UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SENECA NATION, a federally recognized Indian tribe,

Plaintiff,

vs. 18-cv-00429-LJV

Andrew CUOMO, in his official capacity as Governor of New York;
Eric T. SCHNEIDERMAN, in his official capacity as New York State Attorney General;
Paul A. KARAS, in his official capacity as Acting Commissioner of the New York State Department of Transportation;
Thomas P. DiNAPOLI, in his official capacity as Comptroller of the State of New York; and
The New York State Thruway Authority,

Defendants.

NOTICE OF MOTION TO DISMISS

MOTION BY:	Defendants ANDREW CUOMO, ERIC T. SCHNEIDERMAN, PAUL A. KARAS, THOMAS P. DINAPOLI, and THE NEW YORK STATE THRUWAY AUTHORITY.
RELIEF SOUGHT:	Dismissal pursuant to FRCP 12 (b) (1), (6), and (7).
WHEN RETURNABLE:	As directed by the Court or Local Rule 7 (a)(1). Defendants request an opportunity to submit reply papers.
WHERE RETURNABLE:	Hon. Lawrence J. Vilardo United States Courthouse 2 Niagara Sq. Buffalo, New York 14202

SUPPORTING PAPERS: Memorandum of Law.

DATED: Buffalo, New York
June 5, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2018, I electronically filed the Notice of Motion and Memorandum of Law, in this matter, with the Clerk of the District Court using its CM/ECF system and thereby provided service on the following CM/ECF participant:

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

The Defendants, Andrew Cuomo, Eric T. Schneiderman, Paul A. Karas, Thomas P. DiNapoli, and the New York State Thruway Authority, submit this Memorandum of Law in support of their Motion to Dismiss. As the Court will see, the issues raised in this lawsuit were previously litigated and the Second Circuit ruled that the State of New York was an indispensable party, because it owns the right of way, which was purchased from the Plaintiff. Seneca Nation of Indians v New York, 383 F3d 45, 48 - 49 (2d Cir. 2004). That Court further ruled that the State of New York could not be sued by Plaintiff, due to its Eleventh Amendment immunity, and, since it was an indispensable party, the case was dismissed. Plaintiff now seeks to re-litigate these issues, arguing that it is seeking only injunctive and declaratory prospective equitable relief, from which the State does not enjoy Eleventh Amendment immunity. However, the relief it seeks is a barely disguised demand for money damages and, therefore, cannot be properly characterized as prospective injunctive relief. As such, the State, and the Defendants being sued in their official capacities, are indeed immune and, since the State is a necessary party, the case must be dismissed in its absence.

STATEMENT OF FACTS

Solely for the purposes of this Motion, the Defendants accept the facts as alleged in the Complaint, as they must. Chambers v. Time Warner, Inc., 282 F.3d 147, at 152 (2d Cir. 2002). With the exception of the Thruway Authority and Acting Commissioner Paul. A. Karas, the Defendants are all independently elected officials of the State of New York (ECF No. 1 ¶¶ 7, 8, and 10; hereinafter "the Complaint" or "Compl."). They are all sued solely in their Official Capacity. Id. Paul A. Karas is the Acting Commissioner of the State of New York Department of Transportation ("DOT"), and is also sued solely in his official capacity. Compl. ¶ 9. The

Thruway Authority is characterized as a Public-Benefit Corporation and is sued in its individual capacity. Compl. ¶ 11. The Plaintiff is a federally recognized Indian tribe. Compl. ¶ 6.

On October 5, 1954, the Plaintiff conveyed a permanent easement on over three hundred (300) acres of land on its Cattaraugus Reservation to the Thruway Authority in exchange for $75,000. Compl. ¶¶ 15 and 32 - 33. The agreement also called for the Thruway Authority to compensate individual Senecas who were displaced by the easement. Compl. ¶ 33. This agreement was never signed or approved by a Federal Official. Compl. ¶ 34. The easement was used for the construction of the New York State Thruway, which is part of the federal interstate highway system. Compl. ¶ 36. The Thruway Authority collects tolls from the users of the Thruway, which are held by the Comptroller. Compl. ¶ 38; see also New York Public Authorities Law §§ 354 (8) and 364. Plaintiff alleges that the easement was obtained in violation of federal law. Compl. ¶¶ 17 – 18, 28, and 37. In particular, Plaintiff alleges that pursuant to 25 U.S.C. §177 (1949) (Indian Non-Intercourse Act) and 25 C.F.R. §256 (1949), the Defendants were required to obtain consent for the grant of the easement from the United States and, since they did not, the grant of the easement was void *ab initio*. Id.

The Complaint lists three claims. The first, for an injunction "requiring that the Defendants (except the Comptroller) obtain a valid easement" for the portion of the Thruway that runs across Seneca lands. Compl. ¶ 51. In the alternative, the Plaintiff seeks "an order enjoining the Defendants (except for the Comptroller) from collecting tolls" for that portion of the Thruway. Compl. ¶ 52. The second claim seeks an injunction requiring that the Comptroller "segregate and hold in escrow" future tolls which are attributable to that portion of the Thruway. The third claim requests judgment declaring that the current easement is invalid, and directing

"that some of the funds being collected by the Thruway and being deposited with the Comptroller on a continuing basis" are in violation of Federal Law. Compl. ¶¶ 62 - 63.

STANDARD OF REVIEW

"Where … the defendant moves for dismissal under Rule 12(b)(1), Fed. R. Civ. P., as well as on other grounds, the court should consider the Rule 12(b)(1) challenge first since if it must dismiss the complaint for lack of subject matter jurisdiction, the accompanying defenses and objections become moot and do not need to be determined." Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n, 896 F.2d 674, 678 (2d Cir.1990) (quotation omitted); see also Baldessarre v. Monroe–Woodbury Cent. Sch. Dist., 820 F.Supp.2d 490, 499 (S.D.N.Y. 2011), aff'd sub nom., Baldessarre ex rel. Baldessarre v. Monroe–Woodbury Cent. Sch. Dist., 496 F. App'x 131 (2d Cir. 2012) ("When a defendant moves to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction, and also moves to dismiss on other grounds such as Rule 12(b)(6) for failure to state a claim upon which relief can be granted, the Court must consider the Rule 12(b)(1) motion first."). "A court faced with a motion to dismiss ... must decide the jurisdictional question first because a disposition of a Rule 12(b)(6) motion is a decision on the merits and, therefore, an exercise of jurisdiction." Sikhs for Justice Inc. v. Indian Nat'l Cong. Party, 17 F.Supp.3d 334, 338 (S.D.N.Y. 2014) (quotation omitted). In other words, if a court lacks subject matter jurisdiction, it cannot reach the merits of the case.

The standard of review on a motion to dismiss for lack of subject matter jurisdiction is well settled:

> A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it. In resolving a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), a district court ... may refer to evidence outside the pleadings. A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists.

Makarova v. U.S., 201 F.3d 110, 113 (2d Cir. 2000) (citations omitted). On the other hand, in ruling upon a motion to dismiss made pursuant to Fed. R. Civ. P. 12(b)(6), the Court must construe:

> the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor. Although the pleading standard is a liberal one, bald assertions and conclusions of law will not suffice. To survive dismissal, the plaintiff must provide the grounds upon which her claim rests through factual allegations sufficient to raise a right to relief above the speculative level.

Reddington v. Staten Island Univ. Hosp., 511 F.3d 126, 131 (2d Cir. 2007) (citations and internal quotation marks omitted).

Argument

Point I

PLAINTIFF IS BOUND BY THE SECOND CIRCUIT'S DECISION IN SENECA NATION OF INDIANS v. NEW YORK

On August 5, 1993, the Plaintiff herein brought suit against the State of New York, the Thruway, and others seeking, *inter alia*, to invalidate the Thruway easement at issue in the case at bar. Seneca Nation of Indians v New York (WDNY Case No. 93-CV-688); see also Seneca Nation of Indians v New York, 383 F.3d 45, 46 - 47 (2d Cir. 2004). Following a Motion for Summary Judgement, Judge Arcara found that the State of New York was the owner of the easement, but that Eleventh Amendment immunity prevented it from being named as a party. Id. at 48 – 49. Finding that the State was a necessary and indispensable party, Judge Arcara dismissed the case against the Thruway. On appeal, the Second Circuit affirmed those findings. Id. The Supreme Court denied Plaintiff's petition for writ of certiorari. 547 U.S. 1178 (2006). Because the claim upon which the instant suit is based has been litigated, all the way to the Second Circuit, this case must be dismissed.

The Second Circuit's ruling in the prior suit bars the instant suit due to the doctrines of collateral estoppel and *res judicata*. The Plaintiff has had a full opportunity to argue its points regarding the legitimacy of the Thruway easement and proper remedies when it brought suit twenty three years ago, and lost. *Res judicata* applies when three conditions are met:

> (1) the previous action involved an adjudication on the merits;
> (2) the previous action involved the Plaintiffs or those in privity with them; [and]
> (3) the claims asserted in the subsequent action were, or could have been, raised in the prior action.

Grant v United Fedn. of Teachers, 2014 US Dist LEXIS 32616, at 14 - 15 (E.D.N.Y. 2014) (quoting Monahan v. N.Y.C. Dep't of Corr., 214 F.3d 275, 285 (2d Cir. 2000)).

As to the first issue, the prior action was dismissed by the Second Circuit, in which the Court upheld the principle that the State of New York had Eleventh Amendment immunity from suit by the Plaintiff, among others. Seneca Nation of Indians, 383 F.3d 45. The Court further held that the State of New York was the actual owner of the easement in question and was, therefore, a necessary and indispensable party to any action regarding the easement. This is a decision on the merits of the sovereign immunity and indispensable party issues. Clearly, the same Plaintiff was involved. In the earlier case, the Seneca Nation was a Plaintiff. The earlier suit also concerned the validity of the Thruway easement and the relief Plaintiff could obtain as a result of that issue, so the claims asserted were raised in the prior action. In any event, regardless of whether the prior suit contained the identical causes of action as the case at bar, r*es judicata* applies to "not only as to what was pleaded, but also as to what could have been pleaded.'" Cameron v Church, 253 F Supp. 2d 611 (S.D.N.Y. 2003) (quoting Teltronics Services, Inc. v. Hessen, 762 F.2d 185, 193 (2d Cir. 1985)).

For similar reasons, the Plaintiff's claims are barred by collateral estoppel. Under that doctrine, a judgment prevents a litigant from litigating an issue if:

> (1) the issues in both proceedings are identical,
> (2) the issue in the prior proceeding was actually litigated and actually decided,
> (3) there was full and fair opportunity to litigate in the prior proceeding, and
> (4) the issue previously litigated was necessary to support a valid and final judgment on the merits.

Carney v. Philippone 332 F.3d 163 (2d Cir. 2003) (citing N.L.R.B. v. Thalbo Corp., 171 F.3d 102, 109 (2d Cir. 1999)). As discussed above with regard to *res judicata*, in the prior litigation, the issues of Eleventh Amendment immunity and indispensable party were identical to the issues at bar. They were actually litigated, the process taking over ten years. There was a full and fair opportunity to litigate the issues during that ten years, and those issues were necessary to support the final judgment of dismissal.

In addition to the issues being precluded, allowing this case to go forward would violate the rule against claim splitting, given that the Plaintiff could have advanced its theory of equitable and declaratory relief in 1993, when it filed the earlier suit. In Ambase Corp. v. City Investing Co. Liquidating Trust, 326 F.3d 63, 72 - 73 (2d Cir. 2003) the Second Circuit explained that the:

> rule against claim splitting is based on the belief that it is fairer to require a plaintiff to present in one action all of his theories of recovery relating to a transaction, and all of the evidence relating to those theories, than to permit him to prosecute overlapping or repetitive actions in different courts or at different times.

Id. at 73 (quoting Maldonado v Flynn, 417 A2d 378, 382 (Del Ch 1980)). In the case at bar the Complaint attempts to address the issue of the State's Eleventh Amendment immunity by arguing that the relief it seeks is declaratory and injunctive prospective relief, so that immunity does not apply under Ex parte Young, 209 U.S. 123 (1908). Compl. ¶ 2. Regardless of the

merits of this argument from Plaintiff, which are few, this ignores the rule against claim splitting. Clearly, the question of the validity of the easement over the Cattaraugus Reservation was the transaction that was at the heart of Seneca Nation of Indians v. New York. As noted by the Second Circuit, the plaintiff was aware of the State's immunity and did not challenge it on the appeal. *Id.* at 47. If the Plaintiff had a theory which would have allowed it to obtain the relief it seeks in the case at bar, it should have presented that theory at the time, instead of attempting to prosecute overlapping or repetitive actions at this time, over twenty years after the initial suit was brought. This cannot be allowed. "The plaintiff cannot slice and dice its theories into separate lawsuits." Simmtech Co. v Citibank, N.A., 2016 US Dist LEXIS 102698, *23 (S.D.N.Y. 2016).

POINT II

THE ACTION, AS AGAINST THE STATE OFFICIALS SUED IN THEIR OFFICIAL CAPACITIES, IS BARRED BY THE STATE'S ELEVENTH AMENDMENT SOVEREIGN IMMUNITY

Even if the Plaintiff was not bound by issue preclusion, the case at bar would still have to be dismissed on Eleventh Amendment and necessary party grounds once the Court considered the issues, *de novo*. Article III, § 2 of the Constitution provides that the federal judicial power extends, *inter alia*, to controversies "between a State and Citizens of another State." Relying on this language, in 1793 the Supreme Court assumed original jurisdiction over a suit brought by a citizen of South Carolina against the State of Georgia. Chisholm v. Georgia, 2 Dall. 419 (1793). The decision "created such a shock of surprise that the Eleventh Amendment was at once proposed and adopted." Monaco v. Mississippi, 292 U.S. 313, 325 (1934). The Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Amendment's language not only overruled the particular result in Chisholm, but the Supreme Court has recognized that its greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III. Thus, in Hans v. Louisiana, 134 U.S. 1 (1890), the Court held that, despite the limited terms of the Eleventh Amendment, a federal court could not entertain a suit brought by a citizen against his own State. The Court determined that federal jurisdiction over suits against unconsenting States "was not contemplated by the Constitution when establishing the judicial power of the United States." Id. at 15. In short, the principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art. III.

In Ex parte Young, 209 U.S. 123 (1908), the Supreme Court carved out a narrow exception to Eleventh Amendment immunity. There the Court recognized that a state official, sued in his or her official capacity, could be enjoined prospectively from violating federal law. The doctrine was seen as necessary "to permit federal courts to vindicate federal rights." Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 105 (1989). Ex parte Young, however, authorizes relief only when the complaint alleges an ongoing violation of federal law. It does not does not authorize retrospective relief for allegations of past violations of federal law. Papasan v. Allain, 478 U.S. 265, 277-78 (1986); see also Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 281-88 (1997). The line between prospective and retrospective relief is drawn because "[remedies] designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law," whereas "compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment." Green v. Mansour, 474 U.S. 64, 68 (1985).

Of particular relevance to the instant case is the fact that the Ex Parte Young exception to Eleventh Amendment immunity is not meant to address past violations of federal law, particularly where the aggrieved party has an adequate remedy at law in the form of monetary damages. In Papasan, 478 U.S. at 265, the Supreme Court explained:

> We have also described certain types of cases that formally meet the Young requirements of a state official acting inconsistently with federal law but that stretch that case too far and would upset the balance of federal and state interests that it embodies. Young's applicability has been tailored to conform as precisely as possible to those specific situations in which it is "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.' " Pennhurst, supra, at 105, 104 S.Ct., at 910 (quoting Young, supra 209 U.S., at 160, 28 S.Ct., at 454). Consequently, Young has been focused on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past, as well as on cases in which the relief against the state official directly ends the violation of federal law as opposed to cases in which that relief is intended indirectly to encourage compliance with federal law through deterrence or directly to meet third-party interests such as compensation. As we have noted: "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment." Green v. Mansour, 474 U.S. 64, 68, 106 S.Ct. 423, 426, 88 L.Ed.2d 371 (1985) (citation omitted).
>
> Relief that in essence serves to compensate a party injured in the past by an action of a state official in his official capacity that was illegal under federal law is barred even when the state official is the named defendant. This is true if the relief is expressly denominated as damages. See, e.g., Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945). It is also true if the relief is tantamount to an award of damages for a past violation of federal law, even though styled as something else. See, e.g., Green v. Mansour, supra 474 U.S. at 69–70, 106 S.Ct., at 426–427; Edelman v. Jordan, 415 U.S. 651, 664–668, 94 S.Ct. 1347, 1356–1358, 39 L.Ed.2d 662 (1974). On the other hand, relief that serves directly to bring an end to a present violation of federal law is not barred by the Eleventh Amendment even though accompanied by a substantial ancillary effect on the state treasury. See Milliken v. Bradley, 433 U.S. 267, 289–290, 97 S.Ct. 2749, 2761–2762, 53 L.Ed.2d 745 (1977); Edelman, supra 415 U.S., at 667–668, 94 S.Ct., at 1357–1358.

Id. at 277-78.

With these general principles in mind, and for the foregoing reasons, it is clear that the Plaintiff's instant action is barred by Eleventh Amendment immunity.

A. Plaintiff's Complaint Seeks Monetary Relief For A Past Violation Of Federal Law

The relief sought in Plaintiff's complaint is styled as injunctive and declaratory relief; however, in reality what Plaintiff seeks is monetary damages for an alleged past violation of federal law. Plaintiff's complaint alleges that the easement that the State purchased in 1954 for the construction of the Thruway is void *ab initio* because the State actors that negotiated and ultimately obtained the easement violated federal law governing the alienation of Indian land by not obtaining the consent of the Secretary of the Interior. Based on this alleged violation of federal law, the complaint seeks: 1) an injunction requiring the Defendants (except the Comptroller) to obtain a valid easement on terms that will equitably compensate the Plaintiff pro rata for the future use of its lands or, alternatively, an order enjoining the Defendants (except the Comptroller) from collecting tolls for that portion of the Thruway on Plaintiff's land unless the State obtains a valid easement; 2) an injunction requiring the Comptroller to segregate and hold in escrow future toll money attributable to that portion of the Thruway on Plaintiff's land until the other Defendants obtain a valid easement; and, 3) a declaration that Defendants (except the Comptroller) are violating federal law by not obtaining a valid easement and that money being collected by the Thruway and deposited with the Comptroller on an ongoing basis is derived from a violation of federal law.

Plaintiff's complaint alleges that the Ex Parte Young exception to Eleventh Amendment immunity applies because the above-mentioned relief is prospective injunctive and declaratory relief to stop on ongoing violation of federal law. In the first instance, even a cursory examination of the relief that Plaintiff's complaint seeks reveals that what they are really seeking

is more money for the State's Thruway right of way. Each component of relief that the ad damnum clause of the Complaint seeks revolves around exacting more money from the State for the use of Plaintiff's land for the Thruway right of way. If the monetary component of each of the three items of relief sought is removed, the requested relief becomes meaningless. Money is the *sine qua non* of each component of the relief requested. Secondly, there is no ongoing violation of federal law. It is bedrock law that easements are contracts and are construed in accordance with the rules of contract construction. Lansdowne on the Potomac Homeowners Ass'n, Inc. v. OpenBand at Lansdowne, LLC, 713 F.3d 187, 206 (4th Cir. 2013); see also Franklin Park Plaza, LLC v. V&J Nat. Enterprises, LLC, 57 A.D. 3d 1450, 1452 (4th Dept. 2013). When the Thruway Authority (or its predecessor the NYS Dept. of Public Works) entered into the Thruway right of way easement with the Plaintiff on October 5, 1954, the parties entered into a real property contract. Any purported violation of federal law would have occurred at the time the parties entered into the contract. Accordingly, the relief that Plaintiff seeks in this action "is tantamount to an award of damages for a past violation of federal law, even though styled as something else." Papasan, 478 U.S. 265.

The Second Circuit's decision in Ford v. Reynolds, 316 F.3d 351 (2d Cir. 2003) further illustrates that, in order for the Ex Parte Young exception to apply, the complaint has to allege an ongoing violation of federal law and seek relief that is properly characterized as prospective. The plaintiffs in Ford were students at the City University of New York ("CUNY") and various individuals the students had retained to speak at an event they had planned. The defendants were CUNY administrators who were alleged to have shut down the event and disciplined the students. The plaintiffs commenced an action pursuant to 42 U.S.C. §1983 alleging violations of their constitutional rights and seeking a permanent injunction enjoining defendants from taking

further disciplinary action against them and enjoining defendants from denying payment to the retained speakers. By the time the case was decided in the District Court, the first injunction requested had become moot. Addressing the second injunction requested, the Second Circuit ruled:

> The second injunction requested also fails on its merits. A showing of irreparable harm is required for the imposition of any injunctive relief, preliminary or permanent. To establish irreparable harm, the injury alleged must be one requiring a remedy of more than mere money damages. The only relief sought by the Speaker Plaintiffs is payment of the honoraria they were promised for speaking at the …event. Accordingly, any harm suffered by these plaintiffs can be remedied by monetary damages and injunctive relief should be denied.

Id. at 355 (internal quotation marks and citations omitted). The Court went on to opine that, "[t]here being no valid claim for prospective injunctive relief in the complaint, *Ex parte Young* has no application to this case". Id. In the instant case, as matter of law, the Plaintiff will not be able to establish irreparable harm because the permanent injunctive relief they seek is meant to address an injury that can, in reality, only be remedied with money damages. See, e.g., Los Angeles v. Lyons, 461 U.S. 95, 111-12 (1983) (Irreparable harm is harm that is continuing and for which money damages cannot provide adequate compensation); Tucker Anthony Realty Corp. v. Schlesinger, 888 F.2d 969, 975 (2d Cir. 1989) (to establish irreparable harm injury must be one requiring a remedy of more than mere damages and must be a loss that cannot be rectified by financial compensation); Savage v. Gorski, 850 F2d 64, 68 (2d Cir. 1988) (an injury for which money damages could make a plaintiff whole is plainly reparable.); Geyer v. Lantz, 2005 WL 1657126, *3 (D. Conn. 2005) (Irreparable harm is harm that that cannot be remedied by an award of monetary damages, and federal court should grant injunctive relief against a state or municipal official only in situations of most compelling necessity.). Plaintiff has failed to allege any harm beyond monetary harm.

B. The Ex Parte Young Exception to Eleventh Amendment Immunity Does Not Apply Because This Is An Action To Quiet Title

Based on the same principles of sovereign immunity discussed above, in Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997), the Supreme Court carved out a narrow exception to the Ex Parte Young exception to State Eleventh Amendment immunity. At issue in Coeur d'Alene was the plaintiff tribe's claims to submerged lands located within the boundaries of the Coeur d'Alene Reservation. As here, the tribe named as defendants various state agencies, and various state officials in their official capacity. The tribe sought, in addition to its land title claims, declaratory and injunctive relief establishing its exclusive right to the use and enjoyment of the submerged lands and prohibiting the defendants from regulating the lands. The defendants claimed immunity from suit under the Eleventh Amendment. A majority of the Court concluded that the Ex Parte Young exception did not apply because of the unique nature of the tribe's claims, which the Court determined were the "functional equivalent" of a quiet title action that would have divested the state of substantially all regulatory power over the land at issue. Coeur d'Alene, 521 U.S. at 282.

After Coeur d'Alene, there was confusion amongst the lower federal courts as to whether that case changed their analyses under Ex Parte Young. See, e.g.,Hill v. Kemp, 478 F.3d 1236, 1256-57 (10th Cir. 2007). Writing for the majority in Coeur d'Alene, but only on behalf of himself and Chief Justice Rehnquist with respect to that part of the opinion, Justice Kennedy suggested "a 'case-by-case approach' in which lower courts should 'reflect a sensitivity' to a 'broad' range of questions ranging from the nature and significance of the federal rights at stake, the state interest implicated by the lawsuit, and the availability of a state forum". Id. at 1257 (quoting Coeur d'Alene, 521 U.S. at 280). However, in her concurring opinion in Coeur d'Alene, Justice O'Connor expressed disagreement with this reformation of Ex Parte Young. Id. at 296.

Justice O'Connor's concurrence suggested adherence to the traditional Ex Parte Young analysis that asked simply whether an official capacity action against a state official sought "relief effectively equivalent to a retrospective judgment regardless of how it is formally pled or denominated." Hill, 478 F.3d at 1257. Five years after Coeur d'Alene, the Supreme Court made clear that it was Justice O'Connor's Ex Parte Young analysis that controlled. In Verizon Maryland, Inc. v. Public Service Commission of Maryland, 535 U.S. 635, 645 (2002), the Court held that "[i]n determining whether the doctrine of Ex parte Young avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." Id. (quotations and internal alterations omitted).

Irrespective of the temporary confusion caused by the suggestion in Coeur d'Alene that a different analysis be brought to bear on claims asserting the Ex parte Young exception to Eleventh Amendment immunity, the exception to the exception carved out in Coeur d'Alene for claims that are the functional equivalent to an action to quiet title survives to this date. See Western Mohegan Tribe and Nation v. Orange County, 395 F.3d 18 (2d Cir. 2004). In Western Mohegan Tribe, a case with similarities to this case, the plaintiff tribe sued various New York counties, the State and the Governor alleging that defendants had violated federal common law and Indian Trade and Intercourse Act. The plaintiff tribe sought "'a declaration of plaintiff's ownership and right to possess their reservation lands in the State of New York, which lands are subject to restrictions against alienation under federal law. It also [sought] relief restoring to them the possession of their lands.'" Id. at 20 (quoting plaintiff's complaint). The District Court granted defendants motion to dismiss on Eleventh Amendment immunity grounds and the Second Circuit affirmed. The Second Circuit held that:

> To the extent that the complaint alleges that there has never been a lawful extinguishment of the Tribe's Indian title, it seeks a declaration from this court that New York's exercise of fee title remains "subject to" the Tribe's rights, *i.e.*, a "determination that the lands in question are not even within the regulatory jurisdiction of the State." Coeur d'Alene, 521 U.S. at 282… . Thus, the relief requested by the Tribe is, as much as that sought in Coeur d'Alene, the functional equivalent of quiet the Tribe's claim to title in the New York counties named in the complaint. Id. at 281 ...; see also id. at 289... (O'Connor, *J.*, concurring). As such, the action is squarely governed by Coeur d'Alene, regardless of whether one undertakes the Ex parte Young analysis advocated by the majority opinion, or instead adopts the categorical approach enunciated in the plurality opinion.

Western Mohegan Tribe, 395 F.3d at 23.

In this case, the SNI's request that the Court enjoin the Defendants to obtain a valid Thruway easement right of way and declare the State's ownership interest in the current easement void *ab initio* is the functional equivalent to an action to quiet title. Actions by Indian tribes to extinguish rights granted by easement are actions to quiet title. See Mountain States Telephone and Telegraph Company v. Pueblo of Santa Fe, 472 U.S. 2587 (1985); United States v. City of McAlester Oklahoma, 604 F.2d 42 (10th Cir. 1979); Choctow Nation v. Atchison, Topeka and Santa Fe, 396 F.2d 578 (10th Cir. 1968). Accordingly, pursuant to Coeur d'Alene, the SNI's instant action is barred by the State's Eleventh Amendment immunity.

Point III

THE ACTION SHOULD BE DISMISSED FOR FAILURE TO TIMELY COMMENCE IT

The Plaintiff alleges that it was harmed in 1954, when it conveyed a right of way across its land for the use of the Thruway Authority. Compl. ¶¶ 15, 18, 29, 31, 33 and 38. In 1993, it commenced a lawsuit to invalidate, *inter alia*, the grant of that easement. Now, over sixty years later, after the Thruway Authority has erected an interstate toll highway along the course of the right of way, Plaintiff files this action. The Plaintiff has, through its own inaction, combined

with the reliance by the Thruway Authority and the State, closed the door to the relief which this suit seeks. City of Sherrill v Oneida Indian Nation, 544 U.S. 197, 217 (2005). In Sherrill, the Court cited with approval the case of Felix v. Patrick, 145 U.S. 317 (1892), in which the Supreme Court barred "the heirs of an Indian from establishing a constructive trust over land their Indian ancestor had conveyed in violation of a statutory restriction" because "[i]n the nearly three decades between the conveyance and the lawsuit '"[a] large part of the tract ha[d] been platted and recorded as an addition to the city of Omaha, and . . . sold to purchasers.'" Sherrill, 544 US at 217 (quoting Felix, 145 U.S. at 326). Commenting on the effects of Sherrill, the Second Circuit noted "that 'disruptive,' forward-looking claims, a category exemplified by possessory land claims, are subject to equitable defenses, including laches." Cayuga Indian Nation v Pataki, 413 F3d 266, 277 (2d Cir 2005).

Defendants acknowledge that laches is an affirmative defense, which ordinarily cannot be the basis for a Motion to Dismiss. However, a motion to dismiss based on an affirmative defense can be granted "where the affirmative defense appears on the face of the complaint, and there is no dispute that the Plaintiff's action is barred by the defense". Beaulieu v. Vermont 2010 WL 3632460, *2 - 3 (D.Vt., 2010). The case at bar is one of those cases where the Complaint itself details the affirmative defense, and there is no dispute that this bars Plaintiff's action based on the facts alleged in the Complaint.

Laches "'requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.'" New Jersey v New York, 523 U.S. 767, 806 (1998) (quoting Kansas v. Colorado, 514 U.S. 673, 687 (1995)). The relationship between the two elements are inversely proportional. That is, the greater the unexcused delay, the less prejudice need be shown. "Where there is no excuse for delay, as here, defendants need

show little prejudice; a weak excuse for delay may, on the other hand, suffice to defeat a laches defense if no prejudice has been shown." Stone v Williams, 873 F2d 620, 625 (2d Cir 1989) vacated on other grounds, Stone v Williams, 891 F2d 401 (2d Cir 1989) (citing Larios v. Victory Carriers, Inc., 316 F.2d 63, 67 (2d Cir. 1963)).

With regard to the issue of delay, in the Felix case the delay was less than thirty years, less than half of that in the case at bar. Felix, 145 U.S. at 326. However, a delay as short as six years has been found to be long enough to successfully invoke the defense of laches. Conopco, Inc. v Campbell Soup Co., 95 F3d 187, 192 (2d Cir 1996). In fact, Courts have held that a "delay of six years in filing suit creates a presumption of laches". AccuScan, Inc. v Xerox Corp., 1998 US Dist LEXIS 7825, at *9 (SDNY 1998) (citing A. C. Aukerman Co. v R. L. Chaides Constr. Co., 960 F2d 1020, 1035 – 1036 (Fed Cir 1992)). The Complaint provides no explanation as to why Plaintiff waited over sixty years to bring this action. Therefore, Plaintiff has no excuse for the delay in bringing this action. See also Sherrill, 544 U.S. at 197; see also Cayuga Indian Nation v Pataki, 413 F3d 266, 267 - 268 (2d Cir 2005); Stockbridge-Munsee Community v New York, 756 F3d 163, 165 - 166 (2d Cir 2014). Yet that degree of delay is not required.

As to prejudice, "Defendants may be prejudiced in several different ways." Stone, 873 F.2d at 625 (citing Gull Airborne Instruments, Inc. v. Weinberger, 224 U.S. App. D.C. 272, 694 F.2d 838, 844 (D.C. Cir. 1982)). Prejudice can be found by the loss of evidence or witnesses. Stone, 873 F.2d at 625; see also Aukerman, 960 F2d at 1033. Prejudice can also be shown by the party's change in position, which would render the plaintiff's claim for relief inequitable due to the defendants' and other party's reliance on the *status quo*. *Id.* The "availability of the laches defense represents a conclusion that the societal interest in a correct decision can be outweighed by the disruption its tardy filing would cause." Id. at 626; see also Sherrill, 544 U.S. at 217 ("It is

well established that laches, a doctrine focused on one side's inaction and the other's legitimate reliance, may bar long-dormant claims for equitable relief."); Cayuga, 413 F.3d at 274 ("what concerned the [Sherrill] Court was the disruptive nature of the claim itself").

In the case at bar, the land over which the easement runs has been improved by the massive alteration of the land by the construction of a four lane interstate highway, involving huge resources, along with the various appurtenances which accompany such a highway (paved shoulders, signage, guiderails, drainage, bridges, etc.). In addition, and as plead in the Complaint, the portion of the statewide Thruway that runs across the easement is an integral part of the section of interstate highway that connects the City of Buffalo, New York and Erie, Pennsylvania. Compl. ¶¶ 30 and 36. The Thruway Authority also collects tools from motorists' using the Thruway, which money is used for the maintenance of the Thruway. Compl. ¶ 38. These factors are of the utmost importance, since when "a party belatedly asserts a right to present and future sovereign control over territory, longstanding observances and settled expectations are prime considerations." Sherrill, 544 U.S.at 218. While the Complaint alleges that the Plaintiff has objected to the validity of the easement since 1993 (when it filed Seneca Nation of Indians v New York (WDNY Case No. 93-CV-688)), this in itself was nearly forty years after the conveyance of the easement, longer than the time period applied in Felix, 145 U.S. at 317. Just as in Conopco, 95 F.3d at 187, the State of New York and the Thruway Authority have "committed massive resources" in reliance on the legitimacy of the Seneca's easement. Id. at 192; see also Stone, 873 F.2d at 625 ("Prejudice may also be found if, during the period of delay, the circumstances or relationships between the parties have changed so that it would be unfair to let the suit go forward.").

Based on the facts alleged in the Complaint, the Defendants are entitled to dismissal of this suit on the basis of laches. It is clear that the Plaintiff has unreasonably delayed bringing the instant suit, and that the Thruway Authority and the State would be extremely prejudiced if this claim went forward.

CONCLUSION

This action is barred as against the individual Defendants sued in their official capacities by Eleventh Amendment immunity. Moreover, the Defendants have shown that the issues in this case were, or should have been, litigated years ago. Finally, the Plaintiff has unduly delayed the claims in this action to the prejudice of the Defendants. Accordingly, Defendants are entitled to a judgment dismissing the Complaint in its entirety.

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