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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 **RESPONSE IN OPPOSITION TO MOTION TO DISMISS**

Plaintiff Seneca Nation submits the following Response in Opposition to the Defendants' Motion to Dismiss the Complaint. Defendants move for dismissal on three grounds: (1) the

complaint is barred by claim preclusion, issue preclusion, and the rule against claim splitting; (2) the complaint is barred because it falls outside *Ex parte Young*, 209 U.S. 123 (1908); and (3) the complaint is barred by laches. For the reasons shown below, none of these arguments supports dismissal, and the motion should be denied in its entirety.[1]

LEGAL STANDARD

"In reviewing a motion to dismiss under Rule 12(b)(1), the Court 'must accept as true all material factual allegations in the complaint, but [is] not to draw inferences from the complaint favorable to plaintiffs.'" *Cmty. Servs. for Developmentally Disabled v. Boston*, No. 16-CV-359, 2018 WL 1795644, at *1 (W.D.N.Y. Apr. 16, 2018) (quoting *J.S. ex rel. N.S. v. Attica Cent. Schs.*, 386 F.3d 107, 110 (2d Cir. 2004))). By contrast, in resolving a motion to dismiss under Rule 12(b)(6), "[a] court should consider the motion accepting all factual allegations in the complaint and drawing all reasonable inferences in the plaintiff's favor." *Perez v. Does*, 209 F. Supp. 3d 594, 597 (W.D.N.Y. 2016) (citing *Ruotolo v. City of New York*, 514 F.3d 184, 188 (2d Cir. 2008)). In addition, under Rule 12(b)(6)), "a court generally may consider only 'facts stated in the complaint or documents attached to the complaint as exhibits or incorporated by reference.'" *Perez*, 209 F. Supp. 3d at 597 (quoting *Nechis v. Oxford Health Plans, Inc.*, 421

[1] Defendants' notice of motion to dismiss mentions Rule 12(b)(7), but Defendants make no argument in support of such dismissal, a matter on which they bear the burden of proof. "As for dismissal under Rule 12(b)(7) for failure to join an indispensable party, the movant has the burden of showing that the absent party should be joined under Rule 19 and such a dismissal does not operate as an adjudication of the merits." *Brown v. W. Valley Envtl. Servs., LLC*, No. 10-CV-210A, 2010 WL 3369604, at *7 (W.D.N.Y. Aug. 24, 2010) (citing 2 *Moore's Federal Practice—Civil* § 12.35 (2010)). Moreover, Local Rule 7(a)(3) provides that a motion under Rule 12(b)(7) "shall be supported by at least one (1) affidavit and by such other evidence (i.e., deposition testimony, interrogatory answers, admissions, and documents) as appropriate to resolve the particular motion. Failure to comply with this requirement may constitute grounds for resolving the motion against the non-complying party." Therefore, no argument under Rule 12(b)(7) is properly before the Court, and any motion to dismiss under that rule must be denied.

F.3d 96, 100 (2d Cir. 2005)). A plaintiff survives dismissal if it sets forth "enough facts to state a claim to relief that is plausible on its face." *Perez*, 209 F. Supp. 3d at 597 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

The Defendants take the complaint as true, "accept[ing] the facts as alleged in the Complaint" for purposes of the motion to dismiss. Memorandum of Law in Support of Defendants' Motion to Dismiss (ECF Doc. 16-1) ("Mem.") at 2. In addition, for purposes of the motion to dismiss, Defendants do not dispute that the New York State Thruway is being operated over a portion of the Nation's Cattaraugus Reservation without any valid easement.

BACKGROUND

The Seneca Nation has resided in upstate New York for centuries, and owns and occupies the Cattaraugus Reservation as a federal Indian reservation. Complaint ¶ 16. The Nation's Cattaraugus Reservation currently consists of, and has always consisted of, Indian lands held by the Nation in restricted fee, subject to federal restraints on alienation. *Id.* ¶ 17. In 1794, the United States and the Iroquois Confederacy, which includes the Seneca Nation, entered into the Treaty of Canandaigua, recognizing the lands at issue here as belonging to the Seneca Nation. *See Banner v. United States*, 238 F.3d 1348, 1350 (Fed. Cir. 2001). Although the Nation's aboriginal territory covered several million acres, the Nation today holds only a small portion of that territory. *See Citizens Against Casino Gambling v. Chaudhuri*, 802 F.3d 267, 272 (2d Cir. 2015).

Beginning in the 1940s, the State of New York sought to obtain an easement over a portion of the Reservation for construction of the New York State Thruway. State officials had been subjected to intense lobbying pressure by financial interests, transportation companies, and local chambers of commerce, to extend the Thruway from Buffalo, New York, to Erie,

Pennsylvania—a route requiring passage across the Nation's Cattaraugus Territory. Complaint ¶ 30. In April 1954, the Governor of New York publicly announced that the link between Buffalo and Erie would be built. *Id.* Thus, State officials seeking to build the Thruway had no choice but to seek an easement over the Seneca Nation's Reservation. *Id.*

The years leading up to the easement negotiations coincided with the "termination era" of federal Indian policy, which was characterized by policies aimed at ending the trust relationship between the United States and Indian nations, permitting greater state influence over Indians, ending the political existence of Indian nations, removing restrictions on the alienation of Indian lands, and breaking up reservations and relocating Indians to off-reservation lands. *Id.* ¶ 19. These years also coincided with a postwar development boom in New York, which included unprecedented, large-scale highway construction, expansion of state parks, public power development, and other public works projects across the State. *Id.* ¶ 24. As with the lands of other Indian nations located in the territory of New York, State officials viewed Seneca lands as potential "sacrifice areas" when situated in the path of these development goals. *Id.*

During this period, New York officials took, or threatened to take, a variety of actions that would imperil the Nation's lands, exerting coercive pressure on the Nation. *Id.* ¶ 29. For example, during the months of discussion and negotiations over the easement, State officials prepared to follow through on plans, originally devised in 1946, to impound the Allegheny River in cooperation with officials in Pennsylvania. *Id.* Numerous similar projects had been undertaken in the state in recent years and had resulted in the substantial loss of Indian lands. *Id.*

On October 5, 1954, the Nation purported to convey a permanent easement for a portion of the New York State Thruway to be constructed and used over approximately 300 acres of the Nation's Cattaraugus Reservation. *Id.* ¶¶ 15, 33. The State officials who negotiated and

obtained the easement did not obtain the approval of the Secretary of the Interior pursuant to 25 U.S.C. § 177, 25 U.S.C. § 323, and applicable regulations. *Id.* ¶¶ 17, 34. The State's lead negotiator, Paul G. Baldwin, stated that after "several hours of very frank talk" ("frank talk" that took place against the backdrop of the perilous overall situation in which the Nation found itself), he was able to get the Nation "hammered down to a [one-time payment] of $75,000. This is much lower than any of us expected to acquire these lands for[.]" *Id.* ¶ 32.

Since at least 1993, the Nation has openly denied any validity for the purported easement. In 1993, the Nation filed a lawsuit in this Court against the Thruway Authority challenging operation of the Thruway over the Nation's reservation as a violation of 25 U.S.C. § 323 and the Nonintercourse Act. *See Seneca Nation of Indians v. New York*, No. 93-cv-688A, Aug. 25, 1993, Doc. 1, Complaint. At summary judgment, the Thruway Authority argued, among other things, that the court lacked jurisdiction over the State under the Eleventh Amendment, and the case should be dismissed under Rule 19 because the State was a necessary and indispensable party. *See id.* at Doc. 235, Memorandum in Support of Motion for Summary Judgment.

The magistrate judge issued a report and recommendation concluding that the Thruway easement was invalid under the Nonintercourse Act for failure to obtain approval from the United States. *See id.* at Doc. 228, Report and Recommendation. The magistrate judge nevertheless recommended dismissal because New York was an indispensable party. *See id.* After receiving objections, this Court adopted the magistrate judge's ruling that the State was an indispensable party, and did not reach the merits or adopt the magistrate judge's findings on the merits. *See id.* at Doc. 244, Order dated Nov. 18, 1999. On appeal, the Second Circuit affirmed dismissal on Eleventh Amendment immunity grounds. *Seneca Nation of Indians v. New York,* 383 F.3d 45, 48-49 (2d Cir. 2004) (affirming dismissal under Rule 19 "on sovereign immunity

grounds"). Like the District Court, the Court of Appeals did not reach the issue of whether the easement was valid. *Id.*

The Seneca Nation has continued to protest operation of the Thruway without a valid easement, but the State has refused to address the problem. For example, the Nation has asked the Thruway Authority to collect tolls for the Nation and to remit them to the Nation for the use of its lands by motorists on the Thruway. Complaint ¶ 40. The Thruway Authority has refused to do so. *Id.*

Defendants Cuomo (Governor of the State of New York), Underwood (New York State Attorney General)[2], and Karas (Acting Commissioner of the New York State Department of Transportation) have authority separately and collectively to obtain valid easements for the State and have failed to obtain any valid easement for the portion of the Nation's Reservation where the Thruway is located. *Id.* ¶ 41. The portion of tolls collected for the Thruway that are attributable to the right to enter and cross the Nation's lands, as with all tolls collected by the Thruway Authority, are "paid to the comptroller," defendant DiNapoli, "as agent of the authority." N.Y. Pub. Auth. Law § 364 (McKinney 2018).

ARGUMENT

I. CLAIM PRECLUSION AND ISSUE PRECLUSION DO NOT APPLY BECAUSE THE CLAIMS AND ISSUES HERE WERE NOT DECIDED ON THE MERITS.

Contrary to Defendants' assertions, prior litigation related to the Thruway does not bar the Nation's current action under principles of *res judicata* (claim preclusion), collateral estoppel (issue preclusion), or the rule against claim splitting.

[2] Attorney General Barbara D. Underwood is substituted automatically as a party to this case, in place of her predecessor in office, Eric T. Schneiderman. *See* Fed. R. Civ. P. 25(d).

A. Claim preclusion does not apply because there was no prior adjudication on the merits and because the State and its officers are not in privity for purposes of *Ex parte Young*.

The doctrine of *res judicata*, or claim preclusion, provides that "a 'final judgment *on the merits* bars a subsequent action between the same parties over the same cause of action.'" *Hanrahan v. Riverhead Nursing Home*, 592 F.3d 367, 368 (2d Cir. 2010) (emphasis original) (quoting *Channer v. Dep't of Homeland Sec.*, 527 F.3d 275, 279 (2d Cir. 2008)). Under this doctrine, "a party must show that (1) the previous action involved an adjudication on the merits; (2) the previous action involved the parties 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." *Pike v. Freeman*, 266 F.3d 78, 91 (2d Cir. 2001) (quoting *Monahan v. New York City Dep't of Corr.*, 214 F.3d 275, 284–85 (2d Cir. 2000) (alteration marks omitted)).

Defendants' claim preclusion argument fails because the previous Thruway litigation did not result in an adjudication on the merits, but rather a dismissal for failure to join a party under Federal Rule of Civil Procedure 19. *See Seneca Nation of Indians v. New York*, 383 F.3d 45, 48-49 (2d Cir. 2004) (affirming dismissal under Rule 19 "on sovereign immunity grounds"). Federal Rule of Civil Procedure 41(b) expressly provides that a dismissal for "failure to join a party under Rule 19" does not "operate[] as an adjudication on the merits." "[I]t is clear that a dismissal for failure to join a party is not an adjudication on the merits, and thus, should not have preclusive effect." *Univ. of Pittsburgh v. Varian Med. Systems, Inc.*, 569 F.3d 1328, 1332 (Fed. Cir. 2009) (citing *Hughes v. United States*, 71 U.S. (4 Wall.) 232, 237, 18 L.Ed. 303 (1866) ("If the first suit was dismissed for defect of pleadings, or parties, ... the judgment rendered will prove no bar to another suit."); *Gilman v. Rives*, 35 U.S. (10 Pet.) 298, 301–02, 9 L.Ed. 432 (1836) ("[A] judgment that a declaration is bad in substance [i.e. as here for failure to join

necessary parties] ... can never be pleaded as a bar to a good declaration for the same cause of action. The judgment is in no just sense a judgment upon the merits."); *see also Schwan-Stabilo Cosmetics GmbH & Co. v. Pacificlink Intern. Corp.*, 401 F.3d 28, 35 (2d Cir. 2005) (dismissal for failure to join a necessary party under Rule 19 is "without prejudice"). The previous litigation was dismissed due to a defect in the parties, not on the merits; thus it has no preclusive effect on the current lawsuit which corrects that deficiency. *See* 18A Charles Wright et al., *Fed. Prac. & Proc.* § 4438 (referring to "the long-settled rule that the dismissal [for failure to join an indispensable party] does not bar a new action that corrects the deficiency of parties"); *see, e.g.*, *Nisqually Indian Tribe v. Gregoire*, No. 08-5069-RBL, 2008 WL 1999830, *3 (W.D. Wash. May 8, 2008) (joinder of a tribal official pursuant to *Ex parte Young* "cure[d] the indispensability defect" of failure to join a required sovereign party).

Moreover, except for the Thruway Authority, the prior litigation did not involve the same parties. State officers sued in their official capacities are not the same party as the state for *res judicata* purposes when Eleventh Amendment considerations resulted in dismissal of the earlier case. *See In re Elias*, 216 F.3d 1082 (Table), 2000 WL 431589, *1 (9th Cir. 2000) ("[B]ecause a suit against a state is distinguishable from one against an official under *Ex Parte Young*, at least so far as the Eleventh Amendment is concerned, there is no privity between the two parties for subsequent claims under *Ex Parte Young*."); *see also Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 n.55 (1978) ("[O]fficial-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent—*at least where Eleventh Amendment considerations do not control analysis*") (emphasis added); *accord O'Connor v. Pierson*, 568 F.3d 64, 71 (2d Cir. 2009). Accordingly, the Defendants' claim preclusion defense fails on that independent ground as well.

Defendants also purport to invoke the rule against "claim splitting," but cite a case involving only claim preclusion. The rule against claim splitting applies only to *concurrent* federal actions on the same subject against the same defendant, *i.e.*, it bars "two actions on the same subject in the same court, against the same defendant at the same time." *Kanciper v. Suffolk Cty. Soc. for the Prevention of Cruelty to Animals, Inc.*, 722 F.3d 88, 93 (2d Cir. 2013) (quoting *Coleman v. B.G. Sulzle, Inc.*, 402 F. Supp. 2d 403, 421 (N.D.N.Y. 2005)); *see also* 18A Charles Wright et al., *Federal Prac. & Proc.* § 4406 (claim splitting is "similar to claim preclusion, but . . . [does] not require a prior judgment"). Because this is the only pending action by the Seneca Nation about operation of the Thruway on the Nation's Reservation, the claim splitting doctrine is inapplicable to this suit.

B. Issue preclusion does not bar this action because there was no prior adjudication on the merits of any issue raised in this case.

Issue preclusion (collateral estoppel) does not bar the Nation's action, either. "Collateral estoppel bars relitigation of an issue that has already been fully and fairly litigated in a prior proceeding." *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 400 (2d Cir. 2011) (internal quotation marks and citation omitted). The doctrine "applies when (1) the identical issue was raised in the previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits." *Id.* (quoting *NLRB v. Thalbo Corp.*, 171 F.3d 102, 109 (2d Cir. 1999)). "If the issues are not identical, there is no collateral estoppel." *Id.*

Here, the elements of issue preclusion are not satisfied. First, as noted above, the prior litigation did not culminate in "an adjudication on the merits," but rather involved a "failure to join a party under Rule 19." Fed. R. Civ. P. 41(b). Moreover, the issue decided in the previous

proceeding is not identical to any issue now before the Court. The Nation previously litigated, and this Court and the Second Circuit previously decided, only the State's Eleventh Amendment immunity and whether the Nation's claim should be dismissed under Rule 19. *See Seneca Nation of Indians v. New York*, 383 F.3d 45, 48-49 (2d Cir. 2004) ("Having determined that the State was a necessary party under Rule 19(a), the Magistrate proceeded to examine whether the State was indispensable under Rule 19(b), concluding correctly that it was . . . We find no abuse of discretion in this analysis . . . . Accordingly, we affirm the District Court's dismissal on sovereign immunity grounds."); *see also Seneca Nation of Indians v. New York*, No. 93-CV-688A, Doc. No. 244, Order dated Nov. 18, 1999. Neither issue is raised in this case, which is a suit against state officers filed in accordance with *Ex parte Young*.

II. THIS COURT HAS JURISDICTION UNDER *EX PARTE YOUNG*.

Consistent with *Ex parte Young*, the complaint seeks prospective injunctive relief against state officials for violations of federal law. Therefore the motion to dismiss on Eleventh Amendment grounds should be denied. In *Ex parte Young*, the Supreme Court held that Eleventh Amendment immunity does not bar actions seeking "prospective injunctive relief against state officials to prevent a continuing violation of federal law because a state does not have the power to shield its officials by granting them 'immunity from responsibility to the supreme authority of the United States.'" *In re Dairy Mart Convenience Stores, Inc.*, 411 F.3d 367, 371-72 (2d Cir. 2005) (quoting *Ex parte Young*, 209 U.S. at 160). *Ex parte Young* permits suits, such as this one, against state officers in their official capacities for prospective relief to enjoin continuing violations of federal law. As detailed in the complaint, the defendants' continuing actions operating the Thruway over the Nation's lands are in derogation of the Nation's federally protected reservation.

The Defendants raise two arguments to attempt to defeat application of *Ex parte Young* here. As shown below, both must be rejected.

A. The complaint seeks prospective relief for ongoing violation of the Nation's federal rights.

1. Defendants mischaracterize the complaint as seeking only "monetary damages for an alleged past violation of federal law." Mem. at 11. Quite the opposite: the complaint properly satisfies both required elements of an *Ex parte Young* action because it [1] "alleges an ongoing violation of federal law and [2] seeks relief properly characterized as prospective." *Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002).

First, the complaint alleges an ongoing violation of federal law: "The Defendants' continuing operation of the Thruway without a valid easement" for the portion of the Nation's federally protected Reservation land over which it lies. Complaint ¶ 3. As alleged in the complaint, current operation of the Thruway violates the federal treaties and laws establishing the Reservation and protecting it against alienation. *Id.* It violates the Indian Non-Intercourse Act, because the purported easement is of no "validity in law or equity." 25 U.S.C. § 177. It violates the Canandaigua Treaty of 1794, Art. 3, which provides that "[t]he land of the Seneca Nation is . . . to be the property of the Seneca Nation," which shall not be disturbed "in the free use and enjoyment thereof." *See* Complaint ¶ 3. And it violates 25 U.S.C. § 323 and 25 C.F.R. Part 169, which comprehensively regulate rights-of-way across Indian lands such as the Reservation. *See id.*

Second, the complaint seeks multiple forms of relief properly characterized as "prospective": (a) "that the Defendants (except for the Comptroller) obtain a valid easement for the portion of the Nation's Reservation on which the Thruway is situated, . . . on terms that will *in the future* equitably compensate the Nation pro rata for *future* use of its lands," *id.* ¶ 4

(emphasis added); (b) in the alternative, "that the Defendants (except for the Comptroller) be *enjoined from collecting* tolls for the portion of the Nation's Reservation on which the Thruway is situated without first obtaining a valid easement," *id.* (emphasis added); and (c) that the Comptroller "segregate and hold in escrow any *future* toll monies collected on the Thruway that are fairly attributable to the portion of the Thruway operated in violation of the Nation's federally protected property rights until the other Defendants obtain a valid easement." *Id.* (emphasis added). None of this relief seeks compensation for past injuries; instead, all of this injunctive relief seeks to bring operation of the Thruway into compliance with federal law *prospectively*.

2. Defendants nevertheless argue that the complaint does not allege an "ongoing" federal-law violation because "easements are contracts" and "[a]ny purported violation of federal law would have occurred at the time the parties entered into the contract." Mem. at 12. But the core allegation in the complaint, uncontested for purposes of the motion to dismiss, is that the parties never entered into an easement because no valid consent was obtained from the United States. The Nation does not contend that a valid easement was entered into in violation of federal law; rather, the Nation contends that no valid easement was entered into at all. *See* 25 U.S.C. § 177 ("No purchase, grant, lease, or other conveyance of lands . . . from any Indian nation . . . *shall be of any validity in law or equity*" unless approved under federal law.) (emphasis added). Because there is no valid easement, moreover, the State's continued operation of the Thruway interferes with the federal treaties and laws establishing the Reservation and protecting it against alienation. *See, e.g.*, Canandaigua Treaty of 1794, Art. 3 ("The land of the Seneca Nation is . . . to be the property of the Seneca Nation," which shall not be disturbed "in the free use and enjoyment thereof."). Finally, because federal law comprehensively regulates rights-of-way across Indian lands, New York's continued failure to comply with the federal

scheme constitutes yet another ongoing violation of federal law. *See, e.g.*, 25 C.F.R. Part 169 (governing rights-of-way over Indian land); *see also* 25 U.S.C. § 323. Claims that "seek prospective injunctive relief against state officials in their official capacities for continuing violations of [a tribe's] federal treaty rights . . . fall squarely within the *Ex parte Young* exception to the Eleventh Amendment." *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904 (8th Cir. 1997), *aff'd sub nom. Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

In short, taking the complaint as true, the Defendants' violation of federal law is in acting, on a continuing basis, as though a valid easement exists when it does not. The injury to the Nation occurs every day that the Thruway is operated over Nation land without a valid easement, and the violation of federal law will cease only when a valid easement is in place. The Nation's claims thus describe ongoing, not retrospective, violations of federal law.

3. Defendants further contend that, even though the complaint seeks solely *prospective injunctive* relief, it should be considered "retrospective" because "the requested relief becomes meaningless" without a "monetary component." Mem. at 12. This miscasts the required analysis, which focuses on whether relief is prospective, not whether it has anything to do with money. As even Defendants admit, "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.*" Mem. at 10 (quoting *Papasan v. Allain*, 478 U.S. 265, 278 (1986) (emphasis added)). Requiring a valid easement to comply with federal law is unquestionably prospective and is necessary to end the ongoing violation. It is therefore allowed by *Ex parte Young*, regardless of whether it may have some effect on the state treasury.

Indeed, the case Defendants cite, *Papasan*, forecloses their argument. There the Supreme Court held that the Eleventh Amendment did not bar prospective relief for an *Ex parte Young* claim challenging a long-standing disparity in school funding among certain counties, a disparity that had its roots in historical transactions involving Indian lands. "This alleged ongoing constitutional violation—the unequal distribution by the State of the benefits of the State's school lands—is precisely the type of continuing violation for which a remedy may permissibly be fashioned under *Young*." *Papasan*, 478 U.S. at 282. The Court held that it did not matter that the source of the disparity was a historical wrong for which plaintiffs could not sue in damages:

> It may be that the current disparity results directly from the same actions in the past that are the subject of the petitioners' trust claims, but the essence of the equal protection allegation is the present disparity in the distribution of the benefits of state-held assets and not the past actions of the State. A remedy to eliminate this current disparity, even a remedy that might require the expenditure of state funds, would ensure "'compliance in the future with a substantive federal-question determination'" rather than bestow an award for accrued monetary liability.

Id. The complaint here likewise seeks only "compliance in the future" with federal law, and not "an award for accrued monetary liability."

The Defendants' citation of *Ford v. Reynolds*, 316 F.3d 351 (2d Cir. 2003), *see* Mem. at 12-13, illustrates their error. The relief sought there was payment of agreed-upon honoraria, and the court refused to issue an injunction requiring the payment of money because that was equivalent to a damages claim. Here, by contrast, the Nation does not seek to enforce any agreement and does not seek compensation for any past acts. The complaint does not seek a monetary payment for the land's fair value, does not seek compensation for failure to obtain an easement, and does not seek damages redress for any past violations of the Nation's territorial integrity by the Defendants. Rather, it seeks to remedy a continuing encroachment on the Nation's lands, by resolving that situation through the negotiation of a valid easement. This

continuing violation of federal law cannot be remedied by damages, and the complaint does not seek damages.

B. Because the complaint seeks prospective relief for an ongoing violation of federal law, *Idaho v. Coeur d'Alene Tribe* does not apply.

Defendants also contend that this suit runs afoul of *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997). But subsequent Supreme Court precedent, particularly *Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002), has effectively limited *Coeur d'Alene* to its facts, the "particular and special circumstances" of the case. Because those facts are not present here, *Coeur d'Alene* is inapposite.

Coeur d'Alene was an anomalous case that involved a tribe seeking to establish its sovereignty over, and exclusive right to, certain submerged lands that had been claimed and governed by Idaho for centuries. Justice O'Connor's concurrence, the controlling opinion in a fractured decision, emphasized certain distinguishing facts that, in her view, took the case outside of a typical *Ex parte Young* action. In particular, she observed that the requested relief would not merely deprive the State of possession, but "bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters." *Coeur d'Alene*, 52 U.S. at 282. The problem was that "[t]he Tribe does not merely seek to possess land that would otherwise remain subject to state regulation, or to bring the State's regulatory scheme into compliance with federal law," but rather to deprive the State of its sovereignty over the submerged lands, interfering with the "State's ability to regulate use of its navigable waters." *Id.*

Unless a suit possesses the same unusual distinguishing features of *Coeur d'Alene*—namely, the requested divestiture of (1) both title and sovereign authority (not merely possession) over (2) submerged lands, thus disrupting the State's control over its navigable waters—*Coeur d'Alene* does not apply. Indeed, the Supreme Court has subsequently limited *Coeur d'Alene* to

its facts, recognizing that despite *Coeur d'Alene*, *Ex parte Young* continues to require only "a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon*, 535 U.S. at 645 (quoting *Coeur d'Alene Tribe*, 521 U.S. at 296) (O'Connor, J., concurring in part and concurring in judgment)); *accord Virginia Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011); *Western Mohegan Tribe and Nation v. Orange County* 395 F.3d 18, 21 (2d Cir. 2004).

The Second Circuit, too, has recognized the narrow scope of *Coeur d'Alene* and has applied it only once, when it "directly control[led]" on "virtually identical" facts. *Western Mohegan Tribe & Nation*, 395 F.3d at 23. The Second Circuit noted *Verizon*'s subsequent reaffirmation of the "straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective," *id.* at 21, and observed that the Second Circuit repeatedly "declined to extend *Coeur d'Alene*'s holding." *Western Mohegan*, 395 F.3d at 23 (citing *Barcia v. Sitkin*, 367 F.3d 87, 102 (2d Cir. 2004); *Connecticut v. Cahill*, 217 F.3d 93, 101–02, 104 (2d Cir. 2000)). But after comparing the case before it with the "particular and special circumstances" in *Coeur d'Alene*, it concluded that it directly controlled. *Western Mohegan Tribe*, 395 F.3d at 23. That was because a non-federally recognized group claiming to be an Indian Nation was suing to establish aboriginal title (or "Indian title") to both contested lands and waterways, and thus deprive the state of title to and sovereignty over those lands. *Id*. at 22. *Western Mohegan* recognized the significant effects plaintiffs' claims would have had on "the authority of the State of Idaho over submerged lands," which have "a unique status in the law." *Id.* at 22 n.3. That case thus involved the same "core issues of land, state regulatory authority, and sovereignty [that were] expressly examined by the

Coeur d'Alene Court," and the relief was "the virtually identical 'unique divestiture of the state's broad range of controls over its own lands' that was at issue in *Coeur d'Alene*." *Id.* at 23 n.4.

Thus, just as in *Coeur d'Alene*, the *Western Mohegan* suit sought to deprive the State of (1) both title and sovereign authority over (2) submerged lands—and was thus directly controlled by *Coeur d'Alene*'s facts. By contrast, this case has neither of those features. Unlike *Western Mohegan* or *Coeur d'Alene*, this case involves no submerged lands or control over navigable waters. Indeed, "[t]he extent to which *Coeur d'Alene* is limited to its 'particular and special circumstances'" with regard to submerged lands "cannot be overstated," in that "navigable waters uniquely implicate sovereign interests," submerged lands have a "unique status in the law and [are] infused with a public trust the State itself is bound to respect,'" and "are tied in a unique way to sovereignty." *Duke Energy Trading & Mktg., L.L.C. v. Davis*, 267 F.3d 1042, 1054 n.8 (9th Cir. 2001); *accord Lacano Investments, LLC v. Balash*, 765 F.3d 1068, 1075–76 (9th Cir. 2014); *Gila River Indian Cmty. v. Winkelman*, No. CV 05-1934-PHX-EHC, 2006 WL 1418079, at *2 (D. Ariz. May 22, 2006) ("[*Coeur*] *d'Alene* only limits the application of the *Young* exception when a state's control of submerged lands is challenged.") (citing *Western Mohegan*, 395 F.3d at 22 n.3).

Nor does this case threaten the State's jurisdiction over, or title to, the land in question. Unlike in *Western Mohegan* and *Coeur d'Alene*, which both sought "unique divestiture of the state's broad range of controls over its own lands," the Nation already has undisputed sovereignty over and title to the restricted fee lands comprising its Reservation, and the outcome of this litigation will not affect the State's criminal and civil jurisdiction. *See* 25 U.S.C. §§ 232-233 (extending concurrent jurisdiction over Nation lands to the State of New York); *see also Coeur d'Alene Tribe*, 521 U.S. at 290 (O'Connor, J., concurring in part and concurring in

judgment) (noting that there is a distinction "between *possession* of property and *title* to property" (emphasis original)). Granting the relief sought by the Nation will not "strip the State of any of its jurisdiction or authority to regulate the land." *Lipscomb v. Columbus Mun. Separate. Sch. Dist.*, 269 F.3d 494, 502 (5th Cir. 2001). This case involves no request for "exclusive use, occupancy, and right" to the property at issue, either. *Western Mohegan*, 395 F.3d at 22. Here, the Nation does not seek to alter the possession or use of the land, but merely seeks to have a valid easement concluded on equitable terms.

Indeed, in a ruling on all fours with this one, the Fifth Circuit explicitly declined to apply *Coeur d'Alene* to a suit involving a state's claimed easement. *See Severance v. Patterson*, 566 F.3d 490, 495 (5th Cir. 2009). In *Severance v. Patterson*, the court explained that a suit challenging the state's claim to an easement "is not the functional equivalent of a quiet-title action: Title to the properties at issue rests with [plaintiff], not the State." *Id.* Because the State claimed only an easement, *Coeur d'Alene* had no application. "The Officials do not claim title . . . . The issue is whether the State may constitutionally impose an easement, or an encumbrance, on [plaintiff's] fee simple estate. Thus, the 'particular and special circumstances' of *Coeur d'Alene* . . . are not present in this case." *Id.*

The Second Circuit has likewise refused to apply *Coeur d'Alene* where state property interests are contested but the state would not be deprived of both ownership and sovereignty over lands. In *Deposit Ins. Agency v. Superintendent of Banks (In re Deposit Ins. Agency)*, 482 F.3d 612, 620 (2d Cir. 2007), the court held that a bankruptcy petition seeking assets allegedly held by the state in violation of federal law could proceed because it merely sought to dispossess state official of assets and some incidents of ownership. "More was at stake [in *Coeur d'Alene*] than simple possession or other incidents of ownership. The Indian tribe sought relief that

'would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters,' extinguishing state regulatory control over a 'vast reach of lands and waters long deemed by the State to be an integral part of its territory.'" *Id.*; *accord In re Dairy Mart Convenience Stores, Inc.*, 411 F.3d at 371-372; *Indiana Prot. & Advocacy Servs. v. Indiana Family & Soc. Servs. Admin.*, 603 F.3d 365, 372 (7th Cir. 2010); *Dakota, Minnesota & E. R.R. Corp. v. S. Dakota*, 362 F.3d 512, 517 (8th Cir. 2004).

Similarly, in *Mille Lacs Band*, the plaintiff tribes sought only to vindicate their usufructory rights to land that was ceded to the state by treaty. *See Mille Lacs Band,* 124 F.3d at 914. Because the suit was one "to bring the State's regulatory scheme into compliance with federal law," rather than "to eliminate altogether the State's regulatory power," the case proceeded against the state officers. *Id.* at 914.

As noted, the effect of this suit will be only to require the State to obtain a valid easement for the Thruway in compliance with federal law. At most, the requested relief will affect only the State's claimed interest in future toll monies associated with the portion of the Thruway that crosses the Nation's Reservation; it will not shift title to, or jurisdiction over, any lands or navigable waters. *Coeur d'Alene* does not apply.

III. THE AFFIRMATIVE DEFENSE OF LACHES CANNOT BE DECIDED HERE ON THE FACE OF THE COMPLAINT.

Defendants admit that laches is an affirmative defense that "ordinarily cannot be the basis for a Motion to Dismiss." Mem. at 17; *see, e.g.*, *I.O.B. Realty, Inc. v. Patsy's Brand, Inc.*, No. 16 CIV. 7682 (LLS), 2017 WL 2168815, at *3 (S.D.N.Y. May 16, 2017) ("As with affirmative defenses generally, a complaint can be dismissed because of laches only 'when the defense of laches is clear on the face of the complaint, and where it is clear that the plaintiff can prove no set of facts to avoid the insuperable bar.'"). The Nation was not required to (and did not) plead

in anticipation of this defense, and therefore it cannot be decided on a motion to dismiss the complaint. Although Defendants assert that the Nation was required to provide an "excuse for the delay in bringing this action," Mem. at 18, they cite no authority for this attempt to reverse the pleading burden, and it must be rejected.

In any event, the traditional laches analysis that the Defendants invoke, Mem. at 17-18, does not apply as a matter of law. Under federal law, "the equitable doctrine of laches . . . cannot properly have application to give vitality to a void deed and to bar the rights of Indian wards in lands subject to statutory restrictions." *Ewert v. Bluejacket*, 259 U.S. 129, 138 (1922). Likewise, with respect to state law, "[u]nder the Supremacy Clause, state-law time bars, *e.g.*, adverse possession and laches, do not apply of their own force to Indian land title claims," *Oneida Cty. v. Oneida Indian Nation*, 470 U.S. 226, 241 n.13 (1985). Thus, laches does not apply to actions to enforce federal restraints on alienation such as those at issue here.[3]

Defendants also suggest this action is controlled by *City of Sherrill, N.Y. v. Oneida Indian Nation*, 544 U.S. 197 (2005), a case that involved a delay of over *200 years* before suit. *Sherrill* applied a distinct analysis of various "equitable considerations," including laches, to determine the allowable remedies for a claim seeking deprive the state of longstanding sovereignty over lands. Under *Sherrill*, whether a claim can proceed is based on a fact-intensive balancing of (1) "the length of time at issue between [a] historical injustice and the present day"; (2) "the

[3] Even if a traditional laches analysis applied, Defendants' attempt to make a conclusive showing on the face of the complaint fails. The complaint does not plead facts suggesting that any delay is unexcused or due to lack of diligence. Nor does the complaint conclusively establish the element of prejudice, given the limited nature of the relief sought here. Defendants do not and cannot point to anything in the complaint showing that the Nation's delay between construction of the Thruway and the filing of the complaint, in seeking prospectively to put in place a valid easement in compliance with federal law and on equitable terms, has unduly prejudiced them.

disruptive nature of claims long delayed"; and (3) "the degree to which these claims upset the justifiable expectations of individuals and entities far removed from the events giving rise to the plaintiffs' injury." *Oneida Indian Nation v. County of Oneida*, 617 F.3d 114, 127 (2d Cir. 2010). Applying these standards typically involves "factual and legal determinations which may only be resolved at trial." *New York v. Shinnecock Indian Nation*, 400 F. Supp. 2d 486, 496 (E.D.N.Y. 2005) (citing "the extent of the impact of the 'disruptive' claims, the nature of the Indians' present titles and possibly the length of the delay and the question of laches, and appropriate remedies" as triable issues). Indeed, *Oneida*, *Sherrill*, and *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005), *cited in* Mem. at 17–19, were all decided on summary judgment after fact development. Again, as with traditional laches, *Sherrill*-type equitable considerations are an affirmative defense, and the Nation was not required to plead in its complaint facts or law to counter application of *Sherrill*.

Although the fact-intensive application of the *Sherrill* factors cannot be decided on the face of the complaint, *Sherrill* is plainly inapplicable in any event. First, the claims at issue in *Oneida*, *Cayuga*, and *Sherrill* were all delayed approximately 200 years. By contrast, the events at issue here occurred well within the lifetimes of many Senecas. Moreover, the Nation has consistently sought to vindicate its rights in the Thruway since at least 1993. In a strikingly analogous case, *Canadian St. Regis Band of Mohawk Indians v. New York*, Nos. 5:82-CV-0783, 5:82-CV-1114, 5:89-CV-0829, 2013 WL 3992830 at *8 (N.D.N.Y. July 23, 2013), *Sherrill* was held not to bar a tribe's claim regarding invalidity of power line easements originating in a 1949 agreement:

> *Sherrill* laches cannot bar this claim. The claim's basis is that a 1949 agreement creating the right-of-way was not consummated properly under 25 U.S.C. § 323… and related regulations. . . . While the 40-year gap between the formation of the agreement and the filing of the 1989 Complaint is not the blink of an eye, neither

> is it the "extraordinary passage of time" that is a prerequisite to application of the extraordinary defense of *Sherrill* laches.

Id. (internal citations omitted). This case is no different. And defendants' citations to patent cases importing statutes of limitations into a laches analysis, Mem. at 18, are clearly inapposite. *See, e.g. A. C. Aukerman Co. v. R. L. Chaides Constr. Co*., 960 F.2d 1020, 1034 (Fed. Cir. 1992) ("Courts faced with patent infringement actions 'borrowed' the six-year damage limitation period in the patent statute . . . as the time period for giving rise to a rebuttable presumption of laches.").

Second, the claims here are not "disruptive" claims akin to those in prior cases. *Sherrill* itself turned on the disruptiveness of the remedy sought: to reestablish sovereignty over, and displace state sovereignty over, lands after 200 years.[4] The holding rejecting this disruptive remedy was premised on and "[did] not disturb," *id.* at 221, the Supreme Court's prior holding in *Oneida County* that "recognized the Oneidas' aboriginal title to their ancient reservation land," *id.* at 213, which had resulted in an award of damages to the tribe, *id*. at 209. No similar disruption of sovereignty is sought here. Congress extended concurrent jurisdiction to the State of New York over the Nation's lands in 1948. 25 U.S.C. §§ 232-233; *see also U.S. v. Cook*, 922 F.2d 1026, 1033 (2d Cir. 1991). Ensuring that Defendants comply with federal law to obtain a valid right of way will not disrupt long-standing exercises of state sovereignty over land because Defendants already have and will continue to have jurisdiction over the land in accordance with 25 U.S.C. §§ 232-233.

Finally, this case will not "upset the justifiable expectations of individuals and entities far removed from the events giving rise to the plaintiffs' injury." *Oneida Indian Nation*, 617 F.3d at

[4] The Court held that the tribe could not avoid the requirements of 25 U.S.C. § 465 and its implementing regulations as the proper method to reestablish sovereign control: "Section 465 provides the proper avenue for [the tribe] to reestablish sovereign authority over territory last held by the Oneidas 200 years ago." *Sherrill*, 544 U.S. at 221.

127. Here, only a small parcel is at issue, the Nation already has undisputed title to the parcel, there is only one purported easement owner, and the Nation seeks only to conclude a valid easement on equitable terms. Defendants' citation to *Felix v. Patrick*, 145 U.S. 317 (1892), is inapposite. There the property in question had greatly appreciated, and the Court rejected the notion that, absent fraud, "a party who 28 years ago was unlawfully deprived of . . . title, of the value of $150, shall now be put in the possession of property admitted to be worth over a million." Instead, "justice requires only . . . the repayment of the value of the scrip, with legal interest thereon." *Felix v. Patrick*, 145 U.S. 317, 333–34 (1892). *Felix* does not bar, as a matter of law, the modest equitable relief sought here.

CONCLUSION

The motion to dismiss should be denied.

DATED this 10th day of August 2018.

Respectfully submitted,

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