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' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION TO DISMISS COMPLAINT

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PROCEDURAL HISTORY

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

Plaintiffs filed a Complaint, dated June 22, 2018, 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.

This Court denied Plaintiffs' Motion for Preliminary Injunction by Memorandum and Order, dated July 31, 2018. County Defendants filed their fully briefed Motion to Dismiss on August 13, 2018. State Defendants served Notice of their Motion to Dismiss and their Memorandum in Support on August 2, 2018. In opposition, Plaintiffs served their Memorandum in Opposition on August 17, 2018.

DOCUMENTS WHICH MAY BE CONSIDERED IN THIS MOTION

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 include documents Plaintiffs referred to in their Complaint, without attaching the substantive documents, along with related deed and orders of which the Court may take judicial notice as they are legal documents in the public record. Here, Plaintiffs have put forth an argument of aboriginal fishing rights based upon various colonial deeds, without including the documents themselves, and without including the colonial deed for Southampton, where the events themselves took place. These legal deeds are in the public record, and are properly considered here, as are the colonial Governor's legal orders. *Beng Soon Lim v. Harvest Int'l Realty, Inc.*, 2009 U.S. Dist. LEXIS 109389, *10 (E.D.N.Y. 2009); *Stuart v. Stuart*, 2013 U.S. Dist. LEXIS 175270, *3, n.4 (S.D.N.Y. 2013). Plaintiffs have not controverted the authenticity of such historical legal documents within the public record, thus judicial notice of them may be taken. *See Oneida Indian Nation v. New York*, 691 F.2d 1070, 1086 (2d Cir. 1982); *Hotel Emples. & Rest. Emples. Union, Local 100 v. City of N.Y. Dep't of Parks & Rec.*, 311 F.3d 534, 540, n.1 (2d Cir. 2002)(taking judicial notice of historical facts in authoritative text); *MMA Consultants 1, Inc. v. Republic of Peru*, 245 F. Supp. 3d 486, 500 (S.D.N.Y. 2017).

ARGUMENT

Ex Parte Young and Standing

Plaintiffs deny that any "sovereign interests" are implicated by their suit, and deny the application of *Idaho v. Coeur D'Alene Tribe*, 521 U.S. 261 (1997) and *W. Mohegan Tribe &*

Nation v. Orange County, 395 F.3d 18, 21 (2d Cir. 2004). However, Plaintiffs go on to cite *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985), for its propositions on aboriginal land rights, and *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 670 (1979) for its propositions on the extinguishment of "Indian title." *See* Plaintiffs' Memorandum in Opposition to State Defendants' Motion to Dismiss at pp. 11-12. Plaintiffs make clear their claim that the State Defendants have no regulatory jurisdiction over them in these state waters, implicating a sovereign interest sufficient to bar jurisdiction under the 11th Amendment and Sovereign Immunity. As in *W. Mohegan Tribe*, Plaintiffs'

> claim is fundamentally inconsistent with the State of New York's exercise of fee title over the contested areas. To the extent that the complaint alleges that there has never been a lawful extinguishment of the Tribe's Indian title, it seeks a declaration from this court that New York's exercise of fee title remains 'subject to' the Tribe's rights, *i.e.*, a 'determination that the lands in question are not even within the regulatory jurisdiction of the State.'

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

Plaintiffs' opposition to State Defendants' Motion to Dismiss also fails to address the application of the principles of 11th Amendment and Sovereign Immunity to their claims for monetary damages under Sections 1981 and 1982 against DEC and the Defendants in their official capacities. And though they allege that they are seeking prospective relief, this Court has already found that Plaintiffs Jonathan K. Smith and Gerrod T. Smith suffered no injury in fact to support standing to seek injunctive relief. *See* Memorandum and Order dated July 31, 2018, ECF # 48. Despite spending several pages of their Memorandum in Opposition discussing standing generally, Plaintiffs have failed to address Defendants' arguments regarding standing to seek prospective injunctive or declaratory relief—*see City of Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983); *Shain v. Ellison*, 356 F.3d 211, 215 (2d Cir. 2004); *Deshawn E. by Charlotte E. v. Safir*, 156 F.3d 340, 344 (2d Cir. 1998)("A plaintiff seeking injunctive or declaratory relief

cannot rely on past injury to satisfy the injury requirement but must show a likelihood that he or she will be injured in the future.")—or this Court's prior decision regarding standing of two of the Plaintiffs. Therefore, Plaintiffs Gerrod Smith and Jonathan Smith have no standing to seek injunctive or declaratory relief.

Younger Abstention

Plaintiff Silva's claims for injunctive and declaratory relief are foreclosed by principles of *Younger* abstention, as argued in State Defendants' Memorandum of Law in Support of their Motion to Dismiss, and previously held by this Court. Plaintiffs now put forth an argument of bad faith and harassment in an attempt to circumvent *Younger* abstention. The Complaint, however, alleges no facts to support this argument.

Plaintiffs bear the burden of establishing an exception to *Younger* abstention. *See DeMartino v. New York State Dep't of Labor*, 167 F. Supp. 3d 342, 354 (E.D.N.Y. 2016). This burden is heavy; in order for an exception to apply, the "party bringing the state action must have no reasonable expectation of obtaining a favorable outcome." *Cullen v. Fliegner*, 18 F.3d 96, 103 (2d Cir. 1994). "A state proceeding that is legitimate in its purposes, but unconstitutional in its execution--even when the violations of constitutional rights are egregious--will not warrant the application of the bad faith exception." *Diamond "D" Constr. Corp. v. McGowan*, 282 F.3d 191, 199 (2d Cir. 2002).

Plaintiffs have put forth no facts to support an exception to *Younger* abstention. Plaintiffs reiterate four prosecutions—three nearly a decade ago, including one against a non-Indian non-plaintiff—as proof of bad faith or harassment. These were all for generally applicable regulations. Plaintiffs have failed to demonstrate that this was anything other than "a

straightforward enforcement of the laws of New York." *Diamond "D"*, 282 F.3d at 199. They have not claimed that the eels were within the catch limits or of proper size. They have failed to demonstrate an impermissible subjective motivation - the most important factor in the bad faith inquiry. *Id*. This Court previously held that no exceptions applied. *See* Memorandum and Order dated July 31, 2018, ECF # 48. Plaintiffs have put forth nothing to alter this conclusion.

The Colonial Documents Do Not Support Plaintiffs' Claims

Plaintiffs do not address State Defendants' arguments regarding the substance of the documents they claim as support for their alleged aboriginal fishing rights, instead reiterating the inapposite proposition that treaties should not be construed to their prejudice—despite the absence of a treaty. Plaintiffs repeat that facts should be construed in their favor on a motion to dismiss. *See* Plaintiffs' Memorandum in Opposition to State Defendants' Motion to Dismiss, at p. 19. This Court, however, need not accept Plaintiffs' legal conclusions and subjective characterizations of documents for purposes of a motion to dismiss. *See Madonna v. United States*, 878 F.2d 62, 65 (2d Cir. 1989); *Polar Int'l Brokerage Corp. v. Reeve*, 108 F. Supp. 2d 225, 241 (S.D.N.Y. 2000). The documents do not support Plaintiffs' allegations, for the reasons stated in State Defendants' Memorandum in Support.

Plaintiffs continue to cite to case law involving treaty rights and interpretation. They, however, have utterly failed to allege the existence of any treaty. The body of case law involving treaty law and interpretation is irrelevant to their allegations, and should be disregarded by the Court.

Sections 1981, 1982 and Discriminatory Intent

Plaintiffs have alleged no facts to support discriminatory intent as required under Sections 1981 and 1982. *See Albert v. Carovano*, 851 F.2d 561, 571 (2d Cir. 1988)("Essential to an action under Section 1981 are allegations that the defendants' acts were purposefully discriminatory, and racially motivated.")(internal citations omitted); *Dasrath v. Stony Brook Univ. Med. Ctr*., 2014 U.S. Dist. LEXIS 60410, *14 (E.D.N.Y. 2014); *Bacon v. Suffolk Legislature*, 2007 U.S. Dist. LEXIS 57925, *29 (E.D.N.Y. 2007). Despite Plaintiffs' Memorandum in Opposition spending several pages laying out the elements of claims under these sections, Plaintiffs have failed to allege any facts supporting intentional discrimination based on race. Plaintiffs have failed to allege any facts, either direct or circumstantial, supporting discriminatory intent. Plaintiffs' claims parallel the false syllogism so often noted in the context of discrimination law: 1) I am (insert name of a protected class); (2) something bad happened to me; (3) therefore, it happened because I am (insert name of protected class). *See Bermudez v. City of New York*, 783 F. Supp. 2d 560, 581 (S.D.N.Y. 2011).

Plaintiffs have also alleged no personal involvement of DEC Commissioner Seggos. Plaintiffs claim that the State Defendants are "raising a question of fact as to Seggos' personal involvement . . . which is subject to discovery, and trial." *See* Plaintiffs' Memorandum in Opposition to State Defendant's Motion to Dismiss, at p. 24. However, Plaintiffs have alleged no facts whatsoever regarding Defendant Seggos's personal involvement, as required under these intentional discrimination statutes. *See Patterson v. County of Oneida*, 375 F.3d 206, 229 (2d. Cir. 2004).

Qualified Immunity

In response to State Defendants' Qualified Immunity argument to the allegations against State Defendants in their personal capacities, Plaintiffs appear to conflate 11th Amendment and Sovereign Immunity with Qualified Immunity, arguing that State Defendants have no immunity under *Ex Parte Young*. *See* Plaintiffs' Memorandum in Opposition to State Defendant's Motion to Dismiss, at p. 24-25.

Plaintiffs have not addressed the relevant inquiry under qualified immunity. An official is entitled to qualified immunity "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." *Crawford v. Cuomo*, 721 Fed. Appx. 57, 58 (2d Cir. 2018)(citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)). Plaintiffs have advanced a convoluted theory of aboriginal fishing rights for juvenile eels based upon colonial deeds and orders, mostly concerning dead whale carcasses washing up on shore. They cannot claim that this right was "clearly established" in order to overcome a qualified immunity defense.

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
August 23, 2018

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