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 -

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,

Defendants.

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

Date Served: Feb. 28, 2019

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

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Preliminary Statement

Despite being presented with a concise and pointed motion to dismiss, framed largely in the context of Rule 12(b)(6), Plaintiffs' Memorandum of Law in Opposition dated January 22, 2019 (hereinafter "Plaintiff's Mem."), fails to actually discuss or controvert a number of issues raised by Defendants.[1] Instead, Plaintiffs choose to dispute—at great length—certain arguments not actually advanced, which have no impact on the resolution of this motion. To the extent Plaintiffs actually oppose Defendants' points, however, their arguments are unavailing, and this Complaint should be dismissed.

Argument

In an effort to clarify the issues for the Court, Defendants will begin by identifying those arguments made by Plaintiffs which are inapplicable to the issues presented in this Motion, and those which Plaintiffs have failed to address from the Defendants' Mem. Then, as Plaintiffs have chosen not to respond to Defendants' arguments in the same manner as they were raised in the Defendants' Mem., Defendants will address Plaintiffs' disjointed opposition in the order that Defendant's arguments were initially made.

I. PLAINTIFFS ADVANCE IRRELEVANT ARGUMENTS

As mentioned above, Plaintiffs have chosen to devote a substantial amount of effort in their briefing to opposing arguments that the Defendants did not actually advance. For example, pages 3–5 of Plaintiff's Mem. address Defendants' brief background characterization of the Unkechaug's tribal status. Yet, despite Plaintiffs' contentions, Defendants never argued that "plaintiffs do not have standing due to not being listed by the Bureau of Indian Affairs," id. at p.5, so these arguments are of no moment. Similarly, at pages 5–8 of their papers, Plaintiffs

[1] For the convenience of the Court, all defined terms used herein shall have the same meaning as ascribed in the Defendants' earlier Memorandum of Law dated November 29, 2019 (hereinafter "Defendants' Mem.").

discuss the enforceability of what they term the "Andross Treaty." Again, however, Defendants did not challenge the enforceability of this document in the instant motion, and these arguments are also of no moment.[2] Nor did Defendants make any broad, facial challenge to the Complaint on the basis of standing, as Plaintiffs seem to believe. Instead, Defendants asserted that Plaintiffs lacked standing solely with respect to their interference with religious expression claim. Therefore, these arguments have no bearing on the instant motion either, and will not be discussed further herein.

II. PLAINTIFFS ENTIRELY FAIL TO ADDRESS CERTAIN ARGUMENTS

Next, Plaintiffs have entirely failed to address certain arguments that the Defendants did make. To illustrate, Defendants argued that the Complaint must be dismissed in its entirety against NYSDEC under the Eleventh Amendment, and Plaintiffs' Mem. does not controvert or dispute this point at all. See Defendants' Mem. at p.10. Similarly, Plaintiffs' Mem. completely fails to discuss Defendants' argument that any relief with respect to the Unkechaug's on-reservation fishing or clamming is moot in light of Environmental Conservation Law § 11-0707(8). See id. at p.13.

As Plaintiffs have failed to discuss or dispute these arguments, they must be deemed conceded. See Jacob v. Kimberly-Clark Corp., 05-CV-1739 (ILG), 2006 U.S. Dist. LEXIS 36345, at *13 (E.D.N.Y. June 5, 2006) (Glasser, J.) ("Plaintiff fails to reply to defendant's

[2] That being said, in the event that the Complaint is not dismissed, Defendants **do** intend to challenge Plaintiffs' characterization of this document as a valid and enforceable "treaty," and they will also more comprehensively address what effect—if any—that this document has on the dispute before the Court. Plaintiffs are also incorrect in arguing that they have an unrestricted right to fish as a result of this purported treaty; particularly because it explicitly limits their right to fish "according to law and Custome of the Government," language which Plaintiffs' Mem. and the Complaint conveniently omit. See Morelli Dec. Ex. C. Finally, Plaintiffs are plainly incorrect inasmuch as they assert that treaties cannot be addressed in the context of a Rule 12(b)(6) motion. See Menominee Indian Tribe of Wisconsin v. Thompson, 922 F. Supp. 184, 197 (W.D. Wisc. 1996) (addressing the language of a treaty in a motion to dismiss, and dismissing certain treaty-based causes of action that were unsupported by the treaty's language).

arguments [on 12(b) motion] against several causes of action which are therefore deemed abandoned. . . . These claims are therefore dismissed.") (for the convenience of the Court, all unreported cases are attached as Exhibit 1 to this Memorandum). Therefore, the Complaint is subject to dismissal in its entirety against NYSDEC pursuant to the Eleventh Amendment, and all aspects of the Complaint seeking relief with respect to Plaintiffs' on-reservation fishing or clamming activities must be dismissed as moot.

III. THE COMPLAINT FAILS TO STATE ANY FACIALLY PLAUSIBLE CLAIMS, AND PLAINTIFFS HAVE NOT PROVIDED ANY ADDITIONAL FACTUAL ALLEGATIONS

Despite Defendants clearly couching their arguments in terms of Rule 12(b)(6) and specifically identifying how the Complaint was devoid of necessary and important factual allegations underlying the various causes of action, Plaintiffs have entirely failed to address these issues. Instead, Plaintiffs devote a large portion of their papers to arguing that they have satisfied the requirements of Article III, even though they literally acknowledge that Defendants have not "directly challenge[d] Plaintiffs' Article III standing." See Plaintiffs' Mem. at p.8–16. As this Court is aware, however, Article III standing is entirely separate and distinct from the issues presented by a Rule 12(b)(6) motion; and even though they may have Article III standing, Plaintiffs have not shown that they have any facially plausible causes of action.

As previously observed in the Defendants' Mem., the Complaint contains very little in the way of explicit factual allegations underlying its various causes of action. Plaintiffs' Mem. is no different, and provides no additional factual detail to bolster the insufficient allegations in the Complaint. To illustrate, Plaintiffs still fail to describe or cite to either the complained-of state regulations governing the harvest of glass eels or crustaceans, the allegedly preempting and

controlling federal regulations,[3] or the Unkechaug's own—allegedly more environmentally conscious—regulations. Nor do the Unkechaug identify or describe their "Customary waters" such that Defendants or the Court can ascertain the scope of the geographical area that Plaintiffs claim usufructury rights to.

Then, despite somehow asserting that that Defendants have "ridicule[d]" their religious practices, Plaintiffs have again failed to address Defendants' actual arguments; as they have not provided any additional factual detail about these religious practices or how they are purportedly being interfered with. Though Chief Wallace has submitted a declaration of his own in opposition to this Motion, it also fails to affirmatively describe the religious and spiritual practices at issue—let alone how they specifically require or involve the harvest of glass eels or collection/disposal of shells for wampum—or how they are being interfered with by Defendants. See Simermeyer Dec. Ex. 1. As a result, this cause of action must be dismissed in its entirety. See Smith v. Wilson, No. 9:12-CV-1152 (MAD/RFT), 2013 US Dist. LEXIS 141227, at *28 (N.D.N.Y. Sept. 11, 2013) ("Plaintiff neither identifies what religious practice was allegedly impeded nor how [defendant] interfered with his right to freely exercise his religion. Thus, as Defendants have argued, standing alone, such a bald-faced allegation is insufficient as a matter

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[3] Again, 25 U.S.C. § 232 cannot possibly serve as the predicate for Plaintiffs' claim of preemption by federal regulation, see Compl. ¶¶ 35, 38, as it is not a regulation. Additionally, there is no language in this statute that implicitly or explicitly deprives the State of the ability to regulate the harvest of certain natural resources like glass eels in State waters—one of the cornerstones of a preemption analysis—and by its own terms, this statute only applies to offenses "on Indian reservations." More importantly, however, § 232 has already been recognized by the Second Circuit to allow for concurrent authority by both the State of New York and the federal government. See U.S. v. Cook, 922 F.2d 1026, 1033 (2d Cir. 1991) ("The plain language of the statute leads us to conclude that section 232 extended concurrent jurisdiction to the State of New York."). Therefore, Plaintiffs cannot point to this statute in an effort to salvage their facially deficient preemption cause of action, and it must be dismissed. N.Y. State Dept. of Social Servs. v. Dublino, 413 U.S 405, 421 (1973) ("Where coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one.").

of law to establish a free exercise violation.") adopted by 2013 U.S. Dist. LEXIS 142007 (N.D.N.Y. Sept. 30, 2013); Torres v. City of NY, 154 F. Supp. 2d 814, 818 (S.D.N.Y. 2001) ("From the complaint, it is difficult to garner precisely how [plaintiff's] right to the free exercise of religion was substantially burdened. . . . Accordingly, [plaintiff]'s First Amendment claims are dismissed.").

When seen in the context of the other arguments contained in the Defendants' Mem., the absence of these factual details precludes Defendants from ascertaining what is actually being challenged and litigated in this action. Unfortunately for Plaintiffs, even a liberal interpretation of the Complaint cannot stave off dismissal, as there is simply not enough factual information about the various causes of action provided to begin with.

IV. THE COMPLAINT REMAINS BARRED BY THE ELEVENTH AMENDMENT

In opposition to Defendants' arguments concerning the Eleventh Amendment, Plaintiffs focus exclusively on events predating the filing of this Complaint, and provide no additional factual information showing that they require any prospective injunctive relief. Defendants observe, however, that Wallace's Declaration states that the "Nation continues to fish in violation of the NYSDEC laws and shall continue to exercise our rights to fish despite the NYSDEC laws and criminal prosecution." See Simermeyer Dec. Ex. 1 ¶ 6. Notwithstanding that this critical allegation is entirely absent from the Complaint, even if it was included therein, it still would not forestall the dismissal of this action under the Eleventh Amendment.

A. Plaintiffs Have Not Adequately Shown Seggos' Personal Involvement

This is because Plaintiffs must show more than a need for prospective relief; and they must also demonstrate Seggos' direct connection to the allegedly illegal actions at issue. See Defendants' Mem. at p.12 (citing Brisco and McCluskey). Here, Plaintiffs have again failed to meet this burden, as all of the allegations in the Complaint and additional information in their

opposition concern individuals other than Seggos. To illustrate, persons other than Seggos actually confiscated the eels at JFK airport, NYSDEC's general counsel Thomas Berkman—not Seggos—allegedly "challenge[d] the treaty-based rights" of the Plaintiffs in various correspondence, and Hugh Lambert McLean of the Attorney General's office—again, not Seggos—is the one who allegedly threatened the Unkechaug with prosecution. See Plaintiffs' Mem. at p.19.

Though Plaintiffs cursorily assert that Seggos directed these other individuals to take these actions, the Complaint and Plaintiffs Mem. is devoid of any factual allegations that actually support this assertion.[4] Instead, these are the kind of threadbare, conclusory allegations that are not sufficient to state a claim.

B. Plaintiffs' Remaining Arguments Do Not Defeat Eleventh Amendment Immunity

Next, although Defendants did not make any arguments concerning Coeur d'Alene's limitation on Ex Parte Young, a very recent Report and Recommendation from Judge Steven Locke of the Eastern District of New York in a similar case brought by members of the Shinnecock Indian Nation concerning their purported rights to fish for glass eels demonstrates that Coeur d'Alene does apply to bar the instant suit. See Silva v. Farrish, Case 2:18-cv-03648-SJF-SIL, 2019 U.S. Dist. LEXIS 3531 (E.D.N.Y. Jan. 7, 2019). There, certain members of the Shinnecock tribe from eastern Long Island also sought a declaration that they were entitled to fish for glass eels without regard to NYSDEC's regulations based on certain ancient tribal rights, similar to the relief Plaintiffs seek here. Magistrate Locke, however, addressing arguments

[4] This conclusion does not change even assuming *arguendo* that Plaintiffs can demonstrate Seggos' personal involvement through materials obtained in Defendants' document productions; as those materials and the specific underlying facts are neither incorporated into or referenced in the Complaint, nor referenced in Plaintiffs' Mem. These materials, therefore, have no impact on the instant motion, which argued that the Complaint fails to adequately allege Seggos' personal involvement in the events described therein.

similar to those raised in the Plaintiffs' Mem. at p.20–22, found that the right the plaintiffs sought was essentially equivalent to a quiet title action against the State, and held that the Ex Parte Young exception did not apply to the plaintiffs' claims against Seggos. Id. at *31–37. The same result should occur here, and this Court should find that the Eleventh Amendment operates to bar this suit in its entirety.

Finally, no reasonable argument can be made that Defendants have somehow waived their Eleventh Amendment immunity. "[A] waiver of immunity is voluntary, made either by invoking federal jurisdiction or by a clear declaration, [and] a 'stringent' test is used to determine whether waiver has occurred." McGinty v. New York, 251 F.3d 84, 92–93 (2d Cir. 2001). Here, Defendants have not invoked federal jurisdiction, because they did not commence this suit themselves or otherwise remove it to federal court. See Lapides v. Bd. of Regents, 535 U.S. 613, 620 (2002). Nor was there any "clear declaration" of a waiver; particularly as Plaintiffs explicitly note that there was no express waiver made by the Defendants. See Plaintiffs' Mem. at p.23 ("By coercion and threat of arrest, Defendants attempted to circumvent making an express waiver of sovereign rights under the Eleventh Amendment."). It cannot be said, therefore, that Defendants have waived Eleventh Amendment immunity in a clear declaration so as to satisfy this "stringent" test, and this Complaint must still be dismissed based on the Eleventh Amendment. See McGinty, 251 F.3d at 94 (rejecting arguments of an "implicit" waiver of Eleventh Amendment immunity).

V. PLAINTIFFS' INTERFERENCE WITH RELIGIOUS EXPRESSION CLAIM IS STILL NOT JUSTICIABLE

Though Plaintiffs imply that all members of the Nation are automatically adherents of the Unkechaug faith, as they are "born into their religion and are members for life," this allegation is entirely absent from the Complaint. See Plaintiffs' Mem. at p.24. Yet, even assuming *arguendo*

that Plaintiffs have standing to pursue this cause of action, they have still failed to provide any information demonstrating that this claim is ripe; and this still requires its dismissal from the Complaint. Much like the complete absence of factual allegations concerning the actual religious practices being interfered with, Plaintiffs have again failed to describe the nature of Defendants' purported interference with their religious beliefs. As Defendants have already argued, regardless of whether Plaintiffs challenge proposed additional regulations or currently-existing and completely undescribed regulations, this cause of action is still deficient, and must be dismissed. See Defendants' Mem. at p.14; supra p.4–5.

VI. LEAVE TO AMEND THE COMPLAINT SHOULD BE DENIED

Here, leave to amend the Complaint should be denied; as Plaintiffs were informed of their pleading deficiencies not only in Defendants' pre-motion letter, but also in the Defendants' Mem. In these papers, Defendants set out very specific, concise arguments as to what factual allegations were lacking in the Complaint, and Plaintiffs entirely disregarded Defendants' points. Furthermore, this Court provided Plaintiffs with a February 19, 2019 deadline to make any amendments they desired to the Complaint; and yet they still made a deliberate and conscious decision to take no efforts towards ameliorating these defects.

More importantly, however, Plaintiffs did not submit any factual information that demonstrates how better pleading would cure the myriad number of defects underlying their Complaint. Again, they provided absolutely no evidence directly connecting Seggos to any of the challenged actions so as to overcome the Eleventh Amendment, no details about their religious activities or the nature of Defendants' interference with those activities, and no information about the allegedly preempting and controlling federal regulations that trump those equally-undescribed State regulations concerning eels and crustaceans. The failure to include any materials about these key aspects of Plaintiffs' various causes of action—especially after

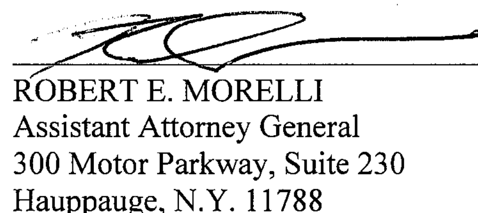
these failings were specifically and repeatedly described by the Defendants—is telling, and this Court should not allow Plaintiffs an attempt to replead when they have not actually demonstrated that they are capable of curing the defects underlying this Complaint.[5] See TechnoMarine SA v. Giftports, Inc., 758 F.3d 493, 505 (2d Cir. 2014) ("A plaintiff need not be given leave to amend if it fails to specify . . . how amendment would cure the pleading deficiencies in its complaint.").

Conclusion

In choosing not to address Defendants' arguments, Plaintiffs have created a situation where multiple aspects of this Motion are essentially uncontested. Plaintiffs compounded this error in failing to provide any of the factual detail necessary to allow for a finding that they have facially plausible causes of action. As Defendants have argued, Plaintiffs have neither met the pleading standards under Rule 12(b)(6) nor adequately invoked the Ex Parte Young exception to Defendants Eleventh Amendment immunity from suit. As a result, for the reasons set forth above and in the Defendants' Mem., the Complaint should be dismissed in its entirety, against all Defendants, without leave to replead.

Dated: Hauppauge, New York
February 28, 2018

LETITIA JAMES
Attorney General of the State of New York
Attorney for Defendants

By: 

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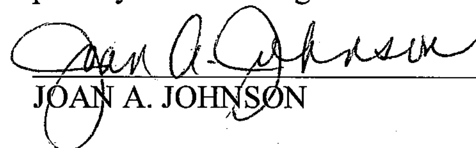
[5] Though it is beyond the scope of the instant Motion, Defendants also note that Plaintiffs have been equally unwilling—or unable—to provide any of this critical information underlying their various causes of action in their responses to Defendants' first set of interrogatories as well.

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

JOAN A. JOHNSON, 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 LETITIA JAMES, Attorney General of the State of New York, attorney for defendant. On February 28, 2019, she served a copy of the enclosed Defendant's Reply Memorandum of Law in Further Support of Their Motion to Dismiss Plaintiff's Complaint upon the following named person(s):

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.



JOAN A. JOHNSON

Sworn to before me this
28th day of February, 2019

ROBERT MORELLI
Assistant Attorney General