UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE CANADIAN ST. REGIS BAND OF MOHAWK INDIANS, Plaintiff, UNITED STATES OF AMERICA, Plaintiff-Intervenor, v. STATE OF NEW YORK, et al. Defendants.	Civil Action Nos. 82-CV-783 82-CV-1114 (NPM)
THE ST. REGIS MOHAWK TRIBE, by THE ST. REGIS MOHAWK TRIBAL COUNCIL, and THE PEOPLE OF THE LONGHOUSE AT AKWESASNE, by THE MOHAWK NATION COUNCIL OF CHIEFS, Plaintiffs, UNITED STATES OF AMERICA, Plaintiff-Intervenor, v. STATE OF NEW YORK, et al., Defendants	Civil Action No. 89-CV-829 (NPM)

MOHAWK PLAINTIFFS' JOINT SURREPLY IN OPPOSITION TO DEFENDANTS' MOTIONS FOR JUDGMENT ON THE PLEADINGS

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INTRODUCTION

Defendants' Reply Memoranda[1] put forward three principal arguments in support of the motions for judgment on the pleadings:

(I) conversion of their Rule 12(a) motions to motions for summary judgment is inappropriate because Plaintiffs are bound by the requests in their various complaints for the impermissible remedy of ejectment;

(II) Plaintiffs' possessory land claims are "inherently disruptive" and thus barred by laches regardless of whether the ordinary elements of a laches defense can be shown as a matter of law or fact; and

(III) in the alternative, this Court should stay further action in this case pending the outcome of appellate proceedings in the *Oneida* litigation. *See Oneida Indian Nation v. State of New York*, 500 F. Supp. 2d 128 (N.D.N.Y. 2007), *appeal docketed*, Nos. 07-2548, 07-2550 (2d Cir. Aug. 3, 2007).

As the following discussion will show, none of these arguments is valid.

ARGUMENT

I. Conversion to Summary Judgment is Appropriate.

In their reply memoranda, Defendants contend that a conversion of the motions for judgment on the pleadings to motions for summary judgment is inappropriate. Defendants say conversion is inappropriate for three reasons: (A) the facts raised by the Mohawks are not "material," SMJRM at 3, or meaningful, PAJRM at 4; (B) the facts raised by Defendants are subject to judicial notice and do not open the door to the presentation of additional facts,

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1 Joint Reply Memorandum of Law in Support of State and Municipal Defendants' Motions for Judgment on the Pleadings, hereinafter "SMJRM," and Reply Memorandum of Law in Further Support of Defendant New York Power Authority's Motion for Judgment on the Pleadings, hereinafter "PAJRM."

SMJRM at 13-14, PAJRM at 14; and (C) the facts are unimportant because the complaints are the only basis upon which this Court can measure the continued validity of Plaintiffs' claims. SMJRM at 6-9; PAJRM at 5-12. Each of these arguments against conversion fails.

A. The Mohawks' Facts Are Material and Meaningful.

The facts raised by Plaintiffs are responsive to the facts raised by Defendants. This alone establishes their materiality. Moreover, the facts proffered by the Mohawks go to the very core of Defendants' generalized factual assertions that there will be disruption. The Mohawks' facts counter the *Cayuga* court's assumption that all possessory land claims share the same facts and are equally disruptive. *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 275 (2d Cir. 2005). We present facts that show the large difference between this case and *Cayuga* or *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005). *See* Plaintiffs' Briefs.[2] Defendants' assertions of disruption, as that term is used in *Cayuga*, are therefore either incorrect or overblown. *See* section II, *infra*; *see also, generally,* Plaintiffs' Briefs. This Court should not blithely accept Defendants' assertion that laches applies, given the facts submitted by the Mohawks.

B. Defendants' Assertions of Fact and Plaintiffs' Responses to Those Assertions Are the Proper Subject of Motions for Summary Judgment.

The State and Municipal Defendants also argue that their census data is subject to judicial notice and that judicially noticed facts cannot lead to conversion of a motion on the pleadings. SMJRM at 24. However, Defendants do not merely present data, but argue as a fact that "the land in the land claim area has a distinctly non-Indian character." SMJRM at 13. In response, the Mohawks have proffered more detailed census tract data for specific land claim

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2 Memorandum of Mohawk Council of Akwesasne in Opposition to All Defendants' Motions for Judgment on the Pleadings, hereinafter "MCAMO," and the St. Regis Mohawk Tribe and the Mohawk Nation Council of Chiefs Memorandum in Opposition to the Defendants' Motion for Judgment on the Pleadings, hereinafter "SRMT/MNCC-MO."

areas, establishing that specific areas are in fact Indian in character. *See, e.g.,* MCAMO at 18-19; SRMT/MNCC-MO at 21-25, 32-39, Attached Declarations. Facts subject to judicial notice are defined as facts not subject to reasonable dispute. Fed. R. Evid. 201(b); *Garb v. Republic of Poland*, 440 F.3d 579, 594 n.18 (2d Cir. 2006). The Mohawks' census data brings Defendants' assertions of fact into dispute, and, indeed, supports a finding that the lands in question have Indian character. For this reason, the facts presented support conversion of Defendants' motions into motions for summary judgment.

C. The Complaints Support This Court's Conversion and Denial of Defendants' Motions.

The crux of Defendants' argument is that the revision of Plaintiffs' requests for relief is of no moment since the Court must consider not the remedies currently requested but the claims as stated in the complaints written two decades ago. *See, e.g.,* SMJRM at 5-6; PAJRM at 5. Defendants say that the plea for ejectment as one form of relief requested in those complaints is enough to warrant dismissal of these suits in their entirety without any further inquiry. SMJRM at 5; PAJRM at 10-11.

While it is true that the *Cayuga* and *Oneida* courts parsed the claims made in the complaints in those cases, the real question for the *Cayuga* court was whether the possessory claim was "subject" to laches. 413 F.3d at 277. In *Cayuga*, the answer to that question depended on the impact the Tribe's possessory claim had on the Defendants. *Id.* If the remedy sought was based on a disruptive possessory claim, then the remedy would not be permitted. *Id.* The court had before it a specific set of facts, also shared by the *Oneida* land claim, which led it to conclude that laches should apply. These facts included the historic removal of Oneidas and Cayugas from the State of New York and extremely large former reservations that are now, and have been for many years, nearly entirely non-Indian in character. *See Cayuga*, 413 F.3d at 269,

277; *Sherrill*, 544 U.S. at 202. As shown below, those are not the facts here. *See infra*; MCAMO at 11-25; SRMT/MNCC-MO at 21-26, 31-44. Further, as Plaintiffs have shown, the presence in the Mohawk land claim of lands governed by the Federal Power Act also factually and legally distinguishes this claim from those at issue in *Cayuga* and *Oneida*. *See* MCAMO at 12-14; SRMT/MNCC-MO at 26-29.[3]

As for their reliance on the language of the complaints, the State and Municipal Defendants acknowledge that the facts the Mohawks have asserted simply flesh out in more detail what has been generally alleged in the complaints. SMJRM at 24. Under Rule 8 of the Federal Rules of Civil Procedure, the Mohawks are not required to detail all of the facts. Plaintiffs are required only to give enough information to put Defendants on notice of the claims and to state enough facts that render the claims plausible. *Bell Atlantic v. Twombly*, __U.S.__, 127 S.Ct. 1955, 1974 (2007); *Iqbal v. Hasty*, 490 F.3d 143, 157-158 (2d Cir. 2007) (the adequacy of allegations can be fleshed out through discovery or a motion for more definite statement if necessary). Moreover, under Rule 54 the statement of remedies is not binding. Fed. R. Civ. P. 54(c). This Court is required to provide whatever relief is available under the law. *See* SRMT/MNCC-MO at 12-13; 10 Charles Alan Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice & Procedure* § 2664 (3d ed. 1998). This is not an attempt to raise new claims, as NYPA argues. PAJRM at 8, n.6. Rules 54 is clear that remedies are not part of a claim and cannot serve as a source for dismissal. 10 Wright, Miller & Kane at § 2664 (demand for relief does not constitute a claim and therefore "a failure to demand the appropriate relief will not result in dismissal").

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3 Similarly, in the *Oneida* case, Judge Kahn found that the complaint's stated claim for ejectment did not justify dismissal of the case in its entirety, given the possibility of a remedy that was non-disruptive. 500 F. Supp. 2d at 139-41.

Based on these authorities, an amendment of the complaint is unnecessary because the real issue is whether the remedies sought will be disruptive in the sense in which that term is used in *Cayuga*. Given the specific and detailed facts on the ground, we have established that in the particular circumstances of this case, and in light of the Federal Power Act and the Indian character of certain land claim areas, the disruption of declaring title in the Mohawks and awarding damages based on the deprivation of Mohawk use of the land is minimal at best. It falls far short of the facts presented in *Cayuga* or *Oneida*. *See Cayuga*, 415 F.3d at 269, 277; *Oneida*, 500 F. Supp. 2d at 131, 134-38. Indeed, this case differs markedly from *Cayuga* and *Oneida*, and neither the Cayugas nor the Oneidas would have been able to amend their complaints to allege the kind of facts that we have proffered in our briefs. Thus, the fact that the courts examined and relied upon certain claims for relief in the *Oneida* and *Cayuga* complaints is no reason to do so here. Different facts require different remedies.

If, however, this Court concludes that Plaintiffs' complaints as currently crafted cannot support conversion of the motions, then the Mohawk Plaintiffs respectfully request leave to amend the complaints to address the recent changes in the law and to bring forth in more detail the facts and theories we are asserting in our briefs. It would be patently unfair to allow Plaintiffs' claims to be dismissed based on pleadings filed 25 years ago given the recent changes in the law and the still-evolving interpretation of these cases. Under Rule 15, this Court should liberally allow amendments to pleadings as necessary to "facilitate a determination of the action on its merits." 6 Wright, Miller & Kane at § 1488; *see also* Fed. R. Civ. P. 15.

II. The *Cayuga* Decision Is Not Precedent for Applying Laches to the MohawkClaims Because the Underlying Facts in This Case Are Materially Different from the Facts There Presented.

In the pending *Oneida* litigation, the United States has argued persuasively that *Cayuga* was wrongly decided.[4] We agree. But that issue is not presently before this Court.

This Court is bound by the *Cayuga* decision. What this Court is not required to do, however, is to extend that holding beyond its specific factual context to wipe out all tribal possessory land claims in New York, no matter how different the circumstances under which they arise. That is the extreme position Defendants here advocate, but, contrary to their contentions, that is not what the fact-intensive laches defense invoked in *Cayuga* dictates.

The facts underlying the *Cayuga* (and *Oneida*) land claims clearly differ materially from the facts underlying the Mohawk claims. At the time the *Cayuga* and *Oneida* lawsuits were filed, the Cayugas had no lands and few members within New York State, while the Oneidas owned only a tiny tract, a fraction of their former reservation, and also had few members resident in the State. *See Cayuga*, 415 F.3d at 269, 277; *Oneida*, 500 F. Supp. 2d at 131, 134-38. The lands these tribes claimed had long since been used, occupied, and developed by non-Indians.

Most Cayugas and Oneidas moved from New York in 1838 as provided in the Treaty of Buffalo Creek. 7 Stat. 550. By contrast, in a supplement to the 1838 Treaty, the United States agreed not to compel the "St. Regis Indians" to remove from their homeland, and the Mohawks never did move. 7 Stat. 561. As the record herein shows, at the time their lawsuits were filed, the Mohawks still owned a reservation comprising a major part of their lands guaranteed by the 1796 Treaty, and continued to use, occupy, and develop the adjacent claimed area, even to the

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4 Relevant portions of the United States' brief on appeal in *Oneida* are attached as Exhibit A.

point of having a preponderance of the population in the so-called Hogansburg Triangle. *See, e.g.,* SRMT/MNCC-MO at 32. Indeed, of the six factors set forth by the Second Circuit in *Cayuga* for invoking laches, 413 F.3d at 275, 277, only one applies to the Mohawk island claim and perhaps one more to the mainland claim. MCAMO at 9-10. What may have appeared as obvious disruption to the courts in *Cayuga* and *Oneida*, therefore, is clearly a matter for further investigation, proof, and analysis here.

This conclusion is particularly apt with respect to the Mohawk island claim, which implicates an additional, and wholly different, federal statute, the Federal Power Act, 16 U.S.C. § 803(e). That Act provides for the operation of hydroelectric projects without disruption, regardless of whether the lands upon which they are located are tribally owned. Moreover, in its recent license renewal decision, the Federal Energy Regulatory Commission expressly renewed NYPA's license with a condition that, if the Mohawks establish that they owned the islands as part of a federal reservation, NYPA's project nonetheless will remain untouched, but only annual payments to the Mohawks would be authorized, as is regularly done in cases involving other Indian tribes with hydroelectric projects on their lands.[5] *See Montana Power Co. v. F.P.C.,* 459 F.2d 863 (D.C. Cir. 1972), *cert. denied,* 408 U.S. 930 (1972). The application of the Federal Power Act and FERC's regulations to bar ejectment and solely to compensate tribes when their lands are used for a project precludes a finding that the Mohawk island claim falls within the purview of *Cayuga* or *Oneida.*[6]

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5 NYPA asserts as evidence of the Mohawks' continuing quest for ejectment that the Tribe argued in the FERC relicensing that if it succeeded in the land claim, NYPA could be evicted from the islands. SMJRM at 6-7. NYPA ignores that FERC did not agree with this argument, instead including a condition in the license for payments to the Mohawks should the Mohawks succeed in the land claim. See SRMT/MNCC-MO at 28. The Tribe cannot be bound by an argument that it made and lost in the FERC proceeding.

6 In addition, in support of its assertions of disruption, NYPA now claims that the Long Sault

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Different facts can, and frequently should, lead to different legal conclusions. As the Supreme Court has determined in the reservation disestablishment cases, cited in *Sherrill*, 514 U.S. at 215 *et seq.,* when discussing the application of "equitable considerations" (including laches) to a claim for reinstated tribal sovereignty, the facts on the ground are often dispositive. *Id.* Thus, the *Sherrill* Court stated that "in the different, but related, context of the diminishment of an Indian reservation . . .'[t]he longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use' may create 'justifiable expectations'" that tribal authority has been displaced by state jurisdiction and cannot be revived. *Id.* at 215 (quoting *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-05 (1977), and citing *Hagen v. Utah*, 510 U.S. 399, 421 (1994)). By contrast, in a later case, *Solem v. Bartlett*, 465 U.S. 463 (1984), the Supreme Court held a reservation had not been diminished and tribal rights had not been lost where tribal members continued to conduct significant activities in the area in question. 465 U.S. at 480 ("Under these circumstances, it is impossible to say that the opened areas of the Cheyenne River Sioux Reservation have lost their Indian character."); *compare South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329, 356-58 (1998). In short, one or more reservation diminishments having been found does not mean that every alleged diminishment must be found.

So too with respect to a fact-determinative laches defense. As Plaintiffs have pointed out, whether laches can be invoked depends "on the 'circumstances peculiar to each case.'"

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and Croil Islands are a "critical part" of the power project. PAJRM at 15. NYPA claims this to be an obvious and practical fact, although the islands are uninhabited and although NYPA offered these islands to the Mohawks as part of a settlement agreement reached in 2005, thereby agreeing the islands were not key to the production of power. *See* Attached Exhibit B. As this Court is aware, the parties had entered into a signed settlement agreement, which, since the *Cayuga* ruling, has been disavowed by some of the parties. The terms of the settlement have been discussed in public and in the media.

MCAMO at 26 (citing *Stone v. Williams,* 873 F.2d 620, 623-24 (2d Cir. 1989), *cert. denied*, 493 U.S. 959 (1989)); SRMT/MNCC-MO at 15-17. The key elements of the laches doctrine are (1) whether the plaintiff has unreasonably delayed in initiating an action and (2) whether the defendant has suffered prejudice as a result of that delay, *see King v. Innovation Books,* 976 F.2d 824, 832 (2d Cir. 1992). Both of these factual questions are subject to dispute in this case. *See, e.g.,* MCAMO at 11-24; SRMT/MNCC-MO at 20-26, 32-44. Moreover, to obtain the benefits of a laches defense, the defendant must not be guilty of "unclean hands," a status Defendant State of New York plainly cannot assert. *See, e.g., King*, 976 F.2d at 833; *United States v. Milstein*, 401 F.3d 53, 64 (2d Cir. 2005) (citing *Bein v. Heath*, 47 U.S. 228, 246-47 (1848)).

Because of the unique facts underlying the Mohawk claims, so different from the situation in both *Cayuga* and *Oneida*, the automatic application of the *Cayuga* result to this case, as Defendants demand, is wholly inappropriate.

III. This Case Should Not Be Stayed Because the Indefinite Duration of the *Oneida* Litigation Would Impair Plaintiffs' Access to Court.

Defendants' arguments for a stay ignore the strong competing interests of the Mohawk Plaintiffs in having their claims resolved without unreasonable delay. A stay would contradict the "virtually unflagging obligation [of the courts] to exercise the jurisdiction given to them" to decide controversies. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 15 (1983). In keeping with this obligation, the Supreme Court has directed trial courts to use the stay power sparingly: "Only in rare circumstances will a litigant in one cause (*sic*) be compelled to stand aside while a litigant in another settles the rule of law that [may] define the rights of both." *Landis v. N. American Co.,* 299 U.S. 248, 255 (1936). Defendants thus have a heavy burden to show a stay is warranted. If there is "even a fair possibility" that the stay will "work damage to some one else," Defendants "must make out a clear case of hardship or inequity in being required to go forward." *Id.*

Defendants have not met their burden here. The possibility of modest additional litigation expense does not qualify as a "clear case of hardship or inequity." With the submission of this Surreply, the Motion for Judgment on the Pleadings will be fully briefed and ready for oral argument. By contrast, there is more than a fair possibility that a stay will harm the interests of the Mohawk Plaintiffs. None of the Defendants has identified a date certain on which the proposed stay would expire. Defendants State of New York and Municipalities ask for a stay "pending the outcome of appellate proceedings in *Oneida.*" SMJRM at page 28. Defendant New York Power Authority asks for a stay "pending the appeal in *Oneida*." PAJRM at 16.

As shown below, the stay Defendants seek would, in effect, be indefinite in duration. A stay that is so extensive that it is "immoderate" or "indefinite" harms the interest of the Mohawk Plaintiffs in a timely resolution of their claims. *See Landis*, 299 U.S. at 254-257.

The *Oneida* case is not proceeding quickly. There are likely to be several more years of litigation before that appeal is finally resolved. A stay would remain in effect throughout the duration of the Second Circuit Court of Appeals' consideration of the appeal, including petitions for rehearing and rehearing *en banc*. Briefing in the first stage of that case is not scheduled for completion until March 11, 2008, barring any requests for extensions of time. There will no doubt be at least one petition for *certiorari* review to the Supreme Court, and that Court's consideration of the case in all of its various stages could easily add another two years to the "outcome of appellate proceedings" in the case.[7] Moreover, Plaintiffs have no assurances that

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7 Although this Court would be bound to follow any ruling of the Second Circuit while the parties seek review in the Supreme Court, a single justice of the Supreme Court may stay the mandate of the Court of Appeals pending the application for *certiorari* review, and the Court of Appeals could stay the issuance of the mandate pending Supreme Court review. *See, e.g., Yong v. I.N.S.*, 208 F.3d 1116, 1119, n.2 (9th Cir. 2000); 28 U.S.C. § 2101(f).

Defendants would not seek to extend a stay through various remand proceedings, the outcome of which cannot be predicted. As a result, even the most conservative estimate of the duration of the proposed stay would put it at nearly three years. The end of the *Oneida* litigation is "susceptible of [neither] prevision [nor] description," and a stay, therefore, would be indefinite and immoderate. *Landis*, 299 U.S. at 257; *see also Am. Mfrs. Mut. Ins. Co. v. Edward Stone, Jr. & Assocs.,* 743 F.2d 1519, 1524 (11th Cir. 1984) (finding stay of federal court proceedings pending conclusion of state court case to be indefinite where the state case had been pending for 18 months); *accord Hines v. D'Artois*, 531 F.2d 726 (5th Cir. 1976).

Where a stay is indefinite or immoderate, a trial court "must identify a pressing need for the stay." *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997). Under this strict standard, the interests of judicial economy alone are insufficient to justify an indefinite stay. *Ortega Trujillo v. Conover & Co. Commc'ns,* 221 F.3d 1262, 1265 (11th Cir. 2000). Defendants have identified no pressing need that would justify an indefinite stay. The possibility that several years from now they may have to assess the impact of a decision of the Court of Appeals or of the Supreme Court on Plaintiffs' claims surely does not qualify as a pressing need justifying a long stay. The need to take into account subsequent legal developments is an ordinary task in litigation. There can be no "pressing need" to avoid the usual burdens of litigation.

Moreover, Defendants overstate the potential impact of the *Oneida* case on this case. That case concerns primarily the so-called fair compensation claim, a legal theory and form of relief that the Mohawk Plaintiffs have not raised. It is entirely possible that the *Oneida* case could be resolved without any appreciable effect on this case.[8] As noted, there are profound

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8 The effect of the Court of Appeals decision in the *Oneida* case on the United States' assertion of a fair compensation claim can be assessed in due course. It makes no sense to hold the entire

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factual distinctions that will significantly diminish the relevance of a decision in that case. *See* Letter from Mohawk Plaintiffs' Counsel to U.S. Magistrate Judge Lowe, September 14, 2007.

The balancing of potential prejudice to the parties should be informed by this Court's "paramount obligation to exercise jurisdiction timely in cases properly brought before it." *Cherokee Nation of Okla.,* 124 F.3d at 1416. The Mohawk Plaintiffs' interest in avoiding delays in this case is especially strong, in light of the record of their futile efforts for more than 150 years to overcome legal and practical obstacles to filing suit. *See* SRMT/MNCC-MO at 59-70. Plaintiffs have a significant interest in preserving their access to court. *Cherokee Nation of Okla.*, 124 F.3d at 1418 (To stay a tribe's suit pending the end of speculative and protracted related litigation "is to place the Tribe[] effectively out of court.")[9] For these reasons, Defendants' request for a stay should be denied.

8(...continued)
Mohawk case in abeyance simply because the Court of Appeals decision might bear on a claim asserted only by the United States.

9 Defendant New York Power Authority's suggestion that Plaintiffs have not sought "early and comprehensive resolution" of the issues in this case is wrong. PAJRM at 17. Even before filing this action, as long ago as the late 1970s, the Mohawk parties sought an out of court resolution of their claims through negotiations with the State of New York, and filed these actions only when the State and the other parties refused to conduct meaningful negotiations. Once the cases were filed, much of the delay can be attributed to Defendants' efforts to re-litigate matters already settled. *Canadian St. Regis Band of Mohawk Indians ex rel. Francis v. New York,* 278 F. Supp. 2d 313, 321 (N.D.N.Y. 2003) (characterizing Defendants' motions as "*deja vu* all over again," in that "*all* of the affirmative defenses *and all* of the counterclaims" filed by Defendants have already been considered in that case or in related land claim litigation) (emphasis in original). Moreover, several stays were obtained to conduct settlement negotiations. *See, e.g., Canadian St. Regis Band of Mohawk Indians v. State of New York,* 2005 WL 2573468, at *11 (N.D.N.Y. 2005). The settlement agreement in this case might have been implemented if Defendants had not returned to court to seek dismissal of this case following *Cayuga*.

CONCLUSION

For the foregoing reasons, Defendants' Motions for Judgment on the Pleadings should be denied, Plaintiffs' Motions to Convert the Pending Motions to Motions for Summary Judgment should be granted, and Defendants' Alternative Motions for a Stay should also be denied.

Date: January 11, 2008

Respectfully submitted

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