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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

SENECA NATION, a federally recognized Indian tribe,

Plaintiff,

v.

Andrew CUOMO, in his official capacity as Governor of New York, *et al.*,

Defendants.

Case No. 1:18-cv-429

SENECA NATION'S REPLY IN SUPPORT OF ITS OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

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INTRODUCTION

The Magistrate Judge erred in recommending dismissal of the Seneca Nation's complaint on the lone ground of issue preclusion. He did so in disregard of controlling Second Circuit precedent and Defendants' own concession that because a Rule 19 "dismissal is without prejudice, the plaintiff may bring a new action if it cures the earlier infirmity." Defs.' Reply Mem. in Supp. of Mot. to Dismiss at 4 (Dkt. 23) ("Defs.' Reply"). As the Objections explained, by bringing a new lawsuit against responsible state officers rather than the State itself, the Nation has successfully cured the infirmity that led to the prior Rule 19 dismissal. Contrary to Defendants' arguments, those Objections fully complied with this Court's rules by specifically identifying the faulty portions of the Report and Recommendation ("Report") and explaining why those rulings were incorrect.

Nothing in Defendants' response rehabilitates the Report; instead, Defendants' brief lays bare the various reasons why the Report must be rejected. First, while the Magistrate Judge recommended dismissal solely based on *issue* preclusion, Defendants rely on authority addressing *claim* preclusion. Issue preclusion (unlike claim preclusion) applies only when identical issues were *actually decided* in prior litigation. But the issue here—whether state officers may be sued under *Ex parte Young* for prospective relief in New York's absence—was never raised or decided in prior litigation. Second, like the Magistrate Judge, Defendants ignore that the complaint alleges the absence of *factual* predicates necessary for formation of a valid contract—facts that should have been (but were not) deemed true on a motion to dismiss. Third, the Magistrate Judge indisputably failed to address whether the Nation properly pleaded a claim for relief, and Defendants do not dispute that this Court may now resolve that pure legal issue in the first instance. Accordingly, this Court should reject the Report and deny the motion to dismiss.

ARGUMENTS

I. THE NATION'S OBJECTIONS TO THE REPORT AND RECOMMENDATION COMPLY WITH LOCAL RULES

Defendants begin their brief with the incorrect assertion that the Nation violated "Local Rule 72's specificity requirement." Defs.' Resp. to Plfs.' Objs. To the Report at 4, Dkt. 36 ("Defs.' Resp."). On the contrary, the very first paragraph of the Nation's Objections "specifically identif[ied]," in compliance with Local Rule 72(b), the three specific portions of the Report to which it is objecting:

> (1) the portions of the R&R recommending that this Court dismiss the complaint on the ground of issue preclusion, *see* R&R 14-16;
>
> (2) the portions of the R&R declining to accept as true all of the well-pleaded factual allegations (and favorable inferences therefrom) on a motion to dismiss, *see* R&R 2-4, 15-16; and
>
> (3) the R&R's failure to find that the Nation adequately pleaded claims seeking prospective relief for ongoing violations of federal law under *Ex parte Young*, 209 U.S. 123, 160 (1908).

Seneca Nation's Objs. To the Magistrate Judge's Report at 1, Dkt. 32 ("Objections"). The remainder of the brief supported these three objections with legal authority in sections I.A and B, section I.C, and section II of the argument, respectively. The Nation (1) explained how the Magistrate Judge's analysis of issue preclusion violated controlling law, (2) offered legal analysis showing that the Magistrate Judge erroneously assumed the facial validity of the easement at issue here, and (3) supplied the missing analysis of issues that the Magistrate Judge failed to reach.

Defendants assert that the Nation failed to challenge the "four points" that the Magistrate Judge purported to distill from the prior litigation. The opposite is true: The Nation specifically detailed how the Magistrate Judge's four-point gloss on the prior litigation "brushed . . . aside" the controlling law and failed to properly apply the issue preclusion analysis. Objections at 9. For example, the Nation specifically refuted the Magistrate Judge's first point, explaining how the

Magistrate Judge's "apparent belief in the 'facial validity' of the easement" undergirded his faulty analysis. *Id.* at 17. The Nation also squarely refuted the second point, arguing that the "facts as pleaded by the Nation show that New York never obtained a valid easement." *Id.* The Nation refuted the third point as well, arguing that the issue of whether "New York must have an opportunity to appear" "reflects a critical misunderstanding of the *Ex parte Young* doctrine." *Id.* at 10-11; *see also id.* at 13 (Magistrate Judge "mistaken[]" to conclude that, after prior suit, "any attack on the validity of the Thruway Easement" could be brought only with New York as Defendant) (emphasis omitted). Defendants, who simply ignore these points, fail to show any violation of Local Rule 72.

II. THE MAGISTRATE JUDGE ERRED IN HOLDING THE NATION'S CLAIMS BARRED BY ISSUE PRECLUSION

As they did before the Magistrate Judge, Defendants again admit that "a Rule 19 failure to join an indispensable, immune party can be cured by suing state officials in their official capacity for prospective injunctive relief." Defs.' Resp. at 6; *see* Defs.' Reply at 4 (similar). That concession proves that issue preclusion cannot apply here. As the Nation explained, suing responsible officials of an immune sovereign under *Ex parte Young* in lieu of the sovereign itself is a well-established way to "cure [a Rule 19] indispensability defect" and allow otherwise-barred claims to proceed. Objections at 12 (quoting *Nisqually Indian Tribe v. Gregoire*, No. 08-5069-RBL, 2008 WL 1999830, at *3 (W.D. Wash. May 8, 2008)); *see also Vann v. U.S. Dep't of Interior*, 701 F.3d 927, 929-930 (D.C. Cir. 2012) (an immune sovereign "is not a required party for purposes of Rule 19" where a responsible official can "adequately represent" the sovereign); *Salt River Project Agric. Improvement & Power Dist. v. Lee*, 672 F.3d 1176, 1181 (9th Cir. 2012) (noting that "a contrary holding would effectively gut the *Ex parte Young* doctrine"). Defendants fail to cite, let alone distinguish, any of this authority.

Defendants argue that "[i]ssue preclusion applies not only to those claims that were actually litigated, but also to those claims that the party could have made in a prior proceeding." Defs.' Resp. at 7. That is dead wrong. As the Nation explained in its Objections (at p. 9), controlling precedent is clear that issue preclusion applies *only* when the "identical issue was raised" and "was *actually litigated and decided* in the previous proceeding." *Republic of Ecuador v. Chevron Corp*., 638 F.3d 384, 400 (2d Cir. 2011) (emphasis added). Defendants have confused claim preclusion (res judicata) with issue preclusion (collateral estoppel), relying on cases interpreting the former instead of the latter. *See Greenwich Life Settlements, Inc. v. ViaSource Funding Grp., LLC*, 742 F. Supp. 2d 446, 453 (S.D.N.Y. 2010) (adjudicating motion to dismiss on claim preclusion grounds, without mentioning issue preclusion); *Grant v. United Fed'n of Teachers*, No. 12-cv-02149 (CBA)(VMS), 2014 U.S. Dist. LEXIS 32616 at *14 (E.D.N.Y. Mar. 12, 2014) (same); *PPC Broadband, Inc. v. Corning Gilbert, Inc.*, No. 5:13-cv-538 (GLS/DEP), 2013 U.S. Dist. LEXIS 165480 at *3-*4 (N.D.N.Y. Nov. 21, 2013) (same). But as other cases they cite make clear, while claim preclusion may bar claims that *could have* been brought in previous litigation, issue preclusion—the subject of the Magistrate Judge's Report—requires *actual litigation* of the allegedly preclusive issue. *See East Coast Novelty Co. v. City of New York*, 781 F. Supp. 999, 1004-1006 (S.D.N.Y. 1992) (for issue preclusion, "[w]hat is controlling is the identity of the issue which has necessarily been decided in the prior action or proceeding") (alteration in original); *Cameron v. Church*, 253 F. Supp. 2d 611, 618-619 (S.D.N.Y. 2003) ("the issues in both proceedings must be identical") (citation omitted). For this reason, it is no answer, under issue preclusion, that the Nation "could have named" the Governor and Commissioner of the Department of Transportation in its previous litigation. Defs.' Resp. at 7. Rather, this argument is a tacit

admission that issue preclusion does not apply.[1]

The cases Defendants rely on do not suggest a different result. For instance, their lead case—a First Circuit decision interpreting Massachusetts law—actually confirms "that dismissal for failure to satisfy a precondition to suit *should not bar a subsequent suit in which the defect has been cured*." *In re Sonus Networks, Inc. Shareholder Litig.*, 499 F.3d 47, 61 (1st Cir. 2007) (emphasis added). Those cases are also beside the point. It is certainly true that, if a party fails to cure the indispensability defect that led to the prior dismissal, the party cannot simply "return to court, forcing defendants to recreate summary judgment motions, over and over again." Defs.' Resp. at 8. But that just means that "issue preclusion should defeat any effort to relitigate the *same* joinder issue in a second action"; it does not bar new actions "based on different theories that present[] a different Rule 19 issue." 18A CHARLES WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4438 & n.3 (emphasis added) (citing *Gwartz v. Jefferson Mem'l Hosp. Ass'n*, 23 F.3d 1426, 1428 (8th Cir. 1994) (earlier Rule 19 dismissal did not have preclusive effect on subsequent action based on same facts but different legal theory)).[2]

The bottom line is that, in the prior litigation, the only issue that was actually litigated and decided was that the dismissal of the Nation's claim against New York, the Thruway Authority, and its Executive Director must be upheld "under Rule 19(b) [because] the action could not proceed *against the Thruway Authority and its executive director* in the State's absence." *Seneca*

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[1] Although the Magistrate Judge relied exclusively on issue preclusion, claim preclusion does not bar the Nation's suit, either. *See* Pl.'s Resp. in Opp'n to Mot. to Dismiss at 7-9, Dkt. 22.

[2] Citing no authority, Defendants also argue that, had the Nation wanted to cure the Rule 19 defect under an *Ex parte Young* theory, "it should have done so in the 1993 litigation." Defs.' Resp. at 6. But that assertion, too, runs headlong into Defendants' concession that, because a Rule 19 "dismissal is without prejudice, the plaintiff may bring a new action if it cures the earlier infirmity." Defs.' Reply at 4; *see* 18A CHARLES WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4438 (noting "the long-settled rule that the dismissal [under Rule 19] does not bar a new action that corrects the deficiency of parties").

Nation of Indians v. New York, 383 F.3d 45, 47 (2d Cir. 2004) (emphasis added); *see id.* at 48 (asking "whether in equity and good conscience the action should proceed *among the parties before [the Court]*, or should be dismissed") (emphasis added) (citation omitted). This suit, in contrast, presents a new and different issue: whether the Nation may bring a new lawsuit under a different legal theory (*Ex parte Young*) against a different group of defendants that adequately represent the State's interest as a matter of law. *See Seneca Nation of Indians v. New York*, 397 F. Supp. 685, 685-687 (W.D.N.Y. 1975) (under *Ex parte Young*, "an Indian Tribe is not prohibited by the [E]leventh [A]mendment from suing to enjoin the actions of a state official which conflict with treaty rights," including the Nation's "right to the unrestricted use and occupancy of" its reservation lands.). Accordingly, issue preclusion poses no bar to the Nation's suit.

III. THE MAGISTRATE JUDGE ERRED IN DECLINING TO ACCEPT AS TRUE THE COMPLAINT'S WELL-PLEADED FACTUAL ALLEGATIONS

Defendants argue that the Magistrate Judge properly refused to accept as true all of the Nation's well-pleaded factual allegations going to the validity of the contract. But that argument ignores the Nation's authority explaining that the *existence* of a contract—in contrast to the meaning of its terms—is a question of fact. *See* Objections at 17 (citing cases). Defendants neither distinguish the Nation's authority, nor cite any contrary authority of their own.

If Defendants' unsupported assertion were correct, it essentially would be impossible to challenge an invalid contract. For example, if a plaintiff pleaded that a contract's signature was forged, or that one party to a contract was actually a 10-year-old child, the contract in question might (like the easement in question) be *facially* valid. But it would not be presumed *legally* valid at the motion to dismiss stage, given the plaintiff's well-pleaded factual allegations challenging the contract's formation. For the same reason, it was inappropriate for the Magistrate Judge to conclude that the "facial validity" of the purported easement means that the easement should also

be deemed *legally* valid at the motion-to-dismiss stage. Report at 2-4.

Here, the Nation's well-pleaded factual allegations demonstrate that Defendants failed to comply with legal prerequisites to establish a valid easement on the Nation's federally protected Reservation. For example, Paragraphs 27 and 28 plead that the following items "necessary under federal law for a valid conveyance of an easement across Indian land" were never provided to the Department of the Interior: "a map of the definite location of the easement, an application, and information regarding agreements for compensation to individual landowners, for Interior to review." Compl. ¶¶ 27-28. Whether the map, application, and agreements to compensate individual landowners were ever submitted to and approved by Interior are issues of fact that dictate the contract's validity, and must be accepted as true for purposes of Defendants' motion to dismiss. The Magistrate Judge was thus wrong to assume, contrary to these and other factual allegations, that "there is an easement that's valid" at this stage of the proceedings. Report at 13.

IV. THE MAGISTRATE JUDGE ERRED IN DECLINING TO TAKE AS TRUE THE COMPLAINT'S WELL-PLEADED ALLEGATIONS THAT THE FACTS NECESSARY FOR FORMATION OF AN EASEMENT ARE ABSENT

The Nation's Objections (at pp. 18-25) explained that, because the erroneous ruling on issue preclusion short-circuited the proper legal analysis, the Magistrate Judge erred in failing to conclude that the Nation properly pleaded an *Ex parte Young* claim. Defendants, who fault the Nation for even addressing these issues (Defs.' Resp. at 6), offer no contrary argument. But assuming this Court rejects the Magistrate Judge's issue preclusion ruling, this Court will then have discretion either to "return the matter to the magistrate judge with instructions" or to decide the issue itself in the first instance. FED. R. CIV. P. 72(b)(3). Given that whether the complaint properly pleaded an *Ex parte Young* claim presents a pure issue of law that would be reviewed *de novo* by this Court, judicial economy suggests that this Court should resolve that issue now and

deny Defendants' motion to dismiss, rather than returning the matter to the Magistrate Judge.

CONCLUSION

The Court should reject the Magistrate Judge's Report and deny Defendants' motion to dismiss.

DATED this 21st day of February 2019.

Respectfully submitted,

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