UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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DAVID T. SILVA,
GERROD T. SMITH, and
JONATHAN K. SMITH,
Members of the Shinnecock Indian Nation,

Plaintiffs,

- against -

BRIAN FARRISH,
JAMIE GREENWOOD,
EVAN LACZI,
BASIL SEGGOS,
NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,
and SUFFOLK COUNTY DISTRICT ATTORNEY'S OFFICE,

Defendants.

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Case No.: 18-cv-3648 (SJF) (SIL)

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO COUNTY DEFENDANTS' MOTION TO DISMISS

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I. PRELIMINARY STATEMENT

Plaintiffs, David T. Silva, Gerrod T. Smith, and Jonathan K. Smith, all on-Reservation Shinnecock Indians, have filed a two count complaint. Count I seeks a declaratory judgment under the Supremacy Clause, U.S. Const., Art. VI, Cl.2, that Plaintiffs enjoy un-relinquished aboriginal usufructuary fishing rights retained in ceded territory and request a preliminary and permanent injunction pursuant to Fed. R. Civ. P. 65 enjoining the Defendants from enforcing the laws of the State of New York against Plaintiff Silva in Southampton Town Justice Court in Case No. 17-7008, and from otherwise interfering with Plaintiffs' use of the waters, fishing, taking fish, and holding fish in Shinnecock Bay and its estuary and other usual and customary Shinnecock fishing waters. (Doc. 1) (Compl., Count I, ¶¶ 21-23).[1] Count II is a claim for money damages for the continuing race based prosecutions and interference with their property and civil rights under 42 U.S.C. §§1981 and 1982 of the 1866 Civil Rights Act,[2] as amended. (Compl., Count II, ¶¶ 24-25)

Defendants, Suffolk County District Attorney's Office, ("Defendant, DA" or "DA"), and its employee, Assistant District Attorney, Jamie Greenwood, ("Defendant, Greenwood" or "Greenwood"), (collectively, "the County Defendants"), have filed a motion to dismiss the complaint, pursuant to Fed. R. Civ. P. 12(b)(6). (Cover Letter, Doc. 45) The County Defendants erroneously contend that Plaintiffs' claims against Greenwood are barred by absolute prosecutorial immunity and sovereign immunity,[3] and the claims overall fail to satisfy allegations of real or immediate harm.

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[1] Plaintiffs' complaint will be referred to as "Compl., ¶ __".
[2] The County Defendants' arguments rest on Section 1983 case law, which is not raised by Plaintiffs.
[3] The County Defendants also erroneously contend the DA Defendant is not a legal entity. See, DA Def. Mem. Of Law, P. 10.

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II. STATEMENT OF ISSUE

WHETHER THE COURT SHOULD DENY THE COUNTY DEFENDANTS' RULE 12(B)(6) MOTION TO DISMISS THE COMPLAINT?

PLAINTIFFS ANSWER: "YES"

DEFENDANTS ANSWER: "NO"

III. STATEMENT OF FACTS

A. The Plaintiffs are on-Reservation Shinnecock Indians and have been ticketed prosecuted, and had their fish and equipment seized over the last decade for fishing in the waters adjacent to the lands of the Shinnecock Indian Reservation, Shinnecock Bay and its estuary waters.

As alleged in their complaint filed in this Court on June 22, 2018, (Doc. 1), Plaintiffs, David T. Silva, ("Silva"), Gerrod T. Smith, ("Gerrod Smith"), and Jonathan K. Smith, ("Jonathan Smith"), are all on-Reservation members of the Shinnecock Indian Nation, a federally recognized Indian Tribe. (Compl., ¶¶ 2-4) "The Shinnecock and other seafaring native peoples of eastern Long Island have fished in the waters surrounding Long Island and other areas since time immemorial." . (Compl., ¶ 13) **"**At all relevant times, Plaintiffs were and are enrolled members of the Shinnecock Indian Nation, a federally recognized Indian Tribe, ("the Shinnecock Nation"), reside on the Shinnecock Indian Reservation, have fished in the adjacent waters of Shinnecock Bay and its estuary, have been ticketed and prosecuted in New York State courts by the Defendants, and are deterred and chilled from exercising their rights to fish by the acts of the Defendants." (Compl., ¶ 14) Plaintiffs allege that "Colonial Deeds and related documents clearly support the right of the Shinnecock and other native peoples of eastern Long Island to fish in the waters adjacent to their communities without interference" and cite specific historical documents (Compl., ¶ 15 (a-e) The opinion and detailed analysis in the report of Dr. John S. Strong, Exhibit

10 filed in support of Plaintiffs' Motion for Preliminary Injunction clearly supports Plaintiffs' contention. (Doc. 3-10)

Plaintiffs allege "Over the last decade, the Defendants have ticketed, seized fish and fishing equipment, and prosecuted the Plaintiffs for alleged criminal offenses in alleged violation of New York State law involving fishing and raising shellfish in Shinnecock Bay and its estuary waters, which are adjacent to the lands of the Shinnecock Indian Reservation. Each of the prosecutions failed. Yet, the Defendants persist and continue to ticket and threaten prosecution. The Plaintiffs are in fear of exercising those same usual and customary aboriginal fishing rights secured and retained for them by their ancestors when Shinnecock territory was ceded to the English. Ironically Plaintiff Silva is presently scheduled to stand trial on August 30, 2018, in the Town of Southampton Justice Court, located in Hampton Bays, New York, the building itself sitting on ceded Shinnecock territory." (Compl., ¶ 16) Plaintiffs give detailed examples of three failed prosecutions of fishing in Shinnecock Bay against Salvatore Ruggiero, a non-Indian fishing with Gerrod Smith, (Compl., ¶ 17), against Gerrod Smith, (Compl., ¶ 18), against Jonathan Smith, (Compl., ¶ 19), and now against Silva, (Compl., ¶ 20). The place of Indian fishing in each case was Shinnecock Bay which waters touch the land base of the Shinnecock Indian Reservation. The types of fish involved were many and included oysters.

"Most recently on April 20, 2017, Silva was stopped by two DEC Officers, Laczi and Farrish, while Silva was fishing for elver eels in Shinnecock Bay. Silva's eels, net, and other fishing equipment were seized, and Silva was issued a criminal appearance ticket alleging possession of undersized eels in violation of New York State law, 6 NYCRR 40-1(b)(ii). Silva was later charged with two additional criminal offenses, ECL 13-0355 (no fish license), and 6 NYCRR 40-1(b)(iii) (possession of eels over limit). This case is presently lodged and pending in

the Southampton Town Justice Court as Case No. 17-7008 and is being prosecuted by Greenwood. Silva's attempt to obtain a voluntary dismissal by Greenwood was unsuccessful, and Silva's motion to dismiss for lack of jurisdiction was denied by that court. Over Silva's objection, that case is presently scheduled for trial on August 30, 2018 at 9:00 am." (Compl., ¶ 20)

B. Shinnecock Bay and its estuary waters are clearly in an area of un-relinquished aboriginal fishing since time immemorial and retained fishing rights in ceded territory.

Plaintiffs' allege in paragraph 15 of the complaint, with specificity, pointing to particular deeds and other historical documents, that they enjoy an aboriginal right to fish in the waters adjacent to the Shinnecock Indian Nation without interference.[4]

> Colonial Deeds and related documents clearly support the right of the Shinnecock and other native peoples of eastern Long Island to fish in the waters adjacent to their communities without interference, to Wit:
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> a) Department of State Book of Deeds, Unpublished documents, Office of the Secretary of State, Albany, New York, 2: 85-86. (New York State Archives. Series 453, vols. 1-9)
>
> b) Gardiner, David Lion, 1873 [1840] *Chronicles of East Hampton*, Sag Harbor, N.Y.: Isabel Gardiner Mairs, 3.
>
> c) *Documents Relative to the Colonial History of the State of New York*, ed. Edmund Bailey O'Callaghan and Berthold Fernow, 15 vols. Albany, N.Y.: Weed, Parsons, 1856-87, 14: 686, 692, 695, 718, 720.
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> d) *Records of the Town of East Hampton*, ed. Joseph Osborne, 5 vols. Sag Harbor, N.Y. 1887, 1: 2-3, 1: 170-171.
>
> e) *Records of the Town of Southampton*, ed. William Pelletreau. 8 vols. Sag Harbor, N.Y. 1874-77, 1: 162, 167-68; 2: 354-55."

Plaintiffs filed the present lawsuit on June 22, 2018, alleging in Count I "continuing supremacy clause violations of un-relinquished aboriginal usufructuary fishing rights retained in ceded territory. The Plaintiffs exercised their lawful rights to use waters, fish, take fish, and hold

[4] See Exhibit 10, opinion and report by Plaintiffs' expert witness, Dr. John A. Strong, in support of Plaintiffs' motion for preliminary injunction. (Doc. 3-10)

their fish clearly within an area of aboriginal usufructuary fishing rights un-relinquished and retained by Plaintiffs' ancestors in the aforementioned Colonial Deeds and related documents ceding Shinnecock territory, all protected under the Supremacy Clause, U.S. Const., Article VI, clause 2." (Compl., ¶ 22) The relief requested under Count I is "Pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 and Fed. R. Civ. P. 65, the Plaintiffs request the Court to issue a declaratory judgment, and preliminary and permanent injunctive relief in favor of Plaintiffs and against the Defendants, enjoining the Defendants from enforcing the laws of the State of New York against Plaintiff Silva in Southampton Town Justice Court in Case No. 17-7008, and from otherwise interfering with Plaintiffs' use of the waters, fishing, taking fish, and holding fish and shellfish in Shinnecock Bay and its estuary and other usual and customary Shinnecock fishing waters" (Compl., Relief ¶ 1)

Count II alleges a "continuing pattern of illegal racial discrimination in violation of 42 U.S.C. §§1981 and 1982 of the 1866 Civil Rights Act, as amended. The Defendants' aforesaid acts against the Plaintiffs constitute a continuing pattern and practice of purposeful acts of discrimination based on their race as Native Americans in violation of Plaintiffs' civil rights to equal security of the laws and to exercise their lawful federally protected rights to use waters, fish, take fish, and hold their fish without interference, without seizure of person and property, and without prosecution by the Defendants." (Compl., ¶ 25) The relief sought under Count II is "The Plaintiffs demand a jury trial and a monetary award for actual and punitive damages in favor of Plaintiffs and against the Defendants, jointly and severally, in an amount to be determined at trial, including an amount of $102 million punitive damages to deter and punish the Defendants for blocking Plaintiffs' participation in the elver eel market during the 2017 and

2018 seasons, plus any future seasons during the pendency action, plus attorney fees and costs." (Compl., Relief ¶ 2)

IV. STANDARD OF REVIEW

On a motion to dismiss the Court must assume that all of the facts alleged in the Complaint are true, construe those facts in the light most favorable to the Plaintiffs, and draw all reasonable inferences in favor of the Plaintiffs. *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 169 (2d Cir. 2009); *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 115 (2d Cir.2008); *U.S. Bank Nat. Ass'n v. Ables & Hall Builders*, 582 F. Supp. 2d 605, 606 (S.D.N.Y. 2008).

Under *Bell Atlantic Corp. v, Twombly,* 550 U.S. 544 (2007), a plaintiff must include enough facts in their complaint to make it plausible—not merely possible or conceivable—that they will be able to prove facts to support their claims. As the Second Circuit stated:

> Generally, "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (internal quotation marks omitted) (alteration in original) (citations omitted). Instead, "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Id. (citations omitted). What is required are "enough facts to state a claim to relief that is plausible on its face." Id. at 570. In the words of the Supreme Court's most recent iteration of this standard, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, ---U.S. ----, 129 S.Ct. 1937, 1949 (2009). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," however, dismissal is appropriate. *Id*. at 1950. *Star, et al v. Sony BMG Music Entertainment, et al,* ___ F.3d ___ Docket No. 08-5637-cv (2d Cir. *January 13, 2010)* [Slip Op., at 8-9]

V. ARGUMENT

A. Applicable Law

The wording in the colonial documents relating to reserved fishing rights must not be construed to the detriment to the Plaintiffs. "The language used in treaties with the Indians should never be construed to their prejudice." *Squire v. Capoeman*, 351 U.S. 1, 7 (1956)

The Supreme Court has long ago held that an individual governmental officer cannot hide behind the immunity and sovereignty of their office when acting outside the scope of their duties, such as the repeated, fruitless, and race-based Shinnecock prosecutions in excess of jurisdiction by the County Defendants as in this case. *Ex parte Young*, 209 U.S. 123 (1908). Here, Greenwood is treated as acting in her personal capacity and is not protected by the immunity and sovereignty of her office. "The attempt of a State officer to enforce an unconstitutional statute is a proceeding without authority of, and does not affect, the State in its sovereign or governmental capacity, and is an illegal act, and the officer is stripped of his official character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to its officer immunity from responsibility to the supreme authority of the United States." *Ex parte Young*, 209 U.S., at 124.

Quoting from the Federal Judicial Center in explaining the importance of *Young* in the country's jurisprudence (www.fjc.gov):

> **Ex parte Young**
> March 23, 1908
>
> In response to a lawsuit from shareholders of railroad companies challenging the constitutionality of a Minnesota law lowering railroad rates, a federal court issued an injunction against the law's enforcement. Minnesota's attorney general, Edward Young, ignored the injunction and attempted to enforce the law in a state court proceeding. Jailed for contempt of court, he sought a writ of habeas corpus from the Supreme Court. In *ex parte Young*, the Court denied the writ, holding

> that when a state official attempted to enforce an unconstitutional statute, that official was deemed to be acting in their personal, rather than official, capacity, and was therefore not protected by the Eleventh Amendment's grant to the states of sovereign immunity. The decision was highly controversial; many viewed it as an unwarranted intrusion upon the concept of sovereign immunity, while others felt it was a necessary aspect of the federal judiciary's ability to declare state laws unconstitutional.

B. Defendant Greenwood is not entitled to Absolute Immunity or Sovereign Immunity

The County Defendants argue that the cloak of prosecutorial immunity immunizes Defendant Greenwood (County Def., Mem., pp. 2-5), as does sovereign immunity. (County Def., Mem., pp. 6-10) The County Defendants erroneously rest on Section 1983 case law, and do not mention *Ex parte Young*. Under *Young*, Greenwood has no immunity as she is deemed acting in her personal, rather than official capacity, by her alleged participation in the continuing prosecution of the Plaintiffs in excess of state jurisdiction and in violation of the supremacy clause protections of their aboriginal fishing rights under Count I, and in violation of the civil rights laws, Sections 1981 and 1982 under Count II. Further, 42 U.S. § 1981(c) expressly strips the County Defendants of immunity. "The rights protected by this section are protected against impairment … under color of State law."

C. The DA Defendant is a legal entity capable of being sued

The County Defendants contend the Defendant DA is not a legal entity separate from the individual District Attorney. (County Def., Mem., p. 10) The New York cases cited in support by the County Defendants do not involve Section 1981 and 1982 claims. "A governmental entity, as opposed to an individual official, possesses no personal privilege of absolute immunity. Thus, the Office of the District Attorney, named by plaintiff as a defendant in this action, may not avail itself of the absolute immunity defense." *Smith v. Gribitz*, 958 F.Supp. 145, 155 (S.D.N.Y. Mar. 6, 1997) (internal citation omitted, dismissed on other grounds)

The prosecution fund provided by Suffolk County under New York County Law shows the Defendant DA is a separate legal entity and is a justiciable entity capable of being sued. ("The claimant, district attorney and the attorney general in actions or proceedings prosecuted by him shall be jointly and severally liable for any item of expenditure for other than a lawful county purpose disallowed upon a final audit, to be recovered in an action brought against them by the board of supervisors in the name of the county.") CNT § 705. Further, " 'claims . . . asserted against individual municipal employees in their official capacities . . . are tantamount to claims against the municipality itself' (*Vargas v City of New York*, 105 AD3d 834, 837 [2d Dept 2013], lv granted 22 NY3d 858 [2013]; see *Hafer v Melo*, 502 US 21, 25 [1991])." *Igoe v. Apple*, NY Slip Op 28170, May 31, 2018 (Supreme Court, Albany County).

The Defendant DA's own website holds itself out to the public as a legal entity capable of holding intellectual property rights and asking for waivers from the public ("Suffolk County District Attorney's Office"). (www.suffolkcountyny.gov/disclaimer) ("The owners of the copyrights are SCDAO, the County of Suffolk, New York, its affiliates, content suppliers or other third party licensors. The compilation of the content of the Site is exclusive property of SCDAO and is protected under United States and international copyright laws.") ("You agree to grant to SCDAO a non-exclusive, royalty-free, worldwide, perpetual license….") ("As a condition of your use of the Site, you warrant to SCDAO that you will not ….")

To the extent the Defendant DA is not a legal entity, which it is, that part of the action should be construed as brought against the DA in his personal and official capacities under *ex parte Young*.

D. Plaintiffs alleged sufficient real and immediate harm

Lastly, the County Defendants contend that Plaintiffs have failed to allege sufficient real and immediate harm. (County Def., Mem., pp. 11-13). Specifically, the County Defendants argue in mere conclusory fashion, without more, that Plaintiffs have "failed to establish an 'actual controversy' or imminent concrete injury sufficient to warrant the issuance of a declaratory judgment." (County Def., Mem., p. 12) The Plaintiffs have set forth in detail three failed prosecutions and seizure of their fishing property, and a pending one, by the County Defendants for Shinnecock fishing under their aboriginal rights in Shinnecock Bay within a stone's throw of the land base of the Shinnecock Indian Reservation. The detailed pleading of the pattern of actual seizures of fishing property, and actual criminal charges against the Plaintiffs, and the chilling effect such prosecutions have upon their enjoyment of their rights, constitutes facts establishing the Article III requirement of standing: 1) an "injury in fact" by a showing of a "concrete and particularized" injury to the Plaintiffs, as well as the requirements that 2) said acts are fairly traceable to the conduct of the County Defendants, and 3) the conduct is likely to be redressed by a favorable judicial decision. *Robins v. Spokeo*, No. 13-1339, Slip Op. at 6, 578 U.S. __ (2016) Further, the fact that all prior prosecutions failed with dismissals and an acquittal, and the Defendants continue to prosecute Shinnecock Indians for fishing, shows bad faith and harassment on the part of the Defendants. It stands to reason with little effort that a declaratory judgment in favor of Plaintiffs will result in Plaintiffs being able to enjoy their aboriginal fishing rights without interference by the Defendants in Shinnecock Bay and other usual and customary Shinnecock fishing areas.

VI. CONCLUSION

For the foregoing reasons, the County Defendants. Rule 12(b)(6) motion to dismiss Plaintiffs' complaint is without merit and should be denied.

Dated: August 3, 2018
New York, New York

Respectfully submitted,

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