UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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UNKECHAUG INDIAN NATION, CHIEF HARRY B. WALLACE, in his individual capacity as Chief and individually,

Plaintiffs,

- against -

Docket No.: 2:18-cv-01132 (WFK)(AYS)

BASIL SEGGOS, in his official capacity as the Commissioner of the New York State Department of Environmental Conservation, and the NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Date Served: Nov. 29, 2018

Defendants.
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DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' COMPLAINT

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Preliminary Statement

In this action, Plaintiffs the Unkechaug Indian Nation (the "Nation") and the Nation's Chief, Harry B. Wallace ("Chief Wallace," and together with the Nation, "Plaintiffs" or the "Unkechaug") seek a declaratory judgment and injunctive relief against the New York State Department of Environmental Conservation ("NYSDEC") and NYSDEC's Commissioner, Basil Seggos ("Seggos," and together with NYSDEC, "Defendants"), prohibiting them from enforcing any of the State's laws or regulations concerning fishing or clamming against the Unkechaug. This motion is made on behalf of Defendants, seeking an order dismissing Plaintiffs' Complaint in its entirety.

Relying heavily on an order issued by the British colonial governor of New York which predates the formation of the United States government by 100 years, the Unkechaug essentially contend that their fishing and clamming activities are totally immune from State oversight. Yet, rather than set out these arguments in a Complaint containing factual allegations supporting the need for clear and definite prospective relief, Plaintiffs have merely provided a laundry list of vague grievances and conclusory allegations about events in the past.

Briefly, the Complaint is subject to complete dismissal on at least two grounds: first, its failure to state a claim under FRCP 12(b)(6); and second, the Eleventh Amendment. Additionally, other portions of the Complaint are subject to dismissal on various justiciability grounds, including: 1. Mootness; 2. Ripeness; and 3. Lack of standing. These arguments are discussed in turn, below.[1]

[1] At present, Defendants have not elected to pursue all of the issues previously raised in their letter requesting permission for this Motion. Although Defendants believe that those arguments are meritorious, they will pursue these points at a later time in the case if necessary, and their absence from this Motion cannot and should not be construed as a waiver.

Factual and Procedural Background

I. The Unkechaug Indian Nation's Legal Status

As alleged in the Complaint, the Nation has existed "since time immemorial," on or near their lands in present-day Mastic, New York, and Wallace is the current duly elected Chief. See Complaint ¶¶ 2–3, 16. The Nation's reservation is approximately 50 acres in size, and lies "along the bank of the Poospatuck Creek on the southern coast of Long Island." Gristede's Foods, Inc. v. Unkechauge Nation, 660 F. Supp. 2d 442, 462 (E.D.N.Y. 2009) (Matsomoto, J.). Legally, the Nation is a recognized "Indian nation or tribe" by the State of New York pursuant to N.Y. Indian Law § 2, with N.Y. Indian Law §§ 150–153 addressing certain other aspects of the organization. The Nation is not, however, one of the 566 tribes formally recognized by the United States Department of the Interior's Bureau of Indian Affairs "acknowledged to have the immunities and privileges available to federally recognized Indian Tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations, and obligations of such Tribes." See List of Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 81 Fed. Reg. 5019–5025 (Jan. 29, 2016) (for the convenience of the Court, a copy of this publication is attached as Exhibit A to the Declaration accompanying this Memorandum (the "Morelli Dec.")).

II. Glass Eels and Their Controlling Federal/State Regulations

Next, although large portions of the Complaint bemoan NYSDEC's regulations concerning the catch and sale of glass eels, the Complaint provides no information about what glass eels are or what the regulations concerning them provide for. See generally Complaint. Glass eels are a transparent, juvenile life stage of the American eel (*Anguilla rostrata*), typically

between 2–4" long.[2] See Atlantic States Marine Fisheries Commission's Interstate Fisheries Management Plan for American Eel, pp. iv–v, xi (April 2000) (available at http://www.asmfc.org /uploads/file/amEelFMP.pdf) (hereinafter the "Eel Management Plan") (for the convenience of the Court, a copy of this publication is attached as Exhibit B to the Morelli Dec.). In New York, the catch of glass eels is essentially prohibited by 6 N.Y.C.R.R. §§ 10.1(a) & (b), and 40.1 (f) & (i), which require that any eels caught either for recreational or commercial purposes be over 9" long; much longer than a glass eel is.

Notwithstanding the generally applicable regulations prohibiting the harvest of American eels less than 9" long, it is apparent that these proscriptions do not apply to fishing activities that occur wholly on a tribal reservation located within the borders of the State. N.Y. Environmental Conservation Law § 11-0707(8) provides that enrolled members of a tribe and "such other Indians as are permitted by the tribal government . . . may hunt, fish, [and] trap upon such reservation subject only to the rules regulations and fish and wildlife laws established by the governing body of such reservation." In other words, the restrictions contained in 6 N.Y.C.R.R. §§ 10.1 and 40.1 do not apply within the geographic borders of a reservation such as that controlled by the Nation; and Defendants therefore do not enforce their hunting, fishing and trapping regulations on activities occurring entirely within the Nation's reservation in Mastic.

III. *The Allegations—and Lack Thereof—in the Complaint*

Plaintiffs seek declaratory relief concerning their ability to fish and clam free from NYSDEC regulation both on "reservation lands" and in the Nation's "customary fishing waters."

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[2] Mature American eels can grow to approximately 4' long, and although they live in fresh, brackish, and coastal waters along the eastern seaboard of the United States, they reproduce only in the Sargasso Sea. See ASMFC's Eel Management Plan at v. After spawning and hatching in the Sargasso, the larval eels hatch, drift through the ocean, metamorphose near the continental shelf, then enter the nearshore area and swim up rivers during the winter/spring in their glass eel life stage. Id. at xi.

See Complaint ¶ 1. Though the Complaint alleges that the Nation's reservation is "near current day Mastic New York," almost no information is provided about the Nation's "customary fishing waters," aside from a statement that they are in "Poospatuck Bay, off the reservation land." See id. ¶¶ 3, 32. While Plaintiffs contend that they have "always maintained the right to fish that included the harvesting of eels and sea crustaceans for the shells to make wampum," id. ¶ 3, the Complaint lacks sufficient factual allegations or historical detail actually supporting this point.

This is particularly notable concerning wampum, as although wampum is allegedly important in the Nation's religious and ceremonial practices, the Complaint fails to provide any specific details about the collection of the shells needed, or the creation, use, or disposal of wampum beyond a statement that shell remnants are ceremonially buried on reservation lands. See id. Nor does the Complaint detail—in any way—the religious practice(s) that Defendants' "attempt[s] to regulate the fishing of crustaceans" allegedly interfere with. See id. ¶¶ 47–53. Defendants' "attempt[s] to regulate the fishing of crustaceans" are also completely undescribed, and the Complaint does not even contain so much as a citation to any of the regulations—concerning either glass eels or crustaceans—challenged in this action. See generally Complaint.

Moreover, aside from a general and conclusory statement that commercial fishing is important to the Nation in order to "sustain customary tribal economic enterprises to support employment and profit," see id. ¶¶ 6, no allegations in the Complaint suggest that the Unkechaug are currently fishing, making plans to fish for glass eels or crustaceans, or being prevented from doing so, see generally Complaint. Instead, the factual allegations underlying the Complaint relate to events that occurred years in the past, highlighting the absence of allegations concerning the necessity for prospective injunctive relief resulting from this action.

These past events include a criminal summons issued in 2014, the confiscation of fish and fishing equipment in April 2016,[3] "threats of felony criminal prosecution," and previous statements by employees of NYSDEC that "its regulations are controlling concerning fishing in Indian Customary waters." See id. ¶¶ 4, 20–25, 27, 31. Yet, the majority of these allegations are wholly conclusory and provide almost no factual detail, merely asserting that "NYSDEC and Commissioner Seggos" performed the acts in question. See id. ¶¶ 21–24. Even if these conclusory allegations can be viewed as well-pled, when combined with the absence of any allegations concerning future plans for fishing or clamming that are being specifically impeded or prevented by Seggos himself—rather than by NYSDEC generally—they do not support any argument that prospective injunctive relief is necessary here.

Nevertheless, Plaintiffs assert four causes of action in the Complaint. The first contends that "[f]ederal regulations are controlling concerning fishing in Unkechaug Customary waters," and charges that Seggo has acted "beyond the scope of his authority and in violation of federal law." Id. ¶¶ 35, 39. The second is also largely based on federal preemption, and contends that the Nation "has the inherit [sic] authority to self-govern in all aspects of management and regulations concerning fishing on reservation lands and in customary Unkechaug fishing waters," charging that Defendants' attempts to regulate in this area has "violate[d] the Unkechaug inherit [sic] right of self-governing." Id. ¶¶ 42, 45. The third cause of action argues that Defendants' "attempt[s] to regulate the fishing of crustaceans . . . would interfere with the religious expression of the Nation," in violation of First Amendment to the U.S. Constitution. Id. ¶¶ 49,

[3] Notably, this confiscation of fish and fishing equipment spawned litigation in State Supreme Court (Unkechaug Indian Nation v. NYSDEC, Index No. 4254/2016 (N.Y. Sup. Ct., Queens County)), wherein the Nation sought the return of 15.5 kilograms of glass eels—worth approximately $100,000—that were confiscated by NYSDEC at John F. Kennedy Airport prior to the Nation's attempt to export them to Hong Kong.

53. Finally, the last cause of action asserts that Defendants' regulations violate an alleged treaty between the Nation and Edmund Andross, the British Colonial Governor of New York, entered into on May 24, 1676,[4] which is purportedly "valid and adopted by the New York and Federal Constitutions making this agreement the Supreme Law of the Land and enforceable against local and state regulations." Id. ¶ 56.

On this basis, Plaintiffs seek a declaration that they are immune from Defendants' regulations, an injunction prohibiting Defendants from enforcing these regulations against Plaintiffs, and an injunction prohibiting Defendants from bringing any criminal prosecution based on the confiscation of glass eels in April 2016.[5] For a variety of reasons discussed below, however, the Complaint is subject to dismissal in its entirety.

Argument

The standard for a Rule 12(b)(6) motion to dismiss is well-settled, and not subject to dispute:

> To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "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," but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. A complaint must be dismissed where, as a matter of law, "the allegations in [the] complaint, however true, could not raise a

[4] Plaintiffs do not provide a complete transcription of this document, however, and fail to actually attach it to the Complaint. Therefore, for the convenience of the Court, the relevant pages of the Andross Papers referred to in the Complaint at ¶ 2, n.4 are annexed to the Morelli Dec. as Exhibit C.

[5] Finally, although the Complaint contains a stray allegation concerning the Nation's inability to obtain flood insurance due to Defendants' refusal to include them in "environmental schemes and emergency planning," no relief is sought in this respect. See Complaint ¶ 33; "Wherefore." Therefore, this allegation will not be discussed further herein.

> claim of entitlement to relief." Twombly, 550 U.S. at 558. In considering a motion to dismiss, the Court must accept all of the non-movant's factual allegations as true and draw all reasonable inferences in the non-movant's favor. *Id.* at 555. However, the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 555) (internal quotation marks omitted).

Maspeth Fed. Sav. & Loan Assn. v. Fid. Info. Servs., LLC, 275 F. Supp. 3d 411, 415 (E.D.N.Y. 2017) (Kuntz, J.). Furthermore,

> In deciding a Rule 12(b)(6) motion, the court may consider, in addition to the factual allegations of the complaint, documents attached to the complaint as exhibits or incorporated in it by reference, matters of which the court may take judicial notice, and documents in the plaintiff's possession or of which she had knowledge and relied on in bringing suit. Roth v. CitiMortgage Inc., 756 F.3d 178, 180 (2d Cir. 2014) (citing Brass v. Am. Film Techs., Inc., 987 F.2d 142, 150 (2d Cir. 1993)).

Ru Jun Zhang v. Lynch, 16-CV-4889(WFK), 2018 US Dist. LEXIS 38583, at *11–12 (E.D.N.Y. Feb. 28, 2018) (Kuntz, J.) (for the convenience of the Court, all unreported cases are attached as Exhibit 1 to this Memorandum).

I. THE COMPLAINT FAILS TO STATE ANY FACIALLY PLAUSIBLE CLAIMS

Here, a cursory review of the Complaint demonstrates that it fails to allege sufficient factual detail to support any right to relief for the various causes of action contained therein. As mentioned above, although Plaintiffs take issue with NYSDEC's regulations concerning the harvest of glass eels and crustaceans, at no point does their Complaint actually discuss those regulations. See generally Complaint. The Complaint is so factually sparse in this respect that it does not even contain a single citation to any of the regulations—for glass eels or crustaceans—at issue; and its allegations support nothing more than the bare inference that these entirely undescribed regulations exist. Similarly, although the Complaint vaguely asserts that "Federal regulations are controlling concerning fishing in Unkechaug Customary waters as stated publicly

and in newspaper articles dated February 1, 2018," it fails to actually cite these allegedly controlling regulations, or describe how they preempt, supersede, or conflict with State regulations.[6] See Complaint ¶ 35.

It is also impossible to ascertain the scope of the geographical area potentially subject to any order from the Court, as there are no factual details concerning the location of the "Unkechaug Customary waters" for the Nation's glass eel fishery described in the Complaint. See generally Complaint. Nor are there any factual allegations about whether Plaintiffs actually fish on the reservation itself. Id. Then, although Plaintiffs charge that they have "promulgated rules and regulations concerning fishing in [their] customary waters" which promote a "successful environmental conservation method of fishing," no factual detail is provided to support these conclusory allegations either. See Complaint ¶¶ 26, 30.

The lack of factual details in the Complaint is most striking, however, with respect to any cause of action for interference with religious expression, and entirely precludes Defendants from ascertaining anything about this claim. Initially, the Complaint lacks any allegations that Wallace—or any other members of the Nation—are actually adherents of this religion, making it questionable if they even have standing to bring this challenge in the first place. See generally Complaint. Yet, even assuming *arguendo* that Plaintiffs have standing, the Complaint fails to describe—in any way whatsoever—the religious activities in question. Id. Nor is any detail provided about Defendants "attempt[s] to regulate the fishing of crustaceans," see Complaint ¶ 49, such as whether these are proposed regulations or regulations currently valid and in effect. Instead, Defendants are forced to speculate not only about which regulations Plaintiffs complain

[6] To the extent Plaintiffs cite 25 U.S.C. § 232, this is a statute—not a regulation—which does not create affirmative rights, and has absolutely nothing to do with (1) activities occurring outside Indian reservations; (2) the Unkechaug; (3) glass eels or wampum; or (4) fishing in "Unkechaug Customary waters."

of, but also about how these regulations impede or interfere with Plaintiffs' equally undescribed religious activities.

While Plaintiffs may be able to ultimately state facially plausible claims to relief, the instant Complaint falls far short of providing the factual detail required by Iqbal and Twombly to survive a F.R.C.P. 12(b)(6) challenge. As a result, the Complaint should be dismissed in its entirety. See e.g., Fisher v. JPMorgan Chase Bank, N.A., No. 18-810-cv, 2018 U.S. App. LEXIS 30456, at *3 (2d Cir. Oct. 29, 2018) (affirming dismissal of complaint where plaintiff "did not allege the facts that would have been necessary" to state claims to relief); Hirsch v. City of N.Y., No. 18-0405-cv, 2018 U.S. App. LEXIS 28096, at *3 (2d Cir. Oct. 4, 2018) (same); Harris ex rel. Harris v. BNC Mortg., Inc., 737 F. App'x 573, 577 (2d Cir. 2018) (same).

II. PLAINTIFFS' ACTION IS BARRED BY THE ELEVENTH AMENDMENT

As this Court has previously recognized, the Eleventh Amendment provides a state with immunity "from suits in federal court brought by its own citizens and such immunity extends to officers acting on behalf of the State. This immunity extends to state agencies as well." Soloviev v. Goldstein, 104 F. Supp. 3d 232, 243 (E.D.N.Y. 2015) (Kuntz, J.) (internal citation and quotation marks omitted). Moreover, the Eleventh Amendment applies to suits brought by native American tribes. See Seminole Tribe v. Florida, 517 U.S. 44, 55 (1996).

Although there are exceptions to this rule, see generally id., only that provided by the Ex Parte Young doctrine could be applicable here. "[U]nder the Ex parte Young doctrine, the Eleventh Amendment does not bar a suit against a state official when that suit seeks . . . prospective injunctive relief." Id. (internal quotation marks omitted). This doctrine, however, does not permit declarations that state officials "violated federal law in the past." See P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993).

Here, the Eleventh Amendment bars Plaintiffs' claim in its entirety, and Ex Parte Young is not applicable. Cf. Timpanogos Tribe v. Conway, 286 F.3d 1195, 1205 (10th Cir. 2002) (observing that the Eleventh Amendment applies to bar suits brought by tribes against a state, unless the relief sought fits within Ex Parte Young doctrine).

A. The Eleventh Amendment Prohibits Suit Against NYSDEC.

First, it is clear—even to the extent beyond that alleged in the Complaint at ¶ 18—that NYSDEC is a State agency. As a result, all claims against NYSDEC in the Complaint must be dismissed. See e.g., Soloviev, 104 F. Supp. 3d at 244 (dismissing claims brought against the City University of New York—an "arm of the State"—on the basis of the Eleventh Amendment); Deadwiley v. N.Y. State Off. of Children & Family Servs., 97 F. Supp. 3d 110 (E.D.N.Y. 2015) (Kuntz, J.) (dismissing claims against State agency pursuant to Eleventh Amendment).

B. Plaintiffs Have Not Satisfied the Ex Parte Young Exception for a Suit Against Seggos.

Next, to the extent the Complaint seeks relief against Seggos, it fails to allege any facts supporting the necessity for prospective injunctive relief as permitted by Ex Parte Young. "In determining whether *Ex Parte Young* applies, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." Caruso v. Zugibe, 646 F. App'x 101, 105 (2d Cir. 2016) (internal quotation marks omitted). "In seeking prospective relief like an injunction, a plaintiff must show that he can reasonably expect to encounter the same injury again in the future—otherwise there is no remedial benefit that he can derive from such judicial decree." Riley v. Cuomo, No. 2:17-cv-01631 (ADS)(AYS), 2018 U.S. Dist. LEXIS 64535, at *12–13 (E.D.N.Y. Apr. 16, 2018) (Spatt, J.) (internal quotation marks omitted).

Here, the Complaint contains no factual allegations showing that Plaintiffs can "reasonably expect to encounter" enforcement of NYSDEC's regulations in the future, as there are no factual allegations demonstrating that Plaintiffs are actively planning to fish for glass eels and/or harvest crustaceans. See generally Complaint. Obviously, if Plaintiffs do not intend to do these things, there is no reasonable expectation that they will encounter enforcement of NYSDEC's regulations, and no resulting need for any prospective injunctive relief.[7] To the extent the Complaint could be read to seek prospective relief, such a reading could only be based on the mere existence of the Environmental Conservation Law itself. See id. ¶ 51 ("The state, through its Environmental Laws, has threatened . . ."); ¶ 53 ("The State criminal restrictions under the Environmental Laws that threaten . . ."). There are no allegations whatsoever contending that Seggos has specifically threatened to prosecute Plaintiffs arising from the April 6, 2016 seizure of eels.[8] Nor are there any allegations supporting an inference that Seggos—or any other NYSDEC employee—specifically threatened to prosecute Plaintiffs for their undescribed and unalleged plans to fish or clam in the future. See generally Complaint. Rather, the majority of the allegations in the Complaint relate to events that occurred between Plaintiffs and NYSDEC/NYSDEC employees in the past, see id. ¶¶ 4, 20–25, 31. This, however, runs afoul of Ex Parte Young, and requires a finding that the Eleventh Amendment applies. See P.R. Aqueduct & Sewer Auth., 506 U.S. at 146 (holding that the Ex Parte Young doctrine does not permit declarations that officials violated federal law in the past).

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[7] Frankly, the absence of these allegations could even support a finding that Plaintiffs lack the requisite injury-in-fact to establish standing. See Browne v. Hynes, 720 F. App'x 92, 93 (2d Cir. 2018) (affirming dismissal of complaint where plaintiff "offers little more than speculation that he will suffer some future injury").

[8] Instead, the Complaint alleges that Assistant Attorney General Hugh Lambert McLean—who is not named as a defendant here—made this threat. See Complaint ¶ 25.

Even if Plaintiffs had been specifically threatened with prosecution for their future activities, the mere fact that Seggos is the Commissioner of NYSDEC is insufficient to demonstrate that he "ha[d] a 'direct connection to, or responsibility for, the alleged illegal action'" so as to make him amenable to under Ex Parte Young. Brisco v. Rice, 2012 U.S. Dist. LEXIS 10001, at *14 (E.D.N.Y. Jan 27, 2012) (Bianco, J.) (quoting Marshall v. Switzer, 900 F. Supp. 604, 615 (N.D.N.Y. 1995)). As the Supreme Court explained in Ex Parte Young:

> In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act . . . it is plain that such officer must have some [specific] connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party.

209 U.S. 123, 157 (1908). Therefore, in situations where a complaint lacks specific allegations connecting an official to the allegedly illegal activities, the Ex Parte Young exception does not apply, and the claims are barred by the Eleventh Amendment. See e.g. McCluskey v. Imhof, 17-CV-5873(JFB)(ARL), 2018 U.S. Dist. LEXIS 161998, at *5 (E.D.N.Y. Sept. 21, 2018) (Bianco, J.) (dismissing complaint against Commissioner of NYSOTDA because it failed to allege Commissioner's responsibility for, or connection to, events challenged in the suit). As a result, the Complaint must be dismissed against Seggos, as there are no factual allegations connecting him to the actions challenged therein.

Ultimately, the Complaint lacks sufficient factual detail to state any facially plausible need for prospective injunctive relief; regardless of whether that relief is sought—albeit wholly improperly—against NYSDEC, or against Seggos as the Commissioner of NYSDEC. Instead, it is rife with threadbare and conclusory allegations in violation of the Iqbal and Twombly standards, bemoans events occurring wholly in the past, and does not support any conclusion that Seggos was personally responsible for or connected to the incidents or threats at issue. As a

result, the Eleventh Amendment bars all claims against NYSDEC as well as any claims against Seggos, regardless of their nature, and the Complaint must be dismissed in its entirety.

III. CERTAIN ASPECTS OF THE COMPLAINT ARE NOT JUSTICIABLE

Defendants also observe that certain aspects of Plaintiffs' claims are not justiciable; specifically due to the dearth of factual allegations in this inadequately pled Complaint.

A. Any Challenges to Plaintiffs' On-Reservation Fishing or Clamming are Moot.

First, to the extent the Complaint challenges Defendants' regulation of fishing or clamming that occurs entirely within the boundaries of the Nation's reservation, see Complaint ¶¶ 1, 4, 38, 41–43, 45, these issues are moot. This is because N.Y. Envtl. Conserv. Law § 11-0707(8) specifically provides that Indians with a reservation located within the State of New York "may hunt, fish, [and] trap upon such reservation subject only to rules, regulations and fish and wildlife laws established by the governing body of such reservation," and "[t]his subdivision shall in no way limit or otherwise impair the existing powers of any tribal government to regulate hunting, fishing and trapping and/or to issue licenses for same."

Defendants, therefore, cannot—and indeed, do not—enforce their hunting, fishing, and trapping laws and regulations on activities occurring wholly within the geographical borders of a reservation like that owned by the Nation; making this aspect of the Complaint moot, as Plaintiffs have no cognizable injury requiring judicial relief. See e.g., United States v. Mercurris, 192 F.3d 290, 293 (2d Cir. 1999) ("[A] party must . . . have an actual injury which is likely to be redressed by a favorable judicial decision."); Martin-Trigona v. Shiff, 702 F.2d 380, 386 (2d Cir. 1983) ("The hallmark of a moot case or controversy is that the relief sought can no longer be given or is no longer needed."). To the extent Plaintiffs disagree, the Complaint completely lacks allegations supporting any contentions to the contrary.

B. Plaintiffs' Interference with Religious Expression Claim is Not Ripe.

Next, the lack of factual details in the Complaint makes it entirely unclear whether Plaintiffs interference with religious expression claim is ripe. To illustrate, the Complaint charges that Defendants have "attempted to regulate the fishing of crustaceans . . . that would interfere" with Plaintiffs' religious expression. See Complaint ¶ 49 (emphasis added). It is not apparent, however, whether Plaintiffs contend that Defendants are seeking to impose *additional* regulations on the harvest of crustaceans, or if Plaintiffs are complaining of the already existing—yet completely undescribed—regulations governing crustaceans.

To the extent the Complaint takes issue with the former, it is not ripe, and this cause of action must be dismissed. See Nat'l Org. for Marriage, Inc. v. Walsh, 714 F.3d 682, 687 (2d Cir. 2013) ("A claim is not ripe if it depends upon contingent future events that may not occur as anticipated, or indeed may not occur at all." (internal quotation marks omitted)). To the extent Plaintiffs are challenging the latter, the allegation lacks sufficient facts to state a plausible claim. This uncertainty is just further evidence of the vague, threadbare, and conclusory nature of the allegations in the Complaint.

C. Plaintiffs Lack Standing for their Interference with Religious Expression Claim.

Finally, the lack of any allegations describing the Unkechaug's religious practices or identifying Wallace—or any of the Nation's constituent members—as adherents of the Unkechaug faith require a finding that Plaintiffs do not have standing to pursue this claim. Demonstrating standing is Plaintiffs' burden, and requires allegations showing "such a personal stake in the outcome of the controversy as to warrant [the] invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on [plaintiff's] behalf." Knife Rights, Inc. v. Vance, 802 F.3d 377, 383 (2d Cir. 2015) (internal quotation marks omitted).

Here, the Nation itself cannot have standing to pursue this cause of action, because it—by its very nature as a non-sentient entity—cannot have religious beliefs. In other words, the Nation has no injury-in-fact because it cannot be an adherent of the Unkechaug faith.[9] In contrast, Wallace is an individual, and therefore can have his own religious beliefs. Yet, the Complaint fails to actually allege that he is an adherent of the Unkechaug faith; so it cannot be said that he has standing for this cause of action either. As a result, this cause of action must be dismissed in its entirety, as neither Plaintiff has alleged sufficient facts to demonstrate their standing to assert it. See Schwartz v. HSBC Bank USA, N.A., Nos. 17-2212-cv, 17-2309-cv, 2018 U.S. App. LEXIS 26145, at *5 (2d Cir. Sept. 13, 2018) (holding that a plaintiff "must plead those circumstances affirmatively and plausibly" to meet their burden of establishing standing); Hariprasad v. New York, 722 F. App'x 102, 103 (2d Cir. 2018) (affirming dismissal of complaint for lack of standing where plaintiff did not allege that he, specifically, was harmed by the challenged practices).

Conclusion

Even a cursory review of the Complaint demonstrates that Plaintiffs have entirely failed to meet the pleading standards required under the Federal Rules of Civil Procedure. These failures so permeate this action that it cannot even be said Plaintiffs require prospective injunctive relief so as to escape the consequences of the Eleventh Amendment, or that they have properly invoked the Article III justiciability requirements on this Court's jurisdiction. Therefore, for the reasons set forth above, it is respectfully requested that the Court dismiss the Complaint in its entirety, against all Defendants.

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[9] To the extent Plaintiffs could be trying to assert some kind of organizational standing on behalf of the Nation, the Complaint also lacks the necessary factual allegations to establish that the Nation's members are of the Unkechaug faith, and this argument cannot salvage this aspect of the Complaint.

Dated: Hauppauge, New York
November 29, 2018

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By: 

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STATE OF NEW YORK)
) SS.:
COUNTY OF SUFFOLK)

HELEN ORLOWSKI, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and is employed in the office of BARBARA D. UNDERWOOD, Attorney General of the State of New York, attorney for defendant. On November 29, 2018, she served a copy of the enclosed Defendants' Memorandum of Law in Support of Their Motion to Dismiss Plaintiffs' Complaint upon the following named person:

Law Offices of James F. Simermeyer, P.C.
3040 88th Street
East Elmhurst, New York 11369

the addresses designated by said persons for that purpose by UPS Overnight Mail.

HELEN ORLOWSKI

Sworn to before me this
29th day of November, 2018

ROBERT MORELLI
Assistant Attorney General