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,

CV 18-3648
(SJF)(SIL)

-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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STATE DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS COMPLAINT

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PRELIMINARY STATEMENT

Defendants New York State Department of Environmental Conservation, Basil Seggos, Brian Farrish, and Evan Laczi (State Defendants) respectfully submit this Memorandum of Law in Support of their Motion to Dismiss the Complaint pursuant to FRCP 12(b)(1) and 12(b)(6).

Plaintiffs filed a Complaint seeking 1) declaratory and injunctive relief preventing Defendants from interfering with alleged aboriginal fishing rights protected under the Supremacy Clause of the Constitution, and 2) monetary damages for an alleged pattern of illegal racial discrimination under 42 U.S.C. Sections 1981 and 1982.

The Complaint must be dismissed based upon principles of Sovereign Immunity, and for lack of standing, as well as under the doctrine of *Younger* abstention. The Complaint additionally fails to state a claim upon which relief may be granted.

STANDARD OF REVIEW UNDER FED. R. CIV. P. 12(B).

A. Fed. R. Civ. P. 12(b)(1)

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. As the party asserting subject matter jurisdiction, plaintiffs have the burden of establishing by a preponderance of the evidence that such jurisdiction exists, and the Court should not draw argumentative inferences in their favor. *Malik v. Meissner*, 82 F.3d 560, 562 (2d Cir. 1996); *Atlantic Mutual Ins. Co. v. Balfour MacLaine Int'l, Ltd.*, 968 F.2d 196, 198 (2d Cir. 1992). A court resolving a Rule 12(b)(1) motion for lack of subject matter jurisdiction may refer to evidence outside the pleadings. *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) (*citing Kamen v. American Tel. & Tel. Co.*, 791 F.2d 1006, 1011 (2d Cir. 1986)). Indeed, a court

must "look to the substance of the allegations to determine jurisdiction." *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1019 (2d Cir. 1993).

B. Fed. R. Civ. P. 12(b)(6)

In deciding a motion pursuant to FRCP 12(b)(6), the Court must accept all factual allegations in the complaint as true and draw all inferences in favor of the non-moving plaintiff *(see Raila v. United States*, 355 F.3d 118, 119 (2d Cir. 2004)), but, "[t]o survive dismissal, the plaintiff must provide the grounds upon which his claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.'" *See Bell Altantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "A pleader is required to amplify a claim with factual allegations to render the claim plausible," as opposed to merely conceivable. Recitation of a legal conclusion is not the equivalent of a factual allegation and, accordingly, such allegations should not be accepted by the Court as true for motion to dismiss purposes. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. at 555. Allegations "that are so baldly conclusory that they fail to give notice of the basic events and circumstances of which the plaintiff complains are meaningless as a practical matter and, as a matter of law, are insufficient to state a claim." *Barr v. Abrams*, 810 F.2d 358, 363 (2d Cir. 1987). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)(quoting *Twombly*, 550 U.S. at 557).

The complaint is deemed to include documents referenced therein. *See* Fed. R. Civ. P. 10(c); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-154 (2d Cir. 2002); *Rothman v. Gregor*, 220 F.3d 81, 88 (2d Cir. 2000) (complaint is deemed for purpose of motion under Fed. R. Civ. P. 12(b)(6) "to include . . . any statements or documents incorporated in it by reference"). Even if a document is not physically attached to the complaint, it is deemed part of

the complaint for all purposes where it is either expressly referred to in the complaint, is integral to the complaint, or can properly be the subject of judicial notice. *See L-7 Designs, Inc. v. Old Navy*, 647 F.3d 419, 422 (2d Cir. 2011); *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 110-111 (2d Cir. 2010). Moreover, documents that are deemed to be part of the complaint trump inconsistent allegations in the complaint's text. *See e.g., L-7, supra*, 647 F.3d at 422.

The documents properly reviewable in this Rule 12(b)(6) motion are annexed hereto as Appendix One (Bates Stamp Silva-001-043) which includes documents Plaintiffs referred to in their Complaint, without attaching the substantive documents, along with related deed and orders which the State Defendants ask the Court to take judicial notice of as they are in the public record and necessary for context.

ARGUMENT

I. Subject Matter Jurisdiction

Sovereign Immunity

Plaintiffs' claims against Department of Environmental Conservation, and the State Defendants in their official capacities are barred by the Eleventh Amendment and principles of Sovereign Immunity. Unless a State has explicitly and unequivocally consented, it is immune from suit in federal court. *Sossamon v. Texas*, 563 U.S. 277, 131 S.Ct. 1651, 1657-1658 (2011); *Northern Ins. Co. of New York v. Chatham County*, 547 U.S. 189, 193 (2006). This bar applies to claims against State agencies and State officials in their official capacities and bars both monetary and equitable relief. *See Dekom v. New York*, 2013 U.S. Dist. LEXIS 85360, *33 (E.D.N.Y. 2013)(citing *Edelman v. Jordan*, 415 U.S. 651 (1974); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993)); *see also Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989); *Quern v. Jordan*, 440 U.S. 332, 341-345 (1979). Plaintiffs'

claims for monetary damages against DEC and the Defendants in their official capacities are thus barred under principles of sovereign immunity. *Salvador v. Adirondack Park Agency*, 35 Fed. Appx. 7, 10 (2d Cir. 2002).

Plaintiffs' claims for declaratory and injunctive relief are likewise barred. *Ex Parte Young*, 209 U.S. 123 (1908), provides a limited exception to the above principles. Whether the *Ex Parte Young* exception to the Eleventh Amendment's bar applies is a straightforward inquiry that asks whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective. *See In re Dairy Mart Convenience Stores, Inc.*, 411 F.3d 367, 372 (2d Cir. 2005)(citing *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002)).

Plaintiffs fail to satisfy this standard. Plaintiffs have alleged only that Plaintiff Silva is currently facing prosecution, and that the remaining Plaintiffs were each subject to a nearly decade old dismissed prosecution. This Court should abstain from addressing the relief sought as to Plaintiff Silva under the doctrine of *Younger* abstention. Remaining Plaintiffs have failed to allege facts supporting an ongoing violation of federal law. Temporally remote single prosecutions do not constitute an ongoing violation for purposes of *Ex Parte Young*. See *KM Enters. v. McDonald*, 2012 U.S. Dist. LEXIS 138599, *29 (E.D.N.Y. 2012). The Complaint alleges only a dismissed prosecution for undersized flounder, blackfish, and porgy as to Gerrod T. Smith in 2009, and a dismissal in 2010 as to Jonathan K. Smith for a shellfish farm without a license. This Court has already held that Plaintiffs Gerrod Smith and Jonathan Smith lack standing to seek injunctive relief, as they have alleged no injury in fact supporting such relief. *See* Memorandum and Order, dated July 31, 2018, ECF No. 48. For this reason, they 1) fail to allege an ongoing violation and 2) cannot seek prospective relief.

Moreover, this Court should reject the applicability of *Ex Parte Young*, based upon the circumstances and relief requested in this case. Plaintiffs are in effect seeking "a determination that the lands in question are not even within the regulatory jurisdiction of the State, which declaration would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters." *Idaho v. Coeur D'Alene Tribe*, 521 U.S. 261, 282 (1997). The *Coeur D'Alene* Court held the *ex Parte Young* exception inapplicable where a tribe "sought a declaratory judgment to establish its entitlement to the exclusive use and occupancy and the right to quiet enjoyment of the submerged lands as well as a declaration of the invalidity of all Idaho statutes, ordinances, regulations, customs or usages which purport to regulate, authorize, use or affect in any way the submerged lands" and in effect sought quiet title to certain lands, and where "if the Tribe were to prevail, [the state's] sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury." *Coeur D'Alene*, 521 U.S. at 265, 287. The relief requested by Plaintiffs here would likewise affect the state's sovereign interest and regulatory authority over its waters, along with its ability to regulate and protect its wildlife.

The Second Circuit applied similar reasoning in declining to apply *Ex Parte Young* to avoid Eleventh Amendment Immunity where a tribe argued "that it seeks only 'Indian title,' which it describes as the right 'to camp, to hunt, to fish, [and] to use the waters and timbers' in the contested lands and waterways." *W. Mohegan Tribe & Nation v. Orange County*, 395 F.3d 18, 22 (2d Cir. 2004). The Second Circuit interpreted the requested relief as seeking "a determination that the lands in question are not even within the regulatory jurisdiction of the State[,]" citing *Coeur D'Alene*. *W. Mohegan Tribe*, 395 F.3d at 23. Plaintiffs here seek analogous relief, as their intent is to circumvent New York's regulatory jurisdiction within its

borders, preventing the State from regulating wildlife and conservation matters in state waters. This Court should decline to apply *Ex Parte Young* in these circumstances.

Younger Abstention

To the extent not addressed in the Memorandum and Order dated July 31, 2018, ECF No. 48, the Court should dismiss remaining claims seeking injunctive or declaratory relief as to Plaintiff Silva under the *Younger* abstention doctrine. *Younger* abstention is required when three conditions are met: (1) there is an ongoing state proceeding; (2) an important state interest is implicated in that proceeding; and (3) the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of the federal constitutional claims. *Diamond "D" Constr. Corp. v. McGowan*, 282 F.3d 191, 198 (2d Cir. 2004).

"*Younger* generally requires federal courts to abstain from taking jurisdiction over federal constitutional claims that involve or call into question ongoing state proceedings." *Diamond "D"*, 282 F.3d at 198. "This doctrine of federal abstention rests foursquare on the notion that, in the ordinary course, a state proceeding provides an adequate forum for the vindication of federal constitutional rights." *Id.* at 198 (citations and quotations omitted). *Younger* abstention applies equally to suits seeking declaratory relief. *See Samuels v. Mackell*, 401 U.S. 66, 73-74 (1971). Plaintiff Silva has not shown that any alleged constitutional issues cannot be adequately adjudicated in state court. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930 (1975)(stating: "The principle underlying *Younger* and *Samuels* is that state courts are fully competent to adjudicate constitutional claims, and therefore a federal court should, in all but the most exceptional circumstances, refuse to interfere with an ongoing state criminal proceeding.").

Younger abstention requires dismissal of Plaintiff Silva's claims for declaratory and injunctive relief. *Hansel v. Town Court*, 56 F.3d 391, 394 (2d Cir. 1995); *Temple of Lost Sheep,*

Inc. v. Abrams, 930 F.2d 178, 183 (2d Cir. 1991). "*Younger* v. *Harris* contemplates the outright dismissal of the federal suit, and the presentation of all claims, both state and federal, to the state courts." *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973). Plaintiff Silva cannot seek prospective declaratory and injunctive relief during the pendency of a state proceeding. *See Andujar v. City of New York*, 2012 U.S. Dist. LEXIS 151562, *10 (S.D.N.Y. 2012)("The potential of the federal court's ruling to influence the state court's judgment is therefore 'precisely the sort of interference condemned by the Supreme Court in *Younger*.'"). In *Andujar*, the court applied *Younger* abstention where there were "ongoing state proceeding, which the federal action could influence, if not completely dispose of," stating the "federal and state cases are so closely related that if Plaintiff prevailed in this Court, it would 'render [his state criminal] conviction moot and influence the decision on appeal.'" *Id*. at *10-11. "[W]hen a state prosecution is pending, claims of injunctive relief seeking to enjoin future prosecutions still trigger the *Younger* doctrine." *Id*.; *see also Canny v. Ray*, 1991 U.S. Dist. LEXIS 17994, *12 (N.D.N.Y. 1991). Declaratory or injunctive relief preventing enforcement of state laws would influence an issue central to the present state court proceedings, and "any injunction or declaratory judgment against future state action issued by a federal court would affect the course and outcome of the pending state proceedings." *Andujar*, 2012 U.S. Dist. LEXIS 151562, *10 (quoting *Ballard v. Wilson*, 856 F.2d 1568, 1570 (5th Cir. 1988)). This Court should thus dismiss remaining claims for declaratory and injunctive relief sought by Plaintiffs under *Younger* abstention.

Standing

Although this issue may have been addressed in whole or in part by the Court's July 31, 2018 Memorandum and Order, ECF No. 48, Plaintiffs Gerrod Smith and Jonathan Smith lack standing to seek injunctive or declaratory relief preventing Defendants from "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." Their claims for injunctive and declaratory relief should be dismissed.

When seeking injunctive relief, "a plaintiff must show the three familiar elements of standing: injury in fact, causation, and redressability." *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 404 (2d Cir. 2011) (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)). In order to establish standing to seek declaratory or injunctive relief, a plaintiff must establish that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged conduct. *Shain v. Ellison*, 356 F.3d 211, 215 (2d Cir. 2004)(citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-102, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983)); *Deshawn E. by Charlotte E. v. Safir*, 156 F.3d 340, 344 (1998). "For an alleged injury to support constitutional standing, it must be concrete and particularized and actual or imminent, not conjectural or hypothetical." *Knife Rights, Inc. v. Vance*, 802 F.3d 377, 383 (2d Cir. 2015)(internal citations and quotations omitted). A threatened injury must be certainly impending to constitute injury in fact, and allegations of possible future injury are not sufficient. *See McLennon v. City of New York*, 171 F. Supp. 3d 69, 104 (E.D.N.Y. 2016)(internal quotations and citations omitted). "[A] plaintiff cannot rely on past injury to satisfy the injury requirement but must show a likelihood that he . . . will be injured in the future." *Id.*

Plaintiffs Gerrod Smith and Jonathan Smith have not alleged that they are currently being prosecuted or facing criminal charges. They have merely alleged isolated dismissed prosecutions, nearly a decade old, for violating generally applicable State fishing laws. They have not alleged any current facts regarding interactions with Defendants, or how any laws have been applied to them. Their request for injunctive relief is entirely speculative and remote. They

have not stated a concrete and particularized injury. *Shain*, 356 F.3d at 215. As the Court held in deciding Plaintiffs' Motion for Preliminary Injunction, the allegations in the Complaint are insufficient to support the required concrete and particularized injury. *See* Memorandum and Order, dated July 31, 2018, ECF No. 48. These Plaintiffs, alleging isolated past injury, lack standing to seek declaratory or injunctive relief. The Court should dismiss these claims.

Plaintiff Silva likewise does not have standing to seek prospective declaratory and injunctive relief enjoining Defendants from "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." Past injury does not supply a predicate for prospective injunctive relief "since the fact that such practices had been used in the past did not translate into a real and immediate threat of future injury." *Shain*, 356 F.3d at 215 (quoting *Lyons*, 461 U.S. at 105-106). In *Lyons*, the plaintiff was placed in a chokehold by a Los Angeles police officer, yet did not have standing to seek prospective injunctive relief barring police officers from indiscriminately using chokeholds. *Lyons*, 461 U.S. at 105-106.

II. Failure to State a Claim

Plaintiffs' various causes of action also fail to state a claim under Fed. R. Civ. P. 12(b)(6). As to Plaintiffs' Count I claim of a Supremacy Clause violation, the Supremacy Clause does not provide a private right of action. Furthermore, the documents Plaintiffs rely on do not stand for the proposition that Plaintiffs want them to. They do not establish the existence of a treaty right; nor do they support the reservation of exclusive off-reservation fishing rights, as the Plaintiffs must claim, in order to be uniquely and exclusively free from state regulation, in state waters.

The Supreme Court recently held that the Supremacy Clause does not provide a private right of action. *Armstrong v. Exceptional Child Ctr., Inc*., 135 S. Ct. 1378, 1383 (2015). In *Armstrong*, the Court held that it is "apparent that the Supremacy Clause is not the source of any federal rights, and certainly does not create a cause of action." *Id*. In *Davis v. Shah*, 821 F.3d 231, 245 (2d. Cir. 2016), the Second Circuit applied *Armstrong* in finding no implied right of action under the Supremacy Clause to challenge a federal statute that itself contained no "rights-creating language necessary to confer a private cause of action." *Shah*, 821 F.3d at 244-246. Despite citing to a body of federal law regarding Indian treaty interpretation and rights, Plaintiffs here have cited no tribal treaty conferring rights – because none exists. They apparently rely on an implied right of action under the Supremacy Clause. Under *Armstrong*, no such implied right of action exists.

Plaintiffs are left with an unrepresentative sampling of deeds and colonial orders that do not state what they want them to.

April 29, 1648 Deed for East Hampton

The First document is the original purchase deed for the Town of East Hampton, between the Governors of the colonies of New Haven and Connecticut, and the sachems from the Montaukett, Manhansett, Corchaug, and Shinnecock tribes. The relevant language, partially quoted by Plaintiffs is:

> Allsoe, we, the said Sachems, have Covenanted to have Libertie, freely to fish in any or all the cricks and ponds, and hunt up and downe in the woods without Molestation, they giving the English Inhabitants noe just offence, or Iniurie to their goods and Chattells. Likewise, they are to have the fynns and tails of allsuch whales as shall be cast upp, to their proper right and desire they may bee dealt with in the other part. Allsoe, they reserve libertie to fish in all convenient places, for Shells to make wampum. Allsoe, if the Indyans, hunting of any deare, they should chase them into the water, and the English should kill them, the English shall have the body, and the Sachem the skin.
>
> Appendix One at Silva-003-005.

This deed was negotiated for the purchase of land in what is now the town of East Hampton, not Southampton where Plaintiff Silva was ticketed. This area does not encompass or abut the Shinnecock Bay. Plaintiffs fail to quote the qualifying language. These covenants were limited, in that the sachems would give "the English Inhabitants noe just offence, or Iniurie to their goods and Chattells." This deed did not reserve to the Shinnecocks an exclusive right, unconstrained by state regulation, as they now allege they have, in comparison to other residents of the State.

Plaintiffs make no showing that this was more than an individually negotiated term of sale for particular land. Plaintiffs have not alleged that these rights were generally reserved in contemporaneous purchase deeds. In fact, language varies considerably in contemporaneous deeds, even within Plaintiffs' slim sampling. Unacknowledged by Plaintiffs is that this 1648 East Hampton deed exists within a history that conflicts with their claims.

Notably, Plaintiffs have failed to acknowledge, in their limited sampling, the original Indian Deed for Southampton itself, of December 13, 1640. This deed, signed by Mandush, the Shinnecock sachem, reserves no fishing rights, more concerned with securing English protection from attacks by other Indians. It states that the Indians:

> doe absolutely and forever give and grant and by these presents doe acknowledge ourselves to have given and granted to the partyes above mentioned without any fraud, guile, mentall reservation or equivocation to them their heirs and successors forever all the lands, woods, waters, water courses, easmts, profits & emoluments, thence arising whatsoever . . .

Further:

> In full testimonie of this our absolute bargaine contract and grant indented and in full and complete ratification and establishment of this our act and deed of passing over all our title & interest in the premises with all emoluments & profits thereto appertaining, or in any wise belonging, from sea or land within our Limits above specified without all guile wee have sett to our hands the day and yeare above sayd.

Appendix One at Silva-010-012.

June 10, 1658 Deed to Beach

Plaintiffs next cite a deed between Wyandanch, sachem of the Montaukett tribe, and Lion Gardiner. Plaintiffs have without support characterized this deed as a "nation to nation agreement." This deed specifically establishes grazing access for horses and cattle on a specific land tract, replete with a yearly rental price. It states:

> Wiandance hath sould for a considerable sum of money and goods, a certaine tract of beach land, with all ye rest of ye grass that joynes to it, not seperated from it by water, which beach begins Eastward at the west end of Southampton bounds, and westward where it is separated by ye waters of ye sea, coming in out of the Ocean Sea, being bounded Southwards with the great sea, Northwards with the inland water; this land and the grass thereof for a range, or run, for to feed horses or cattle on, I say, I have sold to the aforesaid Lion Gardiner, his heirs, executor and assigns forever, for the sum aforesaid, and a yearly rent of twenty-five shillings a year, which yearly rent is to be paid to the foresaid Sachem, his heirs, executors and assigns for ever, in the eight month, called October, then to be demanded, but the whales that shall be cast upon this beach shall belong to me, and the rest of the Indians in their bounds, as they have beene anciently granted to them formerly by my forefathers.

Appendix One at Silva-013-014, 016-017, 018.

As Professor Strong points out, this deed was for beach land adjacent to Shinnecock lands. Drift whaling was a highly lucrative aspect of the early Long Island economy. This refers to the processing and sale of the carcasses of dead whales that washed up on shore. *See* John A. Strong, *The Montaukett Indians of Eastern Long Island* 25 (Syracuse University Press 2001). Plaintiffs have not shown how this particular reservation of highly lucrative drift whale carcasses in a deed specifically for grazing rights supports an exclusive reservation of general fishing rights. The language in this deed varies considerably from the East Hampton deed above, and makes no reference to fishing generally. Indeed, as shown below, rights to drift whale carcasses were bargained and sold in a variety of ways, in different deeds throughout this period. An agreement concerning horses, cattle and whales, however, does not support Plaintiffs' claims.

May 12, 1659 Deed to John Ogden

The May 12, 1659 deed between Wyandanch, the Montaukett sachem, and John Ogden states in relevant part:

> I say all the land and meadow I have sold for a considerable price unto Mr Iohn Ogden for himselfe his heirs executors and assigns for ever, upon condition as followeth, first that Thomas Halsey and his Associates shall have the privilidge of the peice of meadow called quancawnantuck the terms of yeares formerly granted to him or them but the land lying between quancawnantuck and three miles northward he shall or may possess and improve at present, but when the yeares of the aforesayed Thomas Halsey shall be expired then shall the aforesaid Mr Iohn Ogden or his assigns fully possess and improve all quancaunantucke meadow with the rest aforesayed and then shall pay or cause to be payed unto me wiandance my heires or assigns the summe of twenty five shillings a yeare as a yearly acknowledgement or rent for ever. It is also agreed that wee shall keepe our privilidges of fishing fowling hunting or gathering of berrys or any other thing for our use . . .

Appendix One at Silva-020, 021-022.

This particular deed, known as the "Quogue Purchase" involved a tract west of the present Shinnecock Canal. The agreement reserving certain privileges on the tract appears following conditional language that also gives Thomas Halsey, a colonist, certain rights to the tract. There is no indication that this was more than an individually negotiated term in the sale of a specific tract. This deed does not support Plaintiffs' claim that they have an exclusive fishing right, free of state regulation, unlike non-Shinnecock citizens. At best, the agreement retained equal access in common with other citizens. As stated in prior litigation involving one of the present Plaintiffs:

> The Wyandanch to Ogden Deed of 1659 is also inapplicable because 'when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right to absolute and exclusive use and occupation of the conveyed lands.' *South Dakota v. Bourland*, 508 U.S. 679, 689, 113 S.Ct. 2309, 124 L.Ed.2d 606 (1993). In sum, the Defendant, as a Shinnecock Indian, fails to state a federally protected right to have undersized scallops. Moreover, even if such right existed, it does not implicate racial equality concerns.

New York v. Smith, 952 F. Supp. 2d 426, 431 (E.D.N.Y. 2013).

June 8, 1659 Deed to Lion Gardiner Concerning Whale Rights

The June 8, 1659 deed between Wyandanch, the Montaukett sachem, and Lion Gardiner concerns only drift whales. In fact, this document is a detailed apportionment of the rights and profits from drift whale carcasses from a certain beach tract. In it, Wyandanch sells to Lion Gardiner, "all the Bodyes and Bones of all the Whales that shall come upon the Land, or come a Shoare from the Western end of Southhampton Bounds, unto the place called Kitchaminchoke, yet reserving to ourselves and Indyans, all the Tailes and fins for Ourselves . . ." The document then sets a term of twenty-one years for the agreement. It states further:

> that if any Whale shall bee cast up in the bounds aforementioned, whether it bee found by English or Indyons, it shall bee judged by them both whether it bee a whole Whale or a halfe or otherwise. Now for every whole whale that shall come up, the aforesaid Lyon Gardiner or his Assigns, shall pay or cause to be paid unto mee wyandance, the Sum of five pounds Sterling, or any good pay which wee shall accept of, but if it bee a halfe whale, a third part, or otherwise, they shall pay according to Proportion, and this pay shall be within two Monethes after they have cutt out and carryed the Whale home to their Houses, but in case there shall not five whales come up, within the terme abovesaid, then shall the aforesaid Lyon Gardiner, or his Assigns, have the next five Whales, that shall come up after the Terme, paying to mee, my heirs, Executors or Assigns, the Sum above mentioned, and for the true performance of the promises, Wee have hereunto Sett our hands and Seales.

Appendix One at Silva-023-026 (State Defendant have provided their transcription of this document as Silva-023).

This document, like several other contemporaneous sales of rights to drift whales, does not so much as mention fishing. A similar sale of drift whale rights to Lion Gardiner for further beach land, dated July 28, 1659 is annexed hereto. Appendix One at Silva-028-029. These documents reflect the lucrative and prized nature of access to drift whale carcasses. They reflect that they were sold and traded through a variety of negotiated terms. They do not reserve exclusive fishing rights. Plaintiffs' highly misleading and out of context quote from this document misstates its import.

Undercutting the argument that these deeds reserved exclusive rights to the Indians, Professor Strong has noted, in his academic work:

> The question of drift whales came up again in November 1658 when Wyandanch gave Lion Gardiner and the Reverend Thomas James of East Hampton half the whales "or other great fish" that drifted onto the beach between Napeague and the far end of Montauk. This was an important grant because it gave the two men an exclusive right to all of the ocean beaches on Montaukett lands. The town of East Hampton owned the whale rights from Napeague west to the Southampton border and held them in common trust. Wyandanch did require a small percentage of their profit, but left it to James and Gardiner to pay "what they shall judge meete and according as they find profit by them" ([Records of the Town of East Hampton] I:150).

John A. Strong, *The Montaukett Indians of Eastern Long Island* 26 (Syracuse University Press 2001).

> The Southampton settlers, in contrast, had begun to take advantage of the lucrative whaling potential along the south shore as early as 1650, when John Ogden, an English settler in Southampton, established the first private whaling company (RTSH 1874-77, 1:70-71). Ogden employed Indian whalers to hunt whales that migrated along the Atlantic shore from November through March. In 1659 Southampton entrepreneurs had pushed their control of whaling rights on the south beach westward into Unkechaug territory. In 1662 Ogden met with sachems Tobacus and Winecroscum to negotiate a contract for the rights to drift whales on the south beach lying to the west of the lease held by Anthony Waters. This area of the barrier beach was probably between Enaughquamuck at the mouth of the Carman River and Namkee Creek on the west.

John A. Strong, *The Unkechaug Indians of Eastern Long Island* 56 (University of Oklahoma Press 2011)

Professor Strong has himself elsewhere expanded on the June 8, 1659 document, characterizing it in a markedly different manner:

> The following month Gardiner leased the whale rights to a section of Atlantic beach west of the area he had purchased from Wyandanch the year before (DSBD, 2:85-86). The lease ran for twenty-one years, and Wyandanch was promised five pounds sterling or an equivalent amount of goods for each whole whale carcass. The sachem reserved the tails and fins for himself. Gardiner then turned over the whale rights to John Cooper, who was beginning to develop a whaling enterprise, which would soon become a major industry on the south shore of eastern Long Island.

John A. Strong, *Wyandanch: Sachem of the Montauketts* p. 17 of 23 (East Hampton Library, 1998 East Hampton 350th Anniversary Lecture Series January 31, 1998) http://easthamptonlibrary.org/wp-content/files/pdfs/history/lectures/19980131-2.pdf (last visited 7/16/18).

These various sales and leases of whaling rights do not support a reservation of exclusive whaling rights to the Shinnecock tribe, to say nothing of exclusive fishing rights. Succinctly stated: whales are not eels.

April 1662 Topping Purchase

Plaintiffs have again mischaracterized the cited deed, without attaching the actual document. The relevant transfer of title within the deed states:

> Witnesseth that we the said Weany Anabackus and Iackanapes have given and granted and by these presents do give and grant bargain sell assign and set over unto Thomas Topping aforesaid his heirs and assigns for ever all our right title and interest that we have or ought to have in a certain tract of land lying and being westward of the said Shinecock and the lawful bounds of Southampton above said, that is to say to begin at the canoe place otherwise Niamuck and soe to run westward te a place called and known by the name of Seatuck, and from thence to run northward across the said Island or neck of land unto a place called the head of the bay with all the meadow and pasture, arable land, easements profits benefits emoluments as is or may be contained within the limits and bounds before mentioned together with half the profits and benefit, of the beach on the south side the said Island in respect of fish whale or whales that shall by God's providence be cast up from time to time, and at all times, with all the herbage or feed that shall be, or grow thereon.
>
> To Have and To Hold, all the forementioned demised premises with all and singular the appurtanances thereto belonging or in any ways appertaining to him the said Thomas, his heirs executors, administrators, or assigns forever, without the lett trouble denial or molestation of us the said Weany, Anabaekus, and Iackanapes our heirs or assigns or any other person or persons lawfully claiming from, by, or under us our heirs executors Administrators or assigns…

Appendix One at Silva-031-032.

The deed in fact transfers half of the whaling profits from the beach, along with the herbage and feed to Topping. It once again shows that the whaling rights were sold and

transferred in a variety of ways, across various property sales. Needless to say, it does not reserve an exclusive fishing right to the Shinnecocks. "The Treaty language that ceded that entire tract . . . stated only that the Tribe ceded 'all their right, title, and claim' to the described area. Yet that general conveyance unquestionably carried with it whatever special hunting and fishing rights the Indians had previously possessed in over 20 million acres outside the reservation." *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 766 (1985).

January 22, 1674-5 Resolution

The next series of documents is blatantly mischaracterized by Plaintiffs. Plaintiffs claim that this document states that Indians who discover drift whales shall have such reasonable satisfaction as hath been usual. Plaintiffs do not state from whom this satisfaction shall be. In fact, they have mischaracterized a document that protected the Royal interest in these products. The Crown, in fact, maintained privilege over drift whales, and attempted to protect its interests on Long Island in the 17th Century. This document states:

> The preserving of his Royal Highnesse Interest in a proportion of ye Drift as in ye Law is set forth, the same being taken into Consideracon. It is resolved, That there be some particular man commissioned to take care of drift whales in ye middle & westernmost part of *Long Island*, who is to be accomptable for his Royall Highnesse dues thereof, according to Law.
>
> That if an Indyan find and give notice of any such drift whales, he shall have such reasonable satisfaccon as hath been usuall. If a christian shall find any such whale or great fish & secure it, or give due notice to ye person empowered, where by the said Fish may be saved, hee shall be allowed a quartr part for his share. Provided yt no such whale being found, shall be cut up or embezeled, before notice be given to such Officrs or prsons empowered to take care therein.

Appendix One at Silva-035.

This document undercuts Plaintiffs' argument, as it sets out the Royal possessory interest in the drift whales, and the proportion for the Crown and the discoverer, when a drift whale is

discovered. It does not mention Shinnecock Indians, and reserves no rights to them. State Defendants have attached several other orders, which illuminate the Royal claims. In an Order from May 2, 1672, concerning neglect of the Royal share of the drift whales on Long Island, two men were appointed to make inquiry by Indians or others as to drift whales cast up on the beach. Appendix One at Silva-036. The second order, from May 10, 1672, gave Jonathan Cooper warrant to seize the whale-bone from a drift whale carried off his beach lands by several Indians. Appendix One at Silva-037. In Orders Relating to Whaling on L.I., from April 19, 1673, inhabitants of Brook-haven and Seatalcott complained that Indians were disturbing their whaling rights, and demanding payment from them. The Order required that the Indians cease their unlawful actions, and cease molesting the whalers, to whom liberty had been given to use the beach. Appendix One at Silva-038.

May 23 and 24, 1676 Order Regarding Unkechaug

Plaintiffs have again mischaracterized this Order, selectively quoting the language in a misleading manner. The records state on May 23, 1676:

> At a meeting of the Unchechaug Indyans of Long Island—before the Go: at the Fort.
>
> They give thankes for their peace, and that they may live, eate and sleepe quiet, without feare on the Island, They give some white strung seawant.
>
> They desire they being free borne on the said Island, that they may have leave to have a whale boate with all other materiells to fish and dispose of what they shall take, as to whom they like best.
>
> They complaine that fish being driven upon their beach etc. the English have come and taken them away from them per force.
>
> The Go: Demands if they made complainte of it to the Magistrates in the Townes, who are appointed to redresse any Injuryes.
>
> They say no, but another time will doe it.
>
> The Go: will consider of it and give them Answer tomorrow.

On May 24, 1676:

> The Indyans come againe to the Governor in presence of The Councell.
>
> What they desire is granted them as to their free liberty of fishing, if they bee not engaged to others; They say they are not engaged.
>
> They are to have an Order to shew for their priviledge.

The Order itself states:

> Resolved and ordered that they are at liberty and may freely whale or fish for or with Christians or by themselves and dispose of their effects as they as they thinke good according to law and Custome of the Government of which all Magistrates officers or others whom these may concerne are to take notice and suffer the said Indyans so to doe without any manner of let hindrance or molestacion they comporting themselves civilly and as they ought.

Appendix One at Silva-041, 042-043.

Aside from the obvious point that this was an Unkechaug party (and unknown whether they appeared on behalf of their tribe, or as individuals) who approached the Governor, and not members of the Shinnecock tribe, this document provides no exclusive rights, and in fact establishes that they needed to seek from the Governor leave for fishing and whaling, just as the English did. Plaintiffs misleadingly omit the qualifying language that the order was "according to law and Custome of the Government."

Plaintiffs have failed to establish a reservation of exclusive fishing rights or the existence of a treaty granting them exclusive off-reservation fishing rights without regulation. Plaintiffs have not cited to any treaty granting such rights, and none exists. Plaintiffs' selective use of individual deeds, largely concerning drift whale carcasses does not equate to a treaty. Plaintiffs' legal arguments cite to a body of law specifically concerning federal treaty rights and interpretation. But they have flatly failed to show the existence of any treaty. The case law they

cite is irrelevant. "Absent a treaty fishing right, the State enjoys the full run of its police powers in regulating off-reservation fishing." *People v. Patterson*, 5 N.Y.3d 91, 96 (2005).

Even where a true treaty provides a tribe "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory," the state may impose on Indians, equally with others, regulatory restrictions on the manner of fishing, necessary for conservation. *See Tulee v. Washington*, 315 U.S. 681, 684 (1942); *New York ex rel. Kennedy v. Becker*, 241 U.S. 556, 563 (1916). Treaty-based usufructuary rights do not exempt Indians from state regulation, as the Supreme Court has often noted: "We have repeatedly reaffirmed state authority to impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation." *Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 205 (1999). "The manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 398 (1968).

Plaintiffs have failed to allege the existence of a treaty. They have likewise failed to allege any exclusive unregulated fishing right. "[W]hen an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands." *South Dakota v. Bourland*, 508 U.S. at 689.

42 U.S.C. §§ 1981, 1982

Plaintiffs' Section 1981 and 1982 claims fail as a matter of law. Plaintiffs' have made threadbare allegations devoid of facts that satisfy the elements of these claims.

42 U.S.C. Section 1981 states in relevant part: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce

contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." Section 1981outlaws discrimination with respect to the enjoyment of benefits, privileges, terms, and conditions of a contractual relationship. *See Patterson v. County of Oneida*, 375 F.3d 206, 224 (2d Cir. 2004). To establish a violation of Section 1981, a plaintiff must show: (1) the plaintiff is a member of a racial minority; (2) the defendant intended to discriminate on the basis of race; and (3) the discrimination concerned one or more of the activities enumerated in the statute. *See Campbell v. Grayline Air Shuttle*, 930 F. Supp. 794, 802 (E.D.N.Y. 1996). "It is fundamental to the success of a section 1981 claim that the plaintiff allege discriminatory intent." *Dasrath v. Stony Brook Univ. Med. Ctr.*, 2014 U.S. Dist. LEXIS 60410, *14 (E.D.N.Y. 2014). Absent proof of purposeful discrimination, liability may not be imposed. *General Bldg. Contractors Ass'n v. Pa.*, 458 U.S. 375, 389 (1982).

Section 1982 provides that "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982. As with Section 1981, to state a claim under Section 1982, a plaintiff must allege that he was intentionally deprived of a property right on the basis of race. *Bacon v. Suffolk Legislature*, 2007 U.S. Dist. LEXIS 57925, *29 (E.D.N.Y. 2007).

Plaintiffs have alleged no facts showing discriminatory intent. The Complaint alleges only that Silva was ticketed by DEC Officers Laczi and Farrish for possession of undersized eels, and that two prior prosecutions against the other two Plaintiffs were dismissed nearly a decade ago. Plaintiffs have alleged no facts beyond that the officers were enforcing generally applicable

New York State laws in the New York State waters of the Shinnecock Bay. The Complaint itself alleges that Salvatore J. Ruggiero, a non-Indian, was prosecuted for possession of undersized fish. Plaintiffs have not alleged that they complied with the laws at issue here, or that they were not in New York State waters. They cannot show any discriminatory application of the laws.

Plaintiffs' claims also conflict with the plain language of the statutes. Plaintiffs do not identify any property or contractual right or activity in which they are being discriminated against in comparison to white citizens. In fact, this allegation contradicts Plaintiffs' argument: they are not alleging any right which they are being discriminatorily prevented from exercising; they are claiming that they have exclusive rights to fish, unregulated by the laws of the state, which no other citizens of the state may enjoy.

With respect to Section 1981, Plaintiffs have identified no contractual right that has been impaired or prevented, as required to state a claim. *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006). Furthermore, regarding Plaintiffs Gerrod Smith and Jonathan Smith, whether applying a three-year or four-year statute of limitations to their Section 1981 and Section 1982 claims, *see Duplan v. City of New York*, 888 F.3d 612, 619 (2d Cir. 2018); *Bacon v. Suffolk Legislature*, 2007 U.S. Dist. LEXIS 57925, *14-*17 (E.D.N.Y. 2007), the time to bring these claims is expired, as Plaintiffs have alleged only isolated instances of applying generally-applicable fishing laws.

Personal Involvement

Plaintiffs fail to state a claim as to Respondent Commissioner Basil Seggos in his individual capacity because he had no personal involvement or direct connection to the alleged events. The Complaint fails to allege any facts indicating the personal involvement of Defendant Seggos with respect to these intentional discrimination statutes, as required. *See Patterson v.*

County of Oneida, 375 F.3d 206, 229 (2d Cir. 2004); *Medina v. Cuomo*, 2015 U.S. Dist. LEXIS 152398 at *21 (N.D.N.Y. 2015).

Defendant Seggos has had no direct involvement with the Plaintiffs' case and therefore cannot be found to be personally liable. The sole fact that Seggos "held a high position of authority" is insufficient to prove his personal involvement. *See Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 127 (2d Cir. 2004). The Plaintiffs have asserted no facts to prove that the Commissioner was personally involved or that he took any actions against the Plaintiffs, so their claim against the Commissioner should fail. *KM Enters. v. McDonald*, 518 Fed. Appx. 12, 14 (2d Cir. 2013).

Qualified Immunity

The State Defendants are entitled to qualified immunity in their individual capacities. "Qualified immunity often shields government officials performing discretionary functions . . . from liability for civil damages." *Stein v. Barthelson*, 419 Fed. Appx. 67, 69 (2d Cir. 2011)(quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Qualified immunity applies to the State Defendants here "unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Edrei v. Maguire*, 892 F.3d 525, 532 (2d Cir. 2018)(quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)). "Thus, the qualified immunity defense . . . protects an official if it was objectively reasonable for him at the time of the challenged action to believe his acts were lawful." *Berg v. Kelly*, 2018 U.S. App. LEXIS 20646, *21 (2d Cir. 2018)(internal quotations and citations omitted). "To lose immunity, an official must violate a right, the contours of which are 'sufficiently clear that a reasonable official would understand that what he

is doing violates that right.'" *Drimal v. Tai*, 786 F.3d 219, 225 (2d Cir. 2015)(quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

Here, it was objectively reasonable for the State Defendants to believe their actions were lawful. The Plaintiffs received tickets for violating generally applicable fishing laws and regulations, in New York State waters. They have not denied these substantive facts. Plaintiffs instead have advanced a theory of constitutional violation based upon the premise that isolated 17th century deeds and colonial orders pertaining to whale carcasses exempt them from regulation by the state, through operation of the Supremacy Clause. They have alleged no treaty conferring rights to them. Such a convoluted theory cannot be understood by a reasonable official to provide a clearly established right. No clearly established law gives these claimed rights. The State Defendants are thus entitled to qualified immunity.

CONCLUSION

For the foregoing reasons, the State Defendants respectfully request that this Court grant their Motion to Dismiss, and dismiss the Complaint in its entirety.

Dated: Mineola, New York
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