SHORT FORM ORDER **INDEX NO.: 610010/2019**

SUPREME COURT - STATE OF NEW YORK

PART 6- SUFFOLK COUNTY

PRESENT:
Hon. Sanford Neil Berland, A.J.S.C.

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COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF TRANSPORTATION and THE STATE OF NEW YORK,

Plaintiffs,

- against -

BRYAN A. POLITE, LAUNCELOT A. GUMBS, SENECA BOWEN, DANIEL COLLINS SR., GERMAIN SMITH, DONALD WILLIAMS JR., LINDA FRANKLIN, OUTDOOR, INC./IDON MEDIA, LARRY CLARK, DIGITAL OUTDOOR ADVERTISING, LLC, and IDON MEDIA LLC,

Defendants.

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MOT. SEQ. # 002 MD
SUBMISSION DATE: JULY 9, 2019
MOT. SEQ. # 003 RTC
SUBMISSION DATE: JULY 9, 2019
MOT. SEQ. # 004 MD
SUBMISSION DATE: JULY 9, 2019
MOT. SEQ. # 006 MD
SUBMISSION DATE: JULY 9, 2019

PLTFS' ATTORNEY:
NEW YORK STATE DEPARTMENT OF LAW
300 MOTOR PARKWAY, STE 230
HAUPPAUGE, NY 11788

DEFTS' ATTORNEY:
BYRNES, O'HERN & HEUGLE LLC
Attorneys for defendants Larry Clark, Outdoor, Inc., Idon Media, Digital Outdoors Advertising, LLC, and Idon Media LLC
28 LEROY PLACE
REDBANK, NJ 07701

Upon reading and filing of the following papers in this matter: (1) Order to Show Cause by plaintiffs (mot. seq. #006), signed May 24, 2019, by the Hon. Cheryl A. Joseph, and supporting papers; (2) Affirmation in Opposition to Order to Show Cause by defendants Larry Clark, Outdoor, Inc., Idon Media, Digital Outdoor Advertising, LLC, and Idon Media LLC. (mot. seq. #006), filed June 6, 2019, and supporting papers; (3) Reply Affirmation in Support of Order to Show Cause by plaintiffs (mot. seq. #006), filed June 12, 2019, and supporting papers; (4) Notice of Motion by defendants Bryan A. Polite, Launcelot A. Gumbs, Seneca Bowen, Daniel Collins Sr., Germain Smith, Donald Williams Jr., and Linda Franklin ("the Tribal Trustee Defendants") (mot. seq. #002), filed June 10, 2019, and supporting papers; (5) Notice of Motion by plaintiffs (mot. seq. #003), filed June 10, 2019, and supporting papers; (6) Notice of Motion by defendants Larry Clark, Outdoor, Inc., Idon Media, Digital Outdoor Advertising, LLC, and Idon Media LLC. (mot. seq. #004), filed June 10, 2019, and supporting papers; (7) Affirmation in Opposition by plaintiffs (mot. seq. #002 and #004), filed June 21, 2019, and supporting papers; (8)

Reply Affirmation by Tribal Trustee Defendants (mot. seq. #002), filed June 25, 2019, and supporting papers; (9) Reply Affirmation by defendants Larry Clark, Outdoor, Inc., Idon Media, Digital Outdoor Advertising, LLC, and Idon Media LLC. (mot. seq. #004), filed June 25, 2019, and supporting papers; and (10) Oral Arguments having been held on June 14, 2019, and June 27, 2019; it is

ORDERED that the motions #002, #003, #004 and #006 are consolidated for determination; and it is further

ORDERED that motions #002 and #004 and #006 are denied; and it is further

ORDERED that motion #006 is denied conditionally; and it is further

ORDERED that motion #003 is referred to a conference before the court to be conducted on June 1, 2020 at noon, such conference to be conducted virtually.

This is an action brought by the State of New York and the Commissioner of the State's Department of Transportation (the "Transportation Commissioner") to enjoin the construction and operation of two sixty-foot tall electronic billboards – styled "monuments" by the defendants – on opposite sides of the State's declared and recorded right of way for Route 27, Sunrise Highway, where it bisects a tract, or tracts, of land indisputably long owned and occupied by the Shinnecock Indian Nation (the "Nation") in the Town of Southampton. The amended complaint names, in addition to the original, individual defendants, who are alleged to be officials and Trustees of the Shinnecock Indian Nation, the alleged commercial partners of the Nation in the design, construction, installation and operation of the billboards or participants in other aspects of the project.

Although it was not until 2010 that the Shinnecock Indian Nation received formal recognition by the United States Bureau of Indian Affairs (the "BIA"), it has been a recognized, sovereign Indian tribe in New York State since colonial times, a status that is, among other places, codified in Article 9 of the Indian Law. The matter is principally before the court on the plaintiffs' motion for a preliminary injunction enjoining the completion, maintenance and operation of the monuments, or billboards, and on the defendants' motions to dismiss the action for failure to join an indispensable party and, with respect to those defendants who are trustees of the Nation, on the ground that they are clothed with the same sovereign immunity as the Nation itself. Also, the one non-tribal individual defendant, Larry Clark, and the defendant entities with which he is affiliated – Idon Media LLC ("Idon") and Digital Outdoor Advertising LLC ("Digital Outdoor") – in addition to joining in the other defendants' motion to dismiss the amended complaint for failure to join an indispensable party and as barred by the Nation's sovereign immunity – also seek dismissal of the claims against them on the ground that Idon, Outdoor Digital and Mr. Clark individually have no involvement in the project. In addition,

plaintiffs seek the imposition of contempt sanctions against the defendants for completing the construction of the signs and operating them notwithstanding the previously entered temporary restraining order.

The plaintiff's motion for a preliminary injunction proceeds from its contention that the billboards have been erected on non-reservation land adjoining a state-owned right-of-away – acquired by the State through uncontested condemnation in 1959 – without required permits and engineering and environmental approvals and are, in any event, too close to the adjoining roadway, the defendants' from their contentions that the Nation is an indispensable party to the action because it is the owner and operator of the billboards, "any judgment on the merits in this action will inequitably affect the Nation and its interests," that the billboards are on land owned by the Nation and therefore are beyond the reach of state regulation, and that those defendants who are officials of the Nation enjoy the same sovereign immunity as the Nation itself. This action thus poses the related, but not identical, questions of whether structures erected and operated on land owned potentially ex-reservation by a sovereign Indian nation but located within the right of way of a State highway are subject to State regulation and, if so, under what circumstances and by what means, if any, the State can enforce those regulations through proceedings brought in New York State Supreme Court against the Nation's elected trustees and its commercial partners.

Note that in contrast to the circumstance that confronted the United States Supreme Court in ***City of Sherrill, N.Y. v Oneida Indian Nation of New York***, 544 US 197, 203, 125 S Ct 1478, 1483, 161 L Ed 2d 386 [2005] ("***City of Sherrill***"), this case does not raise the specter of a wildly-belated "land grab" that would be disruptive of the settled expectations of state and local governments and of hundreds of thousands of individuals. Here, not only is it undisputed that the Nation owns the land in question (*compare* ***Shinnecock Indian Nation v New York***, 05-CV-2887 TCP, 2006 WL 3501099 [EDNY Nov. 28, 2006], *affd.* 628 Fed Appx 54 [2d Cir 2015], *cert. denied*, 136 S.Ct. 2512 [June 27, 2016]), but there is no doubt that the Nation has owned it for many decades, if not centuries, predating most, if not all, significant development in the area and that it is the only remaining part of their once-extensive demesne that touches the Peconic Bay side of Long Island. Whether the Nation's title to the land is, or can be deemed, "aboriginal," that is, originating before systematic European colonization of the area began in the seventeenth century, and continuing thereafter without relinquishment is, however, disputed by the plaintiffs, who claim that the Nation currently is merely a fee owner of the property; that the parcels, although characterized on Suffolk County tax maps as "Shinnecock Indian Reservation," are not part of any recognized or recognizable Indian reservation; and that neither the occupation nor the ownership of the land by the Nation has been continuous during any relevant historical period.

Discussion

Sovereign immunity and claimed failure to join a necessary party. The tribal and commercial defendants have moved to dismiss the complaint on several grounds, including what they contend is both the necessity and the impossibility of joining the Nation as a party defendant in this action, and the asserted immunity of the individually named tribal defendants and of those who have contracted with the Nation from both this court's jurisdiction and from the claims that the plaintiff has asserted against them. Settled law, however, establishes none of these grounds has merit.

Although the defendants named by the State and the Transportation Commissioner in their complaint and amended complaint include the officials and members of the Council of Trustees of the Shinnecock Indian Nation, the Nation itself, which enjoys sovereign immunity (*see* ***Sue/Perior Concrete & Paving, Inc. v Lewiston Golf Course Corp.***, 24 NY3d 538, 546 [2014] ("Indian tribes possess the common-law immunity from suit traditionally enjoyed by sovereign powers, unless waived")), has not been named as a defendant. CPLR 1001 (b) provides five factors for courts to consider in deciding whether to dismiss an action where, as here, "jurisdiction over [the necessary party] can be obtained only by his consent or appearance":

> "1. Whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder;
>
> "2. the prejudice which may accrue from the nonjoinder to the defendant or to the person not joined;
>
> "3. whether and by whom prejudice might have been avoided or may in the future be avoided;*820
>
> "4. the feasibility of a protective provision by order of the court or in the judgment; and
>
> "5. whether an effective judgment may be rendered in the absence of the person who is not joined" (CPLR 1001 [b])."

(***Saratoga County Chamber of Commerce, Inc. v Pataki***, 100 NY2d 801, 819-20 [2003], *cert. den.*, 540 US 1017 [2003].)

In ***Saratoga County Chamber of Commerce, Inc. v Pataki***, *supra*, opponents of casino gambling brought an action in Supreme Court challenging the authority of New York's governor to enter into a compact with the St. Regis Mohawk Tribe allowing casino gambling on the

Tribe's reservation and into an amendment to that compact that allowed electronic gaming as well, without the approval of the state Legislature. Supreme Court dismissed the action for failure to join the Tribe, which it deemed an indispensable party pursuant to CPLR 1001, but the Appellate Division reversed. On remand, Supreme Court granted summary judgment for the plaintiffs and declared both the compact and the amendment to it unconstitutional, as violating the separation of powers between the executive and legislative branches of New York's government, and therefore void and unenforceable. The Appellate Division affirmed (***Saratoga County Chamber of Commerce v. Pataki***, 293 A.D.2d 20, 26, 740 N.Y.S.2d 733 [2002]). On the State's appeal as of right, the Court of Appeals agreed that the Mohawk St. Regis Tribe was not an indispensable party to the suit:

> Although its interests are certainly affected by this litigation, the Tribe has chosen not to participate. Unless Congress provides otherwise, Indian tribes possess sovereign immunity against the judicial processes of states (*see e.g. Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 [1978]; *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506, 512, 60 S.Ct. 653, 84 L.Ed. 894 [1940]; *Turner v. United States*, 248 U.S. 354, 358, 39 S.Ct. 109, 63 L.Ed. 291 [1919]). As a result, New York courts cannot force the Tribe to participate in this lawsuit. The State claims that the Tribe's absence requires us to dismiss this action. We disagree.

(100 N.Y.2d 801 at 819). After noting that the state had argued that "the prejudice to the Tribe caused by a judgment eviscerating the authority under which it operates the casino should be sufficient to dismiss the action" (*id.*, 100 NY2D at 820), while the plaintiffs argued "that there can be no remedy for the alleged constitutional violation if the Tribe's absence requires dismissal" (*id.*), Court of Appeals explained

> There are two principal purposes of requiring dismissal owing to the absence of an indispensable party. First, mandatory joinder prevents multiple, inconsistent judgments relating to the same controversy. Second, joinder protects the otherwise absent parties who would be "embarrassed by judgments purporting to bind their rights or interests where they have had no opportunity to be heard" (*First Natl. Bank v. Shuler*, 153 N.Y. 163, 170, 47 N.E. 262 [1897]; *see generally*, 3 Weinstein–Korn–Miller, N.Y. Civ. Prac. ¶ 1001.01 [2002]).
>
> Neither purpose applies here. The Tribe has chosen to be absent. Nobody has denied it the "opportunity to be heard"; in fact, the Oneida Indian Nation, which operates the Turning Stone Casino, has appeared as amicus curiae making much the same arguments we would expect to be made by the [St. Regis Mohawk] Tribe had it chosen to participate. While sovereign immunity prevents the Tribe from being forced to participate in New York court proceedings, it does not require everyone else to forego the resolution of all

> disputes that could affect the Tribe (*see Keene v. Chambers*, 271 N.Y. 326, 330, 3 N.E.2d 443 [1936]; *Plaut v. HGH Partnership*, 59 A.D.2d 686, 398 N.Y.S.2d 671 [1st Dept.1977]; 3 Weinstein–Korn–Miller, N.Y. Civ. Prac. ¶ 1001.10 [citing cases]). While we fully respect the sovereign prerogatives of the Indian tribes, we will not permit the Tribe's voluntary absence to deprive these plaintiffs (and in turn any member of the public) of their day in court.

(100 NY2d at 820-21).

Sovereign immunity and relief. As to whether the relief the plaintiffs here are seeking can be obtained at all in the Nation's absence and by proceeding, instead, against the Nation's officials and those with whom it has entered into commercial relationships, and, even if so, whether some or all of the latter share in the Nation's sovereign immunity, the law is also well settled. Here, the Tribal defendants seek to characterize themselves as merely "nominal" parties in this action, but a governmental body, including a sovereign Indian Nation, can act only through the instrumentality of its officials (*see* ***(Michigan v Bay Mills Indian Community***, 572 US 782, 795 [2014]) ("***Bay Mills***").

Bay Mills was an action by the State of Michigan to enjoin the Bay Mills Indian Community – a federally recognized Indian Tribe with which the State had entered into a compact allowing the tribe to operate a gaming facility on "Indian lands" and which was operating a casino on its reservation – from operating a second gaming facility on land 125 miles from the Bay Mills reservation that the Tribe had subsequently acquired using interest it had earned on a federal compensatory appropriation and which the Tribe deemed "Indian land." Reaffirming the corollary principles that tribal sovereign immunity "'is a matter of federal law and is not subject to diminution by the States'" (572 US at 789, *quoting* ***Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.***, 523 U.S. 751, 756 [1998], that there is "no exception for suits arising from a tribe's commercial activities, even when they take place off Indian lands" (572 US at 790), that ''[t]o abrogate [such] immunity, Congress must 'unequivocally" express that purpose'" (*id.*, quoting ***C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.***, 532 U.S. 411, 418 [2001], *quoting* ***Santa Clara Pueblo v. Martinez***, 436 U.S. 49, 58 [1978]), and that the provision of the Indian Gaming Regulatory Act (IGRA) under which Michigan was seeking to proceed against the Bay Mills Indian Community, 25 USC § 2710(d)(7)(A)(ii) only authorizes suits to enjoin gaming activity on Indian lands – which Michigan claimed was not the case – the Court held that "[a]ccordingly, Michigan may not sue Bay Mills to enjoin the Vanderbilt casino, but must instead use available *alternative means* to accomplish that object" (572 US at 804 [emphasis supplied]). As to those "alternative means," as Justice Kagan, writing for the majority, explained:

> True enough, a State lacks the ability to sue a tribe for illegal gaming when that activity occurs off the reservation. But a State, on its own lands, has many other powers over tribal gaming that it does not possess (absent consent) in Indian territory. Unless federal law provides differently, "Indians going beyond reservation boundaries" are subject to any generally applicable state law. See **2035 *Wagnon v. Prairie Band Potawatomi Nation,* 546 U.S. 95, 113, 126 S.Ct. 676, 163 L.Ed.2d 429 (2005) (quoting *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973)). So, for example, Michigan could, in the first instance, deny a license to Bay Mills for an off-reservation *796 casino. See Mich. Comp. Laws Ann. §§ 432.206–432.206a (West 2001). And if Bay Mills went ahead anyway, Michigan could bring suit against tribal officials or employees (rather than the Tribe itself) seeking an injunction for, say, gambling without a license. See § 432.220; see also § 600.3801(1) (a) (West 2013) (designating illegal gambling facilities as public nuisances). As this Court has stated before, analogizing to *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), tribal immunity does not bar such a suit for injunctive relief against *individuals,* including tribal officers, responsible for unlawful conduct. See *Santa Clara Pueblo,* 436 U.S., at 59, 98 S.Ct. 1670. And to the extent civil remedies proved inadequate, Michigan could resort to its criminal law, prosecuting anyone who maintains—or even frequents—an unlawful gambling establishment. See Mich. Comp. Laws Ann. §§ 432.218 (West 2001), 750.303, 750.309 (West 2004). In short (and contrary to the dissent's unsupported assertion, see *post,* at 2051), the panoply of tools Michigan can use to enforce its law on its own lands—no less than the suit it could bring on Indian lands under § 2710(d)(7)(A)(ii)—can shutter, quickly and permanently, an illegal casino.

(***Michigan v Bay Mills Indian Community***, 572 US at 795-96 [2014][footnote omitted]). *See also* ***Gingras v Think Fin., Inc.***, 922 F3d 112, 121 [2d Cir 2019], *cert denied sub nom.* ***Sequoia Capital Operations, LLC v Gingras***, 140 S Ct 856, 205 L Ed 2d 458 [2020] ("The question before us, however, is whether Plaintiffs can sue tribal officials, in their official capacities, for prospective, injunctive relief to bar violations of *state* law. We hold that they can. The first and most obvious justification for our affirmative answer to this question is that the Supreme Court has already blessed *Ex parte Young*-by-analogy suits against tribal officials for violations of state law").

At this juncture, then, the immunity claims of the Tribal defendants, and their challenge to the court's subject matter jurisdiction, cannot be sustained. To the extent the commercial defendants' claims of immunity are derivative of the assertions of sovereign immunity by the Tribal defendants or share the same predicate, *i.e.*, that they are agents acting on behalf of the Nation and share its sovereign immunity, their immunity claims fail for the same reasons those of the Tribal defendants fail. To the extent they claim that they are an "arm" of the Nation and share in its sovereign immunity on that basis, they have failed to make the requisite showing (*see*

Sue/Perior Concrete & Paving, Inc. v Lewiston Golf Course Corp., *supra*, 24 NY3d at 546-47). In that case, the Court of Appeals, quoting from its 1995 decision in ***Matter of Ransom v St. Regis Mohawk Educ. & Community Fund***, 86 NY2d 553 [1995], articulated the factors that are to be considered in determining whether an entity "that is affiliated with an Indian tribe has the right to claim sovereign immunity against suit," as follows:

> "Although no set formula is dispositive, in determining whether a particular tribal organization is an 'arm' of the tribe entitled to share the tribe's immunity from suit, courts generally consider such factors as whether: [1] the entity is organized under the tribe's laws or constitution rather than Federal law; [2] the organization's purposes are similar to or serve those of the tribal government; [3] the organization's governing body is comprised mainly of tribal officials; [4] the tribe has legal title or ownership of property used by the organization; [5] tribal officials exercise control over the administration or accounting activities of the organization; and [6] the tribe's governing body has power to dismiss members of the organization's governing body. More importantly, courts will consider whether [7] the corporate entity generates its own revenue, whether [8] a suit against the corporation will impact the tribe's fiscal resources, and whether [9] the subentity has the power to bind or obligate the funds of the tribe. The vulnerability of the tribe's coffers in defending a suit against the subentity indicates that the real party in interest is the tribe." (*Ransom*, 86 NY2d at 559-560 [internal quotation marks, citations and brackets omitted].)

(***Sue/Perior Concrete & Paving, Inc. v Lewiston Golf Course Corp.***, 24 NY3d at 546-47). At least on the current record, it does not appear that the commercial defendants meet any of these criteria independently or in their relationship with the Nation. While it may be the successful performance of their respective roles in the billboard enterprise will impact the Nation's fisc, that possibility alone – and which remains to be demonstrated – is insufficient to immunize those defendants from suit (*see id.*, 24 NY3d at 548).

Accordingly, the motions to dismiss are, at this time, denied.

Plaintiffs' motion for a preliminary injunction.

On a motion for a preliminary injunction, the movant must demonstrate (1) a likelihood of success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) a balancing of the equities in the movant's favor (*see Doe v Axelrod*, 73 NY2d 748, 750 [1988]; *Automated Waste Disposal, Inc. v Mid-Hudson Waste, Inc.*, 50 AD3d 1072, 1072-1073

> [2008]; *Petervary v Bubnis,* 30 AD3d 498 [2006]). "A party seeking the drastic remedy of a preliminary injunction must establish a clear right to that relief under the law and the undisputed facts" (*Omakaze Sushi Rest., Inc. v Ngan Kam Lee,* 57 AD3d 497 [2008]; *see Miller v Price,* 267 AD2d 363, 364 [1999]). The purpose of a preliminary injunction is to maintain the status quo, not to determine the ultimate rights of the parties (*see Moody v Filipowski,* 146 AD2d 675, 678 [1989]; *Matter of 35 N.Y. City Police Officers v City of New York,* 34 AD3d 392, 393-394 [2006])

(***Wheaton/TMW Fourth Ave., LP v New York City Dept. of Bldgs.***, 65 AD3d 1051, 1052 [2d Dept 2009]). As the Appellate Division wrote in ***Deutsch v Grunwald***, 165 AD3d 1035, 1037 [2d Dept 2018]:

> "To obtain a preliminary injunction, the moving party must demonstrate (1) a likelihood of success on the merits, (2) irreparable injury absent a preliminary injunction, and (3) that the equities balance in his or her favor" (*Carroll v. Dicker*, 162 A.D.3d 741, 742, 80 N.Y.S.3d 69; *see* CPLR 6301; *Gonzalez v. 231 Maujer St., HDFC*, 157 A.D.3d 869, 870, 69 N.Y.S.3d 689). "The decision to grant or deny a preliminary injunction rests in the sound discretion of the Supreme Court" (*Ruiz v. Meloney*, 26 A.D.3d 485, 486, 810 N.Y.S.2d 216; *see Doe v. Axelrod*, 73 N.Y.2d 748, 750, 536 N.Y.S.2d 44, 532 N.E.2d 1272; *Automated Waste Disposal, Inc. v. MidHudson Waste, Inc.*, 50 A.D.3d 1 072, 857 N.Y.S.2d 648). Here, a preliminary injunction was warranted to maintain the status quo (*see Arcamone–Makinano v. Britton Prop., Inc.*, 83 A.D.3d 623, 920 N.Y.S.2d 362). "Where denial of injunctive relief would render the final judgment ineffectual, the degree of proof required to establish the element of likelihood of success on the merits should be accordingly reduced" (*Sau Thi Ma v. Xuan T. Lien*, 198 A.D.2d 186, 187, 604 N.Y.S.2d 84 [internal quotation marks and citation omitted]). The plaintiff would suffer irreparable injury absent the relief sought and the balance of the equities favors the plaintiff given the prejudice that the plaintiff would suffer from a denial of the requested relief (*see id.* at 187, 604 N.Y.S.2d 84).

(***Deutsch v Grunwald***, 165 AD3d at 1037).

With respect to the first element plaintiffs must demonstrate in order to sustain their motion for a preliminary injunction, likelihood of success on the merits, their showing largely relies on the outcome of inconclusive prior litigation between the State and the Nation, and others in federal court. In 2007, in the context of actions, originally brought in state court, to prevent the Nation and its tribal officials from pursuing an announced plan to construct a casino and conduct gaming activities on the Westwoods property, the United States District Court for

the Eastern District of New York (Bianco, J.), after a thirty-day bench trial[1], concluded that the Nation's title to the Westwoods property is not aboriginal and that even if it were, the construction and operation of a gaming casino there by the Nation would have such "disruptive consequences" upon "neighboring landowners, the Town [of Southampton] and the greater Suffolk County community" as to implicate the bar of ***City of Sherrill, N.Y. v Oneida Indian Nation of New York***, 544 US 197, 203, 125 S Ct 1478, 1483, 161 L Ed 2d 386 [2005], and, moreover, because the BIA had not as of that time recognized the Nation's tribal status, the then-proposed gaming venture would not benefit from the safe haven from application of state anti-gaming laws provided for qualifying tribal gaming enterprises by the Indian Gaming Regulatory Act, 25 USC §§ 2701, et seq. ("IGRA") (***New York v. Shinnecock Nation***, 523 FSupp2d 185, 188-89 [EDNY 2007], *as amended* [2008]). Accordingly, the District Court granted the State permanent injunctive and declaratory relief, preventing the Nation from developing and operating a gaming facility on the Westwoods property. On appeal, however, the Court of Appeals determined that the District Court was without subject matter jurisdiction, as the State's claims against the defendants raised no federal question but only referenced federal law in anticipation of the Nation's defenses, and, without reaching the merits of the Nation's appeal, vacated the District Court's judgment and remanded the action to the District Court with instructions to remand it to state court where it originated (*see* 686 F3d 133 [2d Cir 2012]).

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1 Among other things, the District Court rejected the plaintiffs' contention that the defendants were collaterally estopped from claiming that the Nation held unextinguished aboriginal title to the Westwoods property as a consequence of the holding in ***King v. Shinnecock Tribe of Indians,*** 221 N.Y.S.2d 980 (Sup.Ct. Suffolk County 1961), that the Shinnecock Nation's "right of occupancy" in a strip of land lying west of Canoe Place and a quarter-mile south of Montauk highway "was extinguished by the sovereign," as, among other things, that holding followed from a stipulation made in that case by the State of New York – which ostensibly represented "the Nation in a trust capacity" in the ***King*** action but was acting adversely to the Nation in the action before the District Court (*i.e.*, it was citing the product of its own stipulation for the Nation in the ***King*** case as binding the Nation as its adversary in the action before the District Court) and without any "indication from the record" that the stipulation was entered into by the State on behalf of the Nation "with the intent to be bound in subsequent actions" (523 FSupp2d at 255). It is notable that prior to the trial, after denying the State's motion to remand the State's action to Suffolk County Supreme Court, where it had been brought, and consolidating that action with the parallel action that the Town had filed in Supreme Court and which had also been removed to federal court, the District Court (Platt, J.), had granted the Nation's motion for summary judgment on the issue of whether it is an "Indian Tribe" pursuant to federal common law as articulated in ***Montoya v. United States***, 180 U.S. 261, 266 [1901] and ***Golden Hill Paugussett Tribe of Indians v. Weicker***, 39 F.3d 51, 59 (2d Cir.1994), but otherwise denied the parties' respective motions for summary judgment and partial summary judgment (*see* ***New York v Shinnecock Indian Nation***, 400 FSupp2d 486 [EDNY 2005]).

Thus, the plaintiffs' allegation that "the Westwoods property is not aboriginal or sovereign lands" (Amended Complaint ¶38), which they footnote to the concededly vacated District Court decision in ***New York v. Shinnecock Nation***, *supra*, is, at this juncture, subject to dispute. At the same time, it is undisputed that the Shinnecock Nation's ancestral domain encompassed essentially the entirety of what is now the Town of Southampton, and it has been established that the presence of the Nation in that domain has been continuous (*see* ***Summary under the Criteria and Evidence for the Proposed Finding for Acknowledgment of the Shinnecock Indian Nation*** *(Petitioner #4)*, Approved December 17, 2009 [United States Department of the Interior, Bureau of Indian Affairs]. Ultimately, the burden will be upon the State and Town plaintiffs to refute the defendants' contention that the Nation has sovereign control over the Westwoods property. On the current record, it is impossible to conclude that the plaintiffs will succeed in doing so. Among many other things, the Tribal defendants continue to challenge the validity and effectiveness, particularly in the face of then-existing prohibitions on the acquisition by individuals of tribal land, of the Seventeenth Century instruments that the State relied upon in the earlier federal litigation as the basis for its extinguishment contention, as well as questioning the sufficiency and fairness of the proceeding in which the colonial authority determined that those instruments should be ratified[2], which is their right (*see, e.g.,* 523 FSupp2d at 269-72; *compare* ***Kaufman v Eli Lilly and Co.,*** 65 NY2d 449, 455-56 [1985] ("the party to be

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2 *See, e.g.*, Nelson, W.E., *Legal Turmoil In A Factious Colony: New York, 1664-1776,* 38 Hofstra Law Review 69 [2009]. As Professor Nelson writes, the mixed, and in many respects *ad hoc*, colonial legal structures that the British Governor of mid-17th Century New York oversaw were far from consistent or ideal:

> When Colonel Richard Nicolls, the first English governor of NewYork, arrived in the fall of 1664, two quite different legal systems confronted him. On Manhattan Island and along the Hudson River, sophisticated courts modeled on those of the Netherlands were resolving disputes learnedly in accordance with Dutch customary law. On Long
> Island, Staten Island, and in Westchester, on the other hand, English courts were administering a rude, untechnical variant of the common law carried across the Long Island Sound from Puritan New England and practiced without the intercession of lawyers.
>
> The task for Nicolls was to control these Dutch and Puritan legal systems. The main argument of this Article† is that he did not perform that task well. On the contrary, he set in motion constitutional dynamics that his successors over the next 110 years either could not or would not change. . . .

Id., 38 Hofstra Law Review at 69. As Professor Nelson points out, the legal milieu in the Town of Southampton was by no means less protean or more predictable or well grounded in that time. *See*, e.g., *id.* at 70-72, 75 and *passim*.

precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination").

Further, the electronic signs, however eye catching they may be – which, presumably, is the intent that underlies them – pose none of the disruptive consequences that the federal District Court attributed to the previously proposed gaming venture and, unless constructed and operated without regard to accepted engineering standards, which appears not to be the case – pose no unacceptable safety risk. On the other hand, as the defendants urge, the advertising revenue that that the Nation hopes to earn represents an important revenue source for the Nation. As the United Court of Appeals for the Ninth Circuit wrote in an analogous context,

> A state may exercise its authority over activities of non-tribal members on "Indian country" only "under certain circumstances...." *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 331, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983). Whether the erection and maintenance of billboards constitutes such a circumstance requires "a particularized inquiry into the nature of the state, federal, and tribal interests at stake." *Id.* at 333, 103 S.Ct. 2378. "State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *Id.* at 334, 103 S.Ct. 2378. This "inquiry is to proceed in light of traditional notions of *982 Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging self-sufficiency and economic development." *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 216, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987) (quoting *Mescalero,* 462 U.S. at 334–35, 103 S.Ct. 2378).

Shivwits Band of Paiute Indians v Utah, 428 F3d 966, 981-82 [10th Cir 2005].

In these circumstances, and on the current record, the court is of the view that a preliminary injunction preventing the operation of the billboards, or monuments, is unwarranted, that the plaintiffs would suffer no irreparable harm in the absence of a preliminary injunction, and that the equities do not balance in favor of the defendants, provided defendants have constructed and are operating the billboards in compliance with appropriate structural and other safety standards. Accordingly, the plaintiffs' motion is denied on the foregoing condition and without prejudice to reapplication in the event that condition is not met.

Finally, to the extent plaintiffs seek the imposition of contempt sanctions upon the defendants, their application is referred to a conference before the court to be conducted on June 1, 2020 at noon, such conference to be conducted virtually.

The court has considered the remaining contentions of the parties and finds that they do not require further or additional discussion or alter any of the above determinations.

This constitutes the decision and order of the court.

Dated: May 18, 2020

HON. SANFORD NEIL BERLAND, A.J.S.C.

____ **FINAL DISPOSITION** __XX__ **NON-FINAL DISPOSITION**