreover, while many of these cases involved rights granted by treaty rather than legislative acts, the latter carries the same legal weight and authority as the former. *See Antoine v. Washington*, 420 U.S. 194 (1975); *Blake v. Arnett*, 663 F.2d 906, 909-910 (9th Cir. 1981).

> "Upon the memorial of Gideon, an Indian, and several other Indians living on the country lands on the west side of Ousatunnuck River, at a place called Scatacook, praying this Assembly to grant to them some lands at or near said Scatacook for their improvement and for timber, &c.: Resolved by this Assembly that the said Indians, the memorialists, shall have the liberty, and they have hereby liberty granted to them, for their improvement and for the cutting of wood and timber for their own use only, the whole of the twenty-fifth lot, as the lots are now laid out, and also the equal half of the twenty-fourth lot on the southward part thereof adjoyning to such twenty-fifth lot, and this to be improved by said Indians as aforesaid during the pleasure of this Assembly." (5/1752. PRC 10:108; Indian Series 1, vol. 2, 1647-1789, p. 75)[7]

That year, the Schaghticoke Land was described as follows:

> "The Lot N 25 In the Country land annext to the Town of Kent lying on the West Side of Ousatunneck River Contains thirteen hundred Acres of land inclusive of the land Sequestred for the Use of the Indians at Scaticoke bounded as follow Viz North by the Lot N 24 West by the colony line East by Ousatunneck river and South by land belonging to an Indian named Wallops Chickens formerly Capt John Reads land the land contained in this Lot Exclusive of the Sequestred land aforesaid is a Rocky Mountain and noway Sufficient for A farm" (05/20/1752 CCLR 4:610-611.)

See Velky Aff., Exhibits 5, 6. The State's later statutes confirm the nature of STN's ownership rights – the State codified the duty to care for and manage Indian land, found that STN "own[ed]" the land, and used STN land to allegedly settle STN debts, with the remainder supposedly going to benefit the tribe. (Compl. ¶¶ 1, 3-7, 17-29, 53-61.) *See also Yankton Sioux*, 272 U.S. at 354 (Congress paid for appraisement of land occupied by railroad, and paid money to the Indians for that taking). As such, STN's claim is not barred by *Tee-Hit-Ton*. Instead, STN has recognized title rights as a result of its land being granted by legislative action, triggering the constitutional right to just compensation.[8]

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[7] The State may argue that the language "during the pleasure of the Assembly" means that the land grant was not permanent. But the quoted language relates only to improvements to the land, not ownership of the land. Moreover, the Assembly's grants of parcel 25 and part of parcel 24 are not limited or qualified in any way.

[8] After spending merely one page arguing that STN did not have a constitutionally protected property interest in the land that would support a takings claim, the State spends three pages asserting that STN cannot bring a takings claim regarding the "STN Tribal Fund." STN does not assert such a takings claim. That Fund, which to STN's knowledge contains the proceeds from the release of a single mortgage in 1943 (Compl. ¶ 34), is incident to and evidence of the land takings. It is where the State appears to have put the proceeds from a single taking. While STN

Next, and perhaps implicitly acknowledging the futility of its immunity claim, the State argues that because some of the land takings occurred before 1818 when the Connecticut Constitution came into existence and before 1896 when the Fifth Amendment was first applied to states, that most, *but not all*, of STN's claims should be dismissed because most, *but not all*, pre-date the constitutional provisions STN relies upon. (Br. p. 19.) The State attempts to limit the number of claims to 4 of 91 takings and resulting mortgages, by arguing that the Fifth Amendment was not applied to the states until 1896. The State cites only one case, *Adamson v. People of State of California*, 332 U.S. 46, 79-80 (1947), (Br. p. 19), for the proposition that the Fifth Amendment claims cannot be applied pre-1896, but that case merely states that the Fifth Amendment *was not* applied to states until 1896. *Adamson*, 332 U.S. at 46. The State cites no case stating that Fifth Amendment claims cannot *now* be applied to pre-1896 takings.

Furthermore, even if the Court found that the Fifth Amendment claim could not be asserted as to pre-1896 takings, the Connecticut Constitution provides a basis for STN to recover for the seventy takings that occurred, at a minimum, post-1818. (Br. pp. 15-16, 19.) Thus, the State is effectively challenging just twenty-one of the ninety-one takings claims. (*Id.* p. 20.)

However, even the twenty-one pre-1818 takings are actionable because Connecticut common law prior to 1818 provided for damages for the violation of rights substantially similar to – in fact, foundational to – the rights recognized by article first, § 11 of the Connecticut Constitution. (Compl. ¶ 59.) Protection of property rights and the right to compensation for violation thereof was so firmly entrenched by the time of the state constitutional convention in 1818 that the takings clause (article first, § 11) was adopted without debate. *See Kelo v. City of*

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has asserted a number of claims related to funds held and managed by the State, including an accounting and other injunctive/declaratory relief, and is seeking damages incident to the land takings whatever the source, STN is not asserting an independent takings claim as to the single-mortgage "STN Tribal Fund."

New London, 268 Conn. 1, 126 (2004), *aff'd* 545 U.S. 469 (2005) (citing W. Horton, The Connecticut State Constitution: A Reference Guide (1993) p. 70), *aff'd*, 545 U.S. 469 (2005); *Leavenworth v. Baldwin*, 2 Day 317 (1806) (action of trespass tried to a jury); *Bull v Pratt*, 2 Root 440 (1796) (in action of ejectment for the land, the whole of the plaintiff's damages may and ought to be recovered); *Bird v. Hempstead*, 3 Day 272 (1808) (action for wrongful taking or property); *see also Binette v. Sabo*, 244 Conn. 23, 28-29 n.9 (1998) ("article first, §10, [Open Courts] may . . . embody a private cause of action for pre-1818 'fundamental' common-law rights").[9]

At the very least, even if the Court finds that the pre-1818 takings are not actionable, then it should allow STN to proceed on the seventy takings which occurred post-1818.

III. SOVEREIGN IMMUNITY DOES NOT BAR STN'S DUE PROCESS CLAIMS

In Count III, STN seeks declaratory and injunctive relief on the basis that the State has violated STN's constitutional rights in the manner set forth hereinabove, and on the basis of the State's wrongful conduct to promote an illegal purpose in excess of its statutory authority, specifically taking and selling STN's land without due process. *See St. George v. Gordon*, 264 Conn. 538, 550 n.12 (2003); *Schaghticoke Indians of Kent, Conn., Inc., v. Keith Potter*, 217 Conn. 612 (1991); *Krozser v. New Haven*, 212 Conn. 415, 421 (1989).

In its Motion, the State argues that (i) declaratory relief is not appropriate because STN purportedly does not allege a risk of future takings of STN's land (Br. p. 27),[10] (ii) there *was*

[9] The only authority the State cites in support of dismissing pre-1818 land takings is a 1985 law review article. Br., p. 20, n.14. But even that footnoted article recognized that by the 1770s and 1780s, there was a growing rejection of government takings without compensation, amidst an increased protection for property rights. William Michael Treanor, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 Yale L.J. 694, 701 (1985). At bottom, the State has provided no controlling authority warranting dismissal of the pre-1818 sales of STN's land at this stage of the case, especially in light of STN's authority demonstrating pre-1818 compensation for interfering with property rights.

[10] The State does not make the same challenge to STN's accounting and fiduciary claims, nor could it. Prospective and declaratory relief is an appropriate remedy for STN's accounting claims because there is an ongoing fiduciary

sufficient due process, on the merits, because the taking was authorized by the General Assembly (Br. p. 27), and (iii) STN's claim is not substantial because it did not satisfy the pleading standards and because the prerequisite common law and constitutional law did not yet exist. (Br. pp. 26-27). The State also claims that money damages are not available. (Br. pp. 11-12.)

First, the State conflates the two forms of relief requested in Count III, injunctive and declaratory. It argues for the dismissal of the entire Count on the grounds that there is no threat of future land takings, so relief is purportedly unwarranted. (Br. pp. 26-27.) The lack of future harm is no basis for dismissal. As the Connecticut Supreme Court stated, "[i]t would unduly strain the tendons of legal imagination to hold that the doctrine of sovereign immunity prevents an alleged aggrieved property owner from seeking the minimal relief of a declaration of his rights pursuant to article first, § 11 of the Connecticut Constitution when the doctrine may not be invoked as a bar to monetary damages arising under that same provision." *Textron*, 167 Conn. at 342-43. Additionally, the request for injunctive relief in the form of a constructive trust is proper for the reasons stated herein, *infra* p. 28-31.

The State cites no authority to the contrary. The State relies upon *Gold II*, 296 Conn. 186, which recognized that actions for declaratory and injunctive relief against the State can be brought without consent and without violating sovereign immunity, if the plaintiff alleges that a state official has acted in excess of their statutory authority. Because STN has alleged the State, from the Overseers of the 1800s to Commissioner Klee today, acted in excess of its statutory authority, STN can seek its requested relief. (Compl. ¶¶ 1-9, 25-28.)

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relationship. *McDonald v. Hartford Trust Co*., 104 Conn. 169 (1926) (a fiduciary duty continues until the relationship is terminated); *Dunham v. Dunham*, 204 Conn. 303, 326-27 (Conn. 1987) (same). As the State has never repudiated its relationship with STN nor provided a full accounting, this relationship still exists and as such, STN – as the beneficiaries of the fiduciary relationship – have a right to an accounting.

Second, while it is inappropriate to adjudicate the merits on a motion to dismiss,[11] there is no question that STN was deprived of its right to due process, despite the State's reference to a General Assembly "ample process" which simply facilitated and masked the takings. (Br. p. 27.) Moreover, the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). The United States Supreme Court has reiterated that these fundamental requirements apply to the deprivation of "any significant property interest." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). The actual dispossession of property here was so severe that notice and a meaningful opportunity to be heard prior to the taking were required by the due process clause. *See Roundhouse Constr. Corp. v. Telesco Masons Supplies Co., Inc*., 168 Conn. 371, 375-76, *vacated*, 423 U.S. 809 (1975), *on remand*, 170 Conn. 155, *cert. denied*, 429 U.S. 889 (1976). STN has made the requisite *prima facie* showing of that deprivation. (Compl. ¶¶ 64-65.)

Third, contrary to the State's arguments (Br. pp. 26-27), STN's due process claims satisfy the pleading requirements laid out in *Markley v. Dep't of Pub. Utility Control*, 301 Conn. 56, 68 (2011). (Br. at 26-27). All *Markley* requires to state a "substantial" claim for a constitutional violation is that the pleadings state facts clearly demonstrating an incursion upon constitutionally protected interests. *Markley*, 301 Conn. at 68. STN specifically pled detailed allegations – concerning the State's obligations to STN, the dates and acres of the State's takings of STN's property, including supporting mortgage documentation, and the specific injuries sustained to STN as a result of each taking – and that meets the "clearly demonstrated" standard set forth in *Markley*. (Compl. ¶¶ 1-9, 17-34.)

[11] *Egri v. Foisie*, 83 Conn. App. 243, 248 (2004) ("A motion to dismiss does not test the sufficiency of a cause of action and should not be granted on other than jurisdictional grounds.")

The State also argues that STN cannot allege due process claims for violations that occurred prior to 1818, when the due process provision of article first, § 8 was adopted. (Br. pp. 26-27.) Yet the Connecticut Supreme Court recognizes that where, as here, no "reasonably adequate statutory remedy" exists, Connecticut Constitutional provisions "may . . . embody a private cause of action for pre-1818 'fundamental' common-law rights." *Binette*, 244 Conn. at 28 n.9, 34 (discussing article first, § 10). Here, because there is no adequate remedy to redress the taking of property, the pre-1818 claims satisfy the standards in *Binette*. *Id*. at 34. And given the historical importance of property rights, discussed *supra* p. 18, it is pure sophistry for the State to argue that the taking of thousands of acres without just compensation is "unsubstantial."

Finally, Count III makes an additional claim for money damages pursuant to article first, Section 8 of the Connecticut Constitution. Where there is no "reasonably adequate statutory remedy," courts should determine whether money damages are applicable for violations of Connecticut constitutional provisions on a case by case basis. *See, e.g.*, *Binette*, 244 Conn. at 48 (recognizing there could be money damages for violation of article first, Sections 7 and 9, and noting that "whether to recognize a cause of action for alleged violation of other state constitutional provisions in the future must be determined on a case-by-case basis."); *Doe v. City of Hartford*, 2004 U.S. Dist. LEXIS 8545, at *10 (D. Conn., May 13, 2004) ("The Court is not prepared to conclude that the Connecticut Supreme Court would not allow a cause of action for monetary damages under Section 8.").[12] Here, consistent with the reasoning in *Doe* and *Binette*, where there is no reasonably adequate statutory remedy as a matter of law, there is no basis to conclude, at least at this stage of the pleadings, that a claim for damages under article first,

[12] Although the Connecticut Supreme Court has previously declined to find a cause of action for money damages under Section 8, *see Kelly Property v. Lebanon*, 226 Conn. 314, 340-42 (1993), as both *Doe* and *Binette* explain, *Kelley* is factually distinct because there was a "reasonably adequate statutory remedy" in that case. *See Doe*, 2004 US Dist LEXIS 8545, at *9-10; *Binette*, 244 Conn. at 34.

Section 8 would not be recognized by the Connecticut Supreme Court.

IV. STN'S CLAIMS V AND VI, FOR AN ACCOUNTING AND A TRUST, ARE PROPER

In its complaint, STN alleged that the State is a fiduciary, charged with the care of STN's land and funds to be used "in the best interests" of STN. (*See* Compl. ¶ 1.) Instead of doing so, the State's overseers and other officers breached their fiduciary duty, acted in excess of their authority, and squandered and misappropriated STN's land and funds. (*Id.* ¶¶ 17-34.) Counts V and VI of the complaint demand an accounting and seek injunctive relief in the form of "a resulting or constructive trust in favor of STN … and to make tribal funds, including the Schaghticoke Indian Fund, whole." (*Id.* ¶¶ 73-88).[13]

The State raises three challenges to Counts V and VI: (A) that STN's requests for an accounting and a resulting or constructive trust are purportedly "tantamount" to claims for "money damages," and are thus barred on the basis of sovereign immunity (Br. pp. 21-24); (B) that STN's request for declaratory and injunctive relief in Count VI may not be brought against the State (*qua* State), and instead may only be directed at the Commissioner (Br. pp. 28-29); and (C) that Count V, which seeks declaratory and injunctive relief ordering, *inter alia*, the Commissioner to perform an accounting, is barred because the relevant statutes provides no private right of action (Br. pp. 29-32). Each of these arguments are without merit.

A. STN's Counts V and VI Properly Seek Equitable Relief And Are Not Tantamount To Claims For Money Damages

As the State concedes, sovereign immunity does not apply when the State's officers and agents acted in excess of their statutory authority. (Br. pp. 23-24.) In its Motion, the State does not contest that the State acted in excess of its authority, but instead contends that this exception

[13] In the alternative, STN also brings seeks money damages on its breach of fiduciary duty claim (Count III), which is addressed below in Part V.

does not apply because STN's requests for an accounting, and a resulting or constructive trust (Claims V and VI) are purportedly "tantamount" to claims for "money damages," and are thus barred. (Br. pp. 21-24.)[14] But this contention misapplies the law, as claims for an accounting and a trust are equitable claims that seek the calculation of, and the return, of STN's own property, and are thus "not 'dressed-up' claims for money damages, but proper claims for equitable relief." *Gold v. Rowland*, 2006 WL 2808629, at *16 (Conn. Super. Ct. July 26, 2006) (*"Gold I"), aff'd in part, rev'd in part on other grounds, Gold II.*

1. Sovereign Immunity Does Not Apply Because The State Acted In Excess Of Its Authority

As the State concedes, an exception to sovereign immunity is found when plaintiff pleads that "defendants' conduct was in excess of their statutory authority." (*See* Br. pp. 23-24.) *See also Unisys Corp. v. Dep't of Labor*, 220 Conn. 689, 697–98 (1991) (plaintiff alleged state officials acted in excess of their statutory authority by failing to award contract on competitive bidding as required under statute); *Doe v. Ward*, 1992 WL 139158, at *2 (Conn. Super. Ct. June 10, 1992) ("…defendant has refused to erase such records despite his statutory obligation to do so. Construing such allegations in a light most favorable to the plaintiff, this constitutes an allegation of exercise of powers in excess of the defendant's authority.").

In its Motion, the State does not contest that it acted in excess of its authority. Nor could it. Under Connecticut's governing statutes and resolutions dating back to 1757, the State – acting through its appointed Overseers, and later through its agencies – was charged with managing STN's land and tribal funds for the "best interest of [STN] and to apply the funds for

[14] The State also contends that STN's complaint contains improperly pleaded counts (Br. p. 21 n.15), however a motion to dismiss is not the proper vehicle to address such claims, and as such the State's argument should not be considered by this Court. *See Egri*, 83 Conn. App. at 248 ("A motion to dismiss does not test the sufficiency of a cause of action and should not be granted on other than jurisdictional grounds.")

STN's "use and benefit." (Compl. ¶¶ 19-24.)[15] Instead, starting at least by 1801, the State's agents sold most of STN's land, loaned the excess proceeds of the sale to private non-STN citizens, and withheld the benefits of those loans from STN. (Compl. ¶¶ 26-34). The Overseers misappropriated STN's funds to benefit themselves, their associates and non-STN parties, and never properly accounted for STN's funds. (*Id.* ¶ 33.) Taking the complaint in the light most favorable to the plaintiff, as the Court is required to do here, *see Gold II*, 296 Conn. at 200–01 ("court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader"), STN has pled facts that show the State, through its agents, acted in excess of its authority by essentially stealing and squandering STN's funds.[16]

2. The State Has A Fiduciary Relationship With STN

The State also does not contest that it stands in a fiduciary relationship to STN (*see* Compl. ¶¶ 1, 25), and indeed the facts show that such a relationship exists.

A "fiduciary or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is

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[15] *See* Resolution of the Connecticut General Assembly, 1801 (residue of land sales was to be used "for [STN's] benefit"); Conn. Gen. Stat. Title 50, §§ 1-2 (1821) (the overseer "shall see that [the lands] are husbanded for the best interest of the Indians, and applied to their use and benefit" and "shall annually, state and settle his account of, the concerns of such tribe"); Conn. Gen. Stat., Title XXVI, §§ 1, 3 (1854) (overseer "shall see that they are husbanded for the best interest of the Indians, and that the rents and profits are applied to their use and benefit" and "shall annually state and settle his account of the concerns of such tribe"); Conn. Gen. Stat. § 5057 (1930) ("The overseer of each tribe shall have the care and management of their lands and money and see that they are used for the best interests of the Indians and that the rents, profits and income thereof are applied to their benefit" and "shall annually settle his account of the concerns"); Conn. Gen. Stat. § 7168 (1949) ("said commissioner shall annually settle his account of the affairs of each tribe [and] shall cause the property of such Indians to be used for their best interest, and the rents, profits and income therefrom to be applied to their benefit"); Conn. Gen. Stat. § 47-65(a)(1961) (the "Commissioner of Energy and Environmental Protection with the advice of the Indian Affairs Council shall have the care and management of reservation lands…Said commissioner shall annually settle his accounts of the affairs of each tribe with the Comptroller….").

[16] The State recites that a plaintiff must "allege or otherwise establish facts that reasonably support" the allegation that the State acted in excess of its authority (Br. p. 24), but does not argue that STN failed to plead such facts. Nonetheless, STN's complaint details the factual basis for its claims. *See* Compl. ¶¶ 26-34.

under a duty to represent the interests of the other." *Cadle Co. v. D'Addario*, 268 Conn. 441, 455 (2004). Here, from as early as 1757, the colony and then the State of Connecticut served in a position of trust, control, and supervision, with a duty to care for STN's land and funds, and maintain both for the best interest of STN. (Compl. ¶ 4; *see* note 14, *supra*.) In 1757, the Connecticut General Assembly appointed a representative to act for the State as an "Overseer" of STN, charged to "manage, direct and superintend said Indians and their affairs . . . ." (Compl. ¶ 4.) Subsequent Overseers and later the State's departments were designated as "Guardians" of STN's lands, and were charged with managing STN's lands and funds for STN's "best interests." (*Id.* ¶¶ 4-5, 19-25).

The State's longstanding position as "guardian" of STN's land and funds establishes that the State has a fiduciary obligation to STN, with respect to the care and management of STN's land and funds. *See Kent School Corp.*, 423 F. Supp. at 786 (Connecticut "has stood in a position of trust and guardianship with respect to the resident Indian tribes").[17] Given that a statutory fiduciary relationship exists between the State and STN, STN has a right to seek relief against the State for, *inter alia*, accounting, resulting trust and/or constructive trust. (*See* Part IV.A.C).[18]

[17] In the analogous federal context, the federal government stands in a fiduciary relationship to federally-recognized tribes, under common trust law. *See United States v. Mitchell*, 463 U.S. 206, 210 (1983) (applicable statutes created all three elements of common law trust, including a trustee (United States), a beneficiary (Native Americans) and a trust corpus (Native American timber, lands and funds), which established a fiduciary relationship); *Shoshone Indian Tribe of Wind River Reservation v. United States*, 364 F.3d 1339, 1348 (Fed. Cir. 2004) ("[T]he United States is the trustee for the Tribes, having assumed the relationship of trustee-beneficiary pursuant to treaties and statutes. That a general trustee relationship exists between the Government and tribal nations has long been recognized by the Supreme Court.").

[18] As a beneficiary, STN has the right to compel its fiduciary to perform an accounting. (See Part III.C, below.) A trust is also an appropriate remedy for breach of fiduciary duty. *See Midsun Group, Inc. v. JEM Dev., LLC*, 2009 WL 1532334, at *9 (Ct. Sup. Ct. May 5, 2009); Bogert, Trusts & Trustees, § 968 ("at the conclusion of an accounting proceeding… the court [among other things] may direct the trustee to replace trust funds . . . by way of reimbursement for breaches of trust . . . .").

3. Sovereign Immunity Does Not Bar An Accounting Or Trust Remedy

The State contends that STN's request for an accounting and a resulting or constructive trust are "tantamount" to demands for money damages, and thus the suit is purportedly barred on the basis of sovereign immunity. (Br. pp. 21-24.) But the State cites no authority for this assertion, and indeed, the relief sought here is equitable in nature, seeking the calculation and restitution of STN's funds that the State had a duty to hold in trust, and thus does not constitute money damages. *See Gold I*, 2006 WL 2808629, at *16 (requests for a resulting or constructive trust are "are not 'dressed-up' claims for money damages," but proper claims for equitable relief); *McDonald v. Hartford Trust Co.*, 104 Conn. 169 (1926) (claim for an accounting and the recovery of funds belonging to the trust is "not a mere money demand; it is an equitable claim.")

The State argues that because this equitable relief would require the State to set aside funds and place them in a specific account held for STN's benefit, the claims result in a "payment" and are thus money damages. (Br. pp. 22-23.) But the mere fact that a judicial remedy "may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'" *New Hartford v. Connecticut Res. Recovery Auth.*, 291 Conn. 433, 460 (2009) (citing *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988)). Rather, "the proper characterization of a monetary remedy turns on what that remedy represents." *Connecticut Res. Recovery Auth.*, 291 Conn. at 460.

An accounting or the imposition of a trust is not akin to money damage,[19] but rather represents the restitution or reimbursement of STN's property that the State was responsible for maintaining. Courts have recognized a sharp distinction between restitution and money

[19] "An 'accounting' is defined as an adjustment of the accounts of the parties and a rendering of a judgement for the balance ascertained to be due." *Mankert v. Elmatco Prod., Inc.*, 84 Conn. App. 456, 460 (2004).

damages, as the former lies in equity and involves accounting for, and returning the property of, the plaintiff: "For restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 214 (2002); *see Connecticut Res. Recovery Auth.*, 291 Conn. at 460 (restitution, an equitable remedy, was not the same as a civil action seeking the recovery of money damages); *Bowen*, 487 U.S. at 893 (courts distinguish between an "an action at law for damages," which is "intended to provide a victim with monetary compensation for an injury to his person, property, or reputation," and an equitable action for specific relief, which "may include an order providing . . . for 'the recovery of specific property *or monies.*"); *see also Williams v. Williams*, 2008 WL 544637, at *2 (Ct. Sup. Ct. Feb. 1, 2008) (an accounting and imposition of a constructive trust are equitable and no right to a jury trial attaches); *School Committee of Burlington v. Department of Education of Mass.*, 471 U.S. 359, 370–371 (1985) (relief that orders a town to reimburse parents for educational costs that Congress intended the town to pay is not "damages").

This distinction was explained in *Gold I*. There, a State employee claimed that the State had misappropriated certain stock in a health-insurance company that had been mis-delivered to the State instead of the employees themselves. *Gold I*, 2006 WL 2808629, at *1. The plaintiff sought orders declaring that the State defendants "are holding the disputed stock or its cash equivalent in constructive trust … or resulting trust" and "requiring the State defendants to transfer such stock or cash to" the plaintiff and his class. *Id.* at 16. There, as here, the State argued that the plaintiff's constructive and resulting trust claims were "nothing more than 'dressed up' claims for money damages." *Id.* at *16.

The *Gold I* court, however, found that claims for a trust are not akin to money damages.

Id. A constructive trust is a lien "in favor of the owner of a particular property … to protect his interests in it, and ultimately ensure its safe return." *Id.*[20] It is not a lien on the defendant's general estate, but rather "only on the property itself, or on any new and different property in which the wrongly withheld property may have been reinvested." *Gold I*, 2006 WL 2808629, at *16 (citing 3 Pomeroy, Equity Jurisprudence (5th ed.) § 1058e, pp. 152-53). Likewise a resulting trust affords a "basis for establishing legal title to the property upon which the trust is imposed, not to support a claim for damages for any losses the beneficiary may have suffered by reason of not having possession of the property from the time of purchase until the time the resulting trust is imposed upon it." 2006 WL 2808629, at *16. In both cases, therefore, a trust serves the purpose of identifying STN's own funds, or their equivalents, and returning those funds or other property to STN, and do not constitute money damages.[21]

The State's authorities are not to the contrary, and none involved fiduciary relationships, or claims for an accounting or trust. (Br. pp. 22-23.) Rather, in each of the cases relied on by the State, the court evaluated the underlying claims at issue and determined – unlike here – that the claims were not equitable but were rather the reformulation of legal claims as equitable relief. For example, in *St. George*, the executor of the estate of a former sheriff sought a declaratory judgment as to whether the estate was entitled to indemnification for a judgment against the

[20] The Supreme Court later reversed because the State had not acted in excess of its statutory authority, however the State did not challenge the superior court's determination that plaintiff's claims for a constructive trust and a resulting trust are not dressed up claims for money damages, but proper claims for equitable relief. *Gold II*, 296 Conn. at 210–11, n.23.

[21] Similarly, federal courts have routinely found that claims for an accounting, and for the imposition of a trust, are equitable relief and not equivalent to money damages. *See Cobell v. Babbitt*, 30 F. Supp. 2d 24, 41 (D.D.C. 1998) ("remedy of accounting is an equitable one [and thus] plaintiffs' requested relief is one for specific relief, as opposed to one for money damages"); *Maryland Dep't of Human Res. v. Dep't of Health & Human Servs.*, 763 F.2d 1441, 1446 (D.C. Cir. 1985) ("although it is a claim that would require the payment of money by the federal government," the relief sought "is not a claim for money damages" because "Maryland is seeking funds to which a statute allegedly entitles it, rather than money in compensation for the losses").

sheriff. *St. George v. Gordon*, 264 Conn. 538 (2003). The claim did not seek true equitable relief, but instead sought damages by seeking indemnification pursuant to a statute. *Id*. at 543, 550, n.12. And in *Bloom*, the plaintiff sought declaratory and injunctive relief for an order to hold a hearing on his unemployment claim, after he failed to timely appeal the dismissal of his prior unemployment claim. *Bloom v. Dep't of Labor*, 93 Conn. App. 37, 39 (2006). Although the State had waived sovereign immunity with respect to claims for unemployment compensation, that immunity expired when plaintiff failed to timely appeal. *Id.* at 40-41. The court found that the plaintiff "cannot overcome the state's sovereign immunity by bringing an identical claim arising from the same underlying proceeding under the guise of a declaratory judgment," and that the plaintiff ultimately sought money damages. *Id.* at 41. But nothing in either *Bloom* or *St. George* addressed the equitable nature of a trust or an accounting, nor did the State's remaining authorities, which are all similarly distinguishable as each involved a legal claim reframed as an equitable one or were otherwise inapposite.[22]

B. Sovereign Immunity Does Not Bar Count Six Against the State

STN seeks, among other things, a declaratory judgment that the State owes a trust and fiduciary duty to STN as to the land and/or funds made the basis of this lawsuit, and seeks injunctive relief in the form of an accounting and imposition of a resulting or constructive trust in favor of STN. (Compl. ¶ 88.) The State claims that 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," and as such, since "it is the Commissioner – not the State *qua*

[22] *Alter & Assocs., LLC v. Lantz*, 90 Conn. App. 15, 17-18 (2005) (plaintiff was a bidder on contract with the Department of Corrections, sought a declaratory judgment to force department to enter into contract); *DaimlerChrysler Corp. v. Law*, 284 Conn. 701, 721–23 (2007) (manufacturer sought reimbursement for payments made to consumers under state lemon law); *Miller v. Egan*, 265 Conn. 301, 317 (2003) (relief sought was explicitly framed as money damages).

State – who has the obligation to 'annually settle his accounts of the affairs of each tribe,'" STN's claims must be directed solely at the Commissioner. (Br. pp. 28-29.) The Appellate Court, however, has made no such ruling and indeed, the State cites no authority to support its legally incorrect assertions.

The State relies on *Hanna v. Capitol Region Mental Health Ctr.*, 74 Conn. App. 264 (2002) and *Ware v. State*, 118 Conn. App. 65 (2009), but in both of those cases the plaintiffs – unlike STN – failed to allege any actions by a state officer in excess of his authority. In *Ware*, for example, "not only is there no substantial allegation that a state officer was acting pursuant to an unconstitutional enactment or in excess of his statutory authority, there is no allegation against a state officer at all." *Ware*, 118 Conn. App. at 76. Likewise in *Hanna*, the plaintiff brought claims against a state-run health center, but did not bring claims against a state employee in his official capacity, nor did plaintiff appear to have alleged any conduct by such a state officer. *Hanna.*, 74 Conn. App. at 270. Thus, the issue in *Hanna* and *Ware* was not that the State itself was named as a defendant, but rather that no improper conduct by a state official was alleged. Conversely, STN has alleged that a series of State officers and agents acted in excess of their statutory authority by taking and selling STN's land and pilfering the proceeds, and has also named the Commissioner, in his official capacity, as a defendant. (*See* pages 24-25, above.)

Indeed, the law is clear that claims against a state official, in his or her official capacity, are "in effect" claims against the State: "because the state can act only through its officers and agents, a suit against a state officer concerning a matter in which the officer represented the state is, in effect, against the state," *Chief Info. Officer v. Computers Plus Ctr., Inc.*, 310 Conn. 60, 79–80 (2013); *see also Miller v. Egan*, 265 Conn. 301, 313 (2003) (same). Indeed, such claims are treated as if they were solely against the state, and courts refer to the state as the defendant.

Henderson v. State, 151 Conn. App. 246, 256–57 (2014). There is thus no basis to distinguish between a state official and the state itself, and the state is a proper party in this lawsuit, especially absent any authority to the contrary.

Moreover, in the unique circumstances of this case, the State is a particularly apt defendant as a representative of its numerous agents, including the Overseers, the Commissioners of the State Parks & Forest Commission, the State Department of Welfare, and the State Department. (*See* Compl. ¶ 22.) Each of these individual actors exceeded their statutory authority and STN's requested relief for accounting and resulting or constructive trust relates to STN's relationship with each of the State's officers and agents, who in their official capacity, wrongfully misappropriated STN's lands and funds. Accordingly, the State, as the entity that acted through its overseers and commissioners, is a proper defendant.

C. STN Is Entitled To An Accounting Because Of Its Fiduciary Relationship With The State

In Count V, STN seeks declaratory and injunctive relief from Commissioner Klee, including, among other things, a declaration as to STN's rights and Commissioner Klee's obligations under Conn. Gen. Statute §§ 47-65 and 47-66, and an order compelling Commissioner Klee to comply with his official statutory obligations under Conn. Gen. Stat. § 47-66, including his obligation to annually account for and settle the accounts of the affairs of STN. (Compl. ¶ 80.) The State contends Count V should be dismissed because Conn. Gen. Stat. § 47-66 does not create a private right of action allowing STN to seek an accounting from the Commissioner. (Br. pp. 29-32.) But the State's argument is misplaced because Conn. Gen. Stat. § 47-66 creates a fiduciary relationship between the State and STN such that STN, as a beneficiary, has a right to seek an accounting under common law.

It is well-established that "the existence of a trust relationship is accompanied as a matter

of course by the right of the beneficiary to demand of the fiduciary a full and complete accounting at any proper time." *Baydrop v. Second Nat. Bank of New Haven Cty.*, 1 Conn. Supp. 29, 30 (1935), *modified on other grounds*, 120 Conn. 322 (1935); *see also* pp. 26-27, above, discussing fiduciary relationship; *Mankert v. Elmatco Prod., Inc.*, 84 Conn. App. 456, 460 (2004); *C & S Research Corp. v. Holton Co*., 36 Conn. Supp. 619, 622 (Super. Ct. 1980) (Courts can "compel an accounting, where a fiduciary relationship exists between the parties and the defendant has a duty to render an account.") (citing 1 Am. Jur. 2d, Accounts and Accounting, § 54). Indeed, this is true even if the "trust" relationship is limited to the circumstances of the relationship. *See Mankert*, 84 Conn. App. at 460 ("The right to compel and account in equity exists not only in the case of those relationships which are traditionally regarded as those of trust and confidence, but also in those informal relations which exist whenever one person trusts in, and relies upon, another."); 1 Am. Jur. 2d Accounts and Accounting § 53 ("The right to compel an account in equity exists … also in those informal relations which exist whenever one person trusts in, and relies upon, another.") Thus, STN's seeks to enforce merely its common law rights, not to enforce a statute. Because STN's right to an accounting is a "matter of course" in a trust relationship, the State's authorities are inapposite (Br. pp. 29-32), as none involved a request for an accounting from a fiduciary,[23] and this branch of the State's Motion should be denied.

[23] Indeed, in every case relied on by the State, a plaintiff sought to enforce, or seek damages for violation of, a statute, and none involved the assertion of common-law rights. *See Gerardi v. City of Bridgeport*, 294 Conn. 461 (2010) (city employees sued under statute that prevented electronic monitoring of employees); *Provencher v. Town of Enfield*, 284 Conn. 772 (2007) (officer sued under statute concerning eligibility to participate in retirement system); *Asylum Hill Problem Solving Revitalization Ass'n v. King*, 277 Conn. 238 (2006) (plaintiff lacked standing to challenge agency's implementation of a tax credit program, based on statute that required agencies to promote racial and economic integration); *Napoletano v. CIGNA Healthcare of Connecticut, Inc.*, 238 Conn. 216 (1996) (Connecticut Public Act governing managed care conferred private cause of action against insurer challenging physicians' removal from healthcare network administered by insurer), *overruled on other grounds by Batte-Holmgren v. Comm'r of Pub. Health*, 281 Conn. 277 (2007).

V. MONEY DAMAGES ARE ALSO APPROPRIATE ON THE BREACH OF FIDUCIARY DUTY CLAIM BECAUSE OF LEGISLATIVE WAIVER

The State also contends that Count IV, for breach of fiduciary duty, should be dismissed on the basis of sovereign immunity because STN seeks money damages. (Br. pp. 11-12.)

Analogous federal cases have found, in the Native American context, that sovereign immunity does not bar money damages. In *Mitchell*, 463 U.S. at 226, 228, for example, Native Americans sought to recover monetary damages from the United States based on waste and mismanagement of timber lands, in breach of the fiduciary duty the United States owed to tribes under various statutes. 463 U.S. at 210. Although the government had not expressly waived immunity or authorized suit, the Court found that the federal government stands in a fiduciary relationship to Native Americans – like the State does here to STN – with the responsibility to manage Native resources and land for the Native Americans' benefit, and thus the statutes must be fairly interpreted as mandating compensation by the government for damages sustained. *Id.* 226, 228 (trust relationship between the parties mandated "compensation by the Federal Government for violations of its fiduciary responsibilities in the management of Indian property."). Likewise, here the relevant State statutes created a fiduciary duty for the State government to manage STN's lands and funds (*see* p. 25-27, above), and thus this Court should find that the statutes at issue waive sovereign immunity.

Moreover, under well-established Connecticut law, if there is an ambiguity over whether Native Americans can seek damages under a statute, the statute should be construed in favor of the Native Americans. *See, e.g., Dark-Eyes v. Comm'r of Revenue Servs.*, 887 A.2d 848, 857, 863 (Conn. 2006) (citing numerous cases, statutes are to be "construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."); *see also Connecticut ex rel. Blumenthal v. U.S. Dep't of Interior*, 228 F.3d 82, 92 (2d Cir. 2000) (noting unique canon of

construction governing statutory provisions involving Native Americans, any doubtful expressions are to resolved in the favor the Native Americans).

In any case, STN is entitled to plead in the alternative, and also seeks declaratory and injunctive relief for the State's breach of fiduciary duty. *See Dreier v. Upjohn Co.,* 196 Conn. 242, 245 (1985) ("[A] plaintiff is permitted to advance alternative and even inconsistent theories of liability against one or more defendants in a single complaint."); *United Coastal Industries v. Clearheart Construction Co.,* 71 Conn. App. 506, 511 (2002) (claims for unjust enrichment and quantum meruit asserted in the alternative to a contract claim); Practice Book § 10-25 (The plaintiff may claim alternative relief, based upon an alternative construction of the cause of action.) Thus even if STN is barred from seeking the relief articulated in Count IV, STN has still properly sought injunctive and declaratory relief for the breach of fiduciary duty in Counts V and VI, and thus the claim should not be dismissed in its entirety.

CONCLUSION

For the reasons set forth above, the State's Motion to Dismiss should be denied in its entirety.

Respectfully submitted,
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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 May 15, 2017 or e-mailed to all counsel of record:

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