UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE CANADIAN ST. REGIS BAND OF MOHAWK INDIANS,

Plaintiff,

THE UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

-vs-

THE STATE OF NEW YORK, HUGH CAREY, as Governor of the State of New York, **THE COUNTY OF ST. LAWRENCE, THE COUNTY OF FRANKLIN, THE VILLAGE OF MASSENA, THE TOWN OF MASSENA, THE TOWN OF BOMBAY, THE TOWN AND VILLAGE OF FORT COVINGTON, FARMERS NATIONAL BANK**, n/k/a **KEY BANK OF NORTHERN NEW YORK, N.A., NATIONWIDE MUTUAL INSURANCE CO., NIAGARA MOHAWK POWER CO., MARINE MIDLAND PROPERTIES CORP., WALSH REALTY CORP. AND CANADIAN NATIONAL RAILWAYS**,

Defendants.

DEFENDANTS' OBJECTIONS TO MAGISTRATE JUDGE'S SEPTEMBER 28, 2012 REPORT AND RECOMMENDATION THAT DEFENDANTS' MOTIONS FOR JUDGMENT ON THE PLEADINGS BE GRANTED IN PART AND DENIED IN PART

5:82-CV-783(Lead)
5:82-CV-1114(Member)
5:89-CV-0829 (Member)

(LEK/TWD)

THE CANADIAN ST. REGIS BAND OF MOHAWK INDIANS

Plaintiff,

THE UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

-vs-

THE STATE OF NEW YORK, HUGH CAREY, as Governor of the State of New York, **ST. LAWRENCE SEAWAY DEVELOPMENT CORP., DAVID W. OBERIN, NIAGARA MOHAWK POWER CO., AND POWER AUTHORITY OF THE STATE OF NEW YORK**,

Defendants.

[caption continued on following page]

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,

THE UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

-*vs*-

THE STATE OF NEW YORK, MARIO M. CUOMO as Governor, **COUNTY OF ST. LAWRENCE; COUNTY OF FRANKLIN; VILLAGE OF MASSENA; TOWN OF MASSENA; TOWN OF BOMBAY, TOWN AND VILLAGE OF FORT COVINGTON; KEY BANK OF NORTHERN NEW YORK, N.A.; NATIONWIDE MUTUAL INSURANCE CO.; NIAGARA MOHAWK POWER CO.; CANADIAN NATIONAL RAILWAYS; POWER AUTHORITY OF THE STATE OF NEW YORK;** *et al*. individuals,

Defendants.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

STANDARD OF REVIEW 2

DEFENDANTS' OBJECTIONS 2

OBJECTION 1

THE ORIGINAL RESERVATION CLAIM SHOULD HAVE BEEN ANALYZED AS A WHOLE AND NOT AS FIVE SEPARATE AREAS 3

OBJECTION II

EVEN IF THE HOGANSBURG TRIANGLE CLAIM IS CONSIDERED SEPARATELY, THE WELL-SETTLED LAW MANDATES ITS DISMISSAL ON THE PLEADINGS WITHOUT THE NEED FOR DISCOVERY 10

A. The Magistrate Misapplied The Controlling Precedent to The Hogansburg Triangle Area. 11

B. The Magistrate Failed To Take Judicial Notice Of The Defendants' Census Data And Improperly Took Notice Of The Plaintiffs' Expert Report On The Make-Up Of The Hogansburg Triangle. 17

C. No Discovery Is Needed Prior To Dismissal Of The Hogansburg Triangle Claim. 22

CONCLUSION 23

APPENDIX 1 - UNREPORTED CASES

APPENDIX 2 - SIMILAR COMPLAINTS

TABLE OF AUTHORITIES

Page

Cases

Cayuga Indian Nation of New York v. Pataki, 413 F.3d 266 (2d Cir. 2005), cert. denied, 547 U.S. 1128 (2006) .... passim

Chambers v. Time Warner, 282 F.3d 147 (2d Cir., 2002) 19

City of Sherrill, New York v. Oneida Indian Nation of New York, 544 U.S. 197 (2005) .... passim

In re Pfizer Inc. Sec. Litig,. 584 F. Supp. 2d 621 (S.D.N.Y. 2008) 21

L-7 Designs, Inc. v. Old Navy, LLC, 647 F.3d 419 (2d Cir. 2011) 19

Oneida Indian Nation of New York State v. County of Oneida, 199 F.R.D. 61 (N.D.N.Y. 2000) 23

Oneida Indian Nation v. County of Oneida, 617 F.3d 114 (2d Cir. 2010), cert. denied, 132 S. Ct. 452 (2011) 5, 7, 8, 13

Onondaga Nation v. State of New York, 2010 WL 3806492 (N.D.N.Y. Sept. 22, 2010) (Kahn, D.J.), aff'd, __ Fed. Appx.__, 2102 WL 5075534 (2d Cir. Oct. 19, 2012) (Summary Order) 1, 6, 18, 23

Onondaga Nation v. State of New York, 2012 WL 5075534 (2d Cir. Oct. 19, 2012) .... passim

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) 16

Shalvoy v. Curran, 393 F.2d 55 (2d Cir. 1968) 19

Shinnecock Indian Nation v. State of New York, 2006 WL 3501099 (E.D.N.Y. Nov. 28, 2006) .... passim

Solem v. Bartlett, 465 U.S. 463 (1984) 16

Thompson v. County of Franklin, 314 F.3d 79 (2d Cir. 2002) 15

United States v. Esquivel, 88 F.3d 722 (9th Cir.), cert. denied 519 U.S. 985 (1996).. 20, 21

Wisconsin v. Stockbridge-Munsee Community, 366 F. Supp. 2d 698 (E.D. Wis. 2004) 16

Statutes

28 U.S.C. §636(b) 2

Rules

Fed. R. Civ. Pro. 72(b)(3) 2

Fed. R. Evid. 201(b)...17

PRELIMINARY STATEMENT

Defendants[1] submit the following objections to the Report and Recommendation of Magistrate Judge Dancks dated September 28, 2012 (Dkt. No. 581) (hereinafter "the Report").

In the Report, the Magistrate recommends that defendants' motions for judgment on the pleadings pursuant to Rule 12(c) be granted in great part and all claims in the plaintiffs' Complaints be dismissed except those claims relating to the parcel of land known as the Hogansburg Triangle and, as to that parcel only, the motions to dismiss be denied.

The Second Circuit has, however, expressly instructed that ancient land claim complaints such as those in these consolidated cases are completely "subject to dismissal *ab initio*" based upon laches because they are patently and inherently disruptive of long-settled expectations. *See Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266 (2d Cir. 2005), *cert. denied*, 547 U.S. 1128 (2006) ("*Cayuga*"). Indeed, the Second Circuit recently and summarily affirmed this Court's dismissal of similar claims on the face of the pleadings, after taking judicial notice of the facts conclusively establishing that the claims are barred by equitable principles. *See Onondaga Nation v. State of New York*, 2010 WL 3806492 (N.D.N.Y. Sept. 22, 2010) (Kahn, D.J.), *aff'd*, __ Fed. Appx.__, 2102 WL 5075534 (2d Cir. Oct. 19, 2012) (Summary Order)("*Onondaga*"*)*. The same result should be reached here.

The defendants therefore respectfully submit that the Report should be adopted in part and rejected in part such that defendants' motions should be granted in their entirety and all claims inclusive of those claims relating to the Hogansburg Triangle in the plaintiffs' Complaints should be dismissed on grounds of laches.

---

[1] These objections are submitted on behalf of all defendants except the New York Power Authority ("NYPA"). The Report recommends dismissal of all of the claims against NYPA.

STANDARD OF REVIEW

Given the specific objections submitted by the defendants, the Court is to "make a de novo determination of those portions of the report . . . or recommendations to which objection is made." 28 U.S.C. §636(b). The Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." Id. *See also* Fed. R. Civ. Pro. 72(b)(3).

DEFENDANTS' OBJECTIONS

As set forth more thoroughly below, the defendants first submit that the Magistrate erred in dividing the plaintiffs' "Original Reservation" claim into five separate sub-areas for purposes of analyzing defendants' laches defense (Report at pp. 34-47). Such an approach entirely misapprehends the nature of this action – a suit to reclaim substantially all of the land purportedly reserved to the Indians of St. Regis in the 1796 Seven Nations Treaty. If adopted, the Magistrate's approach would represent an unwarranted departure from the now well-established precedent of analyzing an entire ancient Indian land claim area as a whole, rather than on a parcel by parcel basis. Additionally, the Magistrate's piecemeal approach is contrary to the Supreme Court's rejection of "checkerboard" jurisdictions in *City of Sherrill, New York v. Oneida Indian Nation of New York*, 544 U.S. 197, 202, 211-12, 214-21 (2005) ("*Sherrill*"). When properly analyzed as a whole, the plaintiffs' land claim must be dismissed in its entirety pursuant to settled Supreme Court and Second Circuit precedent.

Second, even if it were proper to analyze the Hogansburg Triangle area separately from the rest of the land claim area, the Magistrate erred in recommending that defendants' motions be denied with respect to such area (Report at pp. 41-47). The now well-settled and controlling law mandates dismissal of that claim on the pleadings and without the need for discovery and further motion practice. In particular, the Magistrate made three mistakes in analyzing the Hogansburg Triangle area: (1) even if there was a dispute regarding population statistics, the Magistrate erroneously gave

population statistics dispositive weight when they are outweighed as a matter of law by other facts not in dispute that establish that the plaintiffs' claims over the Triangle area should be dismissed because they upset the justifiable expectations of individuals and entities far removed from the events giving rise to plaintiffs' injury; (2) the Magistrate erred in finding that there was a factual dispute regarding the population of the Hogansburg Triangle because she failed to take judicial notice of the defendants' census data and improperly took notice of the plaintiffs' expert report on the demographics of the Hogansburg Triangle, and; (3) contrary to controlling precedent holding that such land claims are dismissible on the face of the pleadings, the Magistrate concluded that there should be discovery and further proceedings concerning the Hogansburg Triangle claim area.

OBJECTION I

THE ORIGINAL RESERVATION CLAIM SHOULD HAVE BEEN ANALYZED AS A WHOLE AND NOT AS FIVE SEPARATE AREAS

The Magistrate made a threshold error in accepting the plaintiffs' invitation to divide the Original Reservation claim into five separate areas in order to avoid a consistent application of the laches defense. Report at pp. 34-36. The Magistrate opined that since the Hogansburg Triangle claim involved three discrete treaties, it could be considered separately from the rest of the approximately 15,000 acre claim area set forth in plaintiffs' Complaints. *Id.*, at p. 36. Further, the Magistrate suggested that the jurisdictional concerns that in great part underpin the laches defense would be absent if the Hogansburg Triangle claim area is segregated out for analysis. *Id.*, at 35.

This is an action seeking to re-establish the tribal plaintiffs' ownership in the Original Reservation as a whole. Plaintiffs sue to reclaim all of the land originally reserved for the Indians of the Village of St. Regis in the Seven Nations Treaty of 1796 (other than the modern reservation land that they currently occupy today). *See e.g.*, Akwesasne Cplt., at ¶ 17. The Original Reservation claim is pleaded as a single cause of action, asserting for the various tribal plaintiff entities "a single

and undivided interest in the lands at issue on behalf of all of the Indians of Akwesasne." Akwesasne Cplt. ¶ 9. The Complaints in this consolidated actions refer to a continuous "series" of treaties – every one of them between New York and representatives of the St. Regis Indians – that purportedly misappropriated the disputed land area over time (from 1816 to 1845). *See e.g.*, Akwesasne Cplt. ¶ 21 (challenging "a series of purported agreements"); U.S. Cplt. ¶ 17 (same). Such allegations are typical of reservation land claims. Suits against the states often allege the gradual misappropriation of reservation land through numerous treaties. The Magistrate's Report, however, disregards the true nature of the Original Reservation claim, and improperly ties today's "settled societal expectations" to individual ancient treaties that have long receded into history.

There is no basis in existing law for this approach, and it is contrary to the Supreme Court's rejection of piecemeal "checkerboard" jurisdiction in *Sherrill*. If adopted, the approach recommended by the Magistrate would represent an unwarranted and unprecedented departure from the prior cases within this Circuit in each of which the laches defense was uniformly applied to entire ancient Indian land claims areas as a whole and not to each individual parcel or separate treaty tracts. Moreover, the potential for checkerboard jurisdictional problems, as cautioned against by the Supreme Court in developing the laches defense in *Sherrill*, is readily apparent from the Magistrate's recommendation and weighs heavily against such a piecemeal approach.

In first recognizing the equitable defenses of laches, acquiescence and impossibility as a bar to an Indian tribe's claim for sovereign control over "discrete parcels of historic reservation land" acquired by the tribe, the Supreme Court evaluated the claim by reference to and analysis of all lands within the historic reservation's former boundaries, not just the particular allegedly tax-exempt "separate parcels of land in question" that the tribe had acquired on the open market. *See Sherrill* at

202, 211-12. The *Sherrill* Court did not, as the Magistrate has recommended here, separately analyze each parcel conveyed through separate treaties and purchases.

To the contrary, every court since *Sherrill* has treated an area of land in this State conveyed in a series of ancient treaties as ***one*** land claim area, not several.[2] Along the same lines as *Sherrill*, in *Oneida Indian Nation v. County of Oneida*, 617 F.3d 114, 126-27 (2d Cir. 2010), *cert. denied*, 132 S. Ct. 452 (2011)("*Oneida*"), the Second Circuit applied the laches analysis to the Oneidas' land claim as a whole and did not separate out for individualized analysis the 872 acre "test case" area or any portion of the entire 250,000 acres claimed by plaintiffs which had been transferred in a series of more than two dozen separate and distinct treaties with the State. *Oneida*, 617 F. 3d at 119 (referencing "25 treaties….a series of transactions from 1795 to 1846 … the first of theses transactions involving 100,000 acres, … [until] during the 1840's [the Oneidas] sold most of their remaining lands to the State"). *See also* Amended Complaint in *Oneida* in Appendix 2 hereto.

Likewise, in *Cayuga*, the Second Circuit applied the *Sherrill* factors to the entire claim area of over 64,000 acres of land encompassing the Cayuga's "Original Reservation." This was the case despite the fact that, as here, the "Original Reservation" lands were acquired in parts by the State in two treaties, the second of which involved a remaining, discrete, three mile square parcel on the eastern shore of Cayuga Lake. *Cayuga*, 413 F.3d at 268-69, 277. *See also* Amended Complaint in *Cayuga* in Appendix 2 hereto. The Second Circuit made no distinction, as the Magistrate would make here, between the "Original Reservation" claim area as a whole and the smaller portion conveyed in a separate and discrete treaty. *Cayuga*, 413 F.3d at 268-69, 277.

---

[2] The plaintiffs here have consistently grouped together all of their challenges to "Mainland Claims," which involve challenges to conveyances by treaty, as distinguished from the "Island Claims," which were not covered by any of the treaties but allegedly misappropriated by land patents issued by the State of New York to private landowners. *See, e.g.,* U.S. Cplt. ¶ 4 ("The lands claimed in these consolidated actions may be divided into two parts: 1) approximately 15,000 acres in Franklin and Saint Lawrence Counties, New York, that were purportedly acquired by the State of New York between 1816 and 1842 . . . and 2) Barnhart, Baxter and the Long Sault Islands . . . .").

The same uniform approach applies even when the land claim area is truly enormous. Thus, in *Onondaga*[3], the plaintiff claimed an extensive area described (at p. *2 of the District Court's decision) as an aboriginal tract in central New York some ten (10) to forty (40) miles wide stretching from Lake Ontario and the St. Lawrence River south to the Pennsylvania border. Those lands were conveyed to the State in a series of treaties dating from the late 18th and early 19th centuries (1793, 1795, 1817, and 1822), each involving separate and distinct tracts within the original Onondaga Reservation. *Id.*, at *2-*3. *See also* Amended Complaint in Onondaga (previously submitted at Dkt. No. 554-6). This Court nevertheless applied the laches defense to the "various parcels" of "land in question" uniformly and as a whole to find the claims equitably barred and subject to dismissal. *Onondaga*, at *7-*8. The Second Circuit summarily affirmed this Court's dismissal of all the Onondagas' claims on the pleadings, without parsing out either the specific lands the Onondagas asserted were of particular interest to them or any of the series of treaties they challenged in their complaint. *Onondaga* at *1-2.

The Eastern District of New York has also addressed an Indian Land claim as a whole, rather than piecemeal as advocated by the plaintiffs here and recommended by the Magistrate in this case. In *Shinnecock Indian Nation v. State of New York*, 2006 WL 3501099, *1-2 (E.D.N.Y. Nov. 28, 2006) (Platt, D.J.) ("*Shinnecock*"), the plaintiff sought relief concerning "each portion of the Subject Lands acquired or transferred from the Nation for the period from 1859 to the present" described as including "…premises referred to as 'Shinnecock Hills' and 'Sebonac Neck' including 'Ram Island'…". The District Court dismissed the claims by applying the laches defense to the entire claim area, without distinguishing among the parcels comprising the "thousands of acres" claimed as a whole.

---

[3] Copies of all decisions cited herein that are not available in an official reporter are annexed hereto as Appendix 1 to this Memorandum in accordance with the Local Rules. Copies of the Amended Complaint in *Oneida* and the Amended Complaint in *Cayuga*, of which this Court may take judicial notice, are annexed hereto as Appendix 2.

In each of the foregoing cases, the court applied the laches defense to a single land claim area as a whole; in each case, the court declined to differentiate the parcels conveyed by individual treaties, even where the plaintiffs challenged dozens of treaties signed over several decades. Those cases govern here. Thus, the laches defense applies to the entire claim area – here, the "Original Reservation" claim. Indeed, in analogous circumstances, this Court has previously rejected the argument that limiting the set of defendants within the entire claim area against whom relief is sought could somehow save the claims against those particular defendants from dismissal. *Onondaga*, 2010 WL 3806492 at *7. *See also Shinnecock*, 2006 WL 3501099 at *5 (smaller parcel of land and smaller number of owners against whom relief was sought insufficient to save claim from dismissal based upon laches). The above cases confirm that "adroit manipulation" of the claim should not alter the laches analysis since "the applicability of an equitable defense requires consideration of the basic premise of a claim, rather than the particular remedy sought." *Oneida*, 617 F.3d at 138 (*citing Cayuga*, 413 F.3d at 275, 277-78).

Moreover, the Magistrate's recommendation is contrary to *Sherrill's* rejection of the checkerboard jurisdiction that would result from recognizing the claim over particular parcels. *See Sherrill*, 544 U.S. at 219-20 ("A checkerboard of alternating state and tribal jurisdiction in New York State – created unilaterally at the OIN's behest – would seriously burde[n] the administration of state and local governments and would adversely affect landowners neighboring the tribal patches."). The Magistrate erroneously concluded (Report at p. 35) that her separate, segmented, treatment of the Hogansburg Triangle would not run counter to the Supreme Court's significant concerns about "disruptive practical consequences" that would flow from a "checkerboard of jurisdictions" in this area. The Magistrate opined that such concerns would be absent since the Triangle area is "contiguous to the current St. Regis Reservation." *Id.* Each of the various other land

claims that this Court and the Second Circuit have considered and dismissed, however, also involved some discrete parcels of land abutting or in close proximity to those tribal plaintiffs' current reservations. *See e.g.* Roberts Aff. (Dkt. No. 554-1), Exhibits X and Y (Dkt. Nos. 554-6 and 554-7 - Onondagas' Amended Complaint and other documents submitted in *Onondaga* litigation which include description of portions of lands being claimed as located around current reservation); Amended Complaint in *Oneida* in Appendix 2 (same).

The Magistrate's recommendation would actually exacerbate the checkerboarding issue that concerned the Supreme Court in *Sherrill*. The Magistrate, in her analysis, assumes that if the plaintiffs prevail with respect to the Hogansburg Triangle, plaintiffs would obtain title to all the land within the Triangle. For example, the Magistrate concludes that her separate, segmented, treatment of the Hogansburg Triangle would not run counter to the Supreme Court's significant concerns about the "disruptive practical consequences" that would flow from a "checkerboard of jurisdictions" in this area. *See* Report, p. 35. In addition, the Magistrate acknowledges the disruptive consequences that would result from the "checkerboard regulatory control over the highway . . . or the need the reroute the highway all together were the Mohawks to be granted possession of Route 37 in the claim area." Report fn. 32. Those conclusions are only true if a decision in favor of the plaintiffs would result in plaintiff's obtaining title to all the land within the Triangle.

It is accepted law, however, that ejectment is not a proper remedy in land claim litigation. *See Cayuga,* 413 F.3d at 276; *Oneida,* 617 F.3d at 126. The plaintiffs, if they were to prevail with respect to the Hogansburg Triangle, would not be entitled to eject private property owners (whether Native American or not) nor the State (Route 37) from their property. The greater percentage of Native American owned property relied upon by the plaintiffs and the Magistrate, therefore, would

actually exacerbate the checkerboarding problem that concerned the United States Supreme Court in *Sherrill*.

The jurisdictional and regulatory problems that stem from analyzing the Hogansburg Triangle area separately (indeed, analyzing areas within the Triangle itself separately and inconsistently) are readily apparent on the face of the Magistrate's report. For example, the Magistrate (correctly) noted that dismissal of the vast majority of the Original Reservation claim on grounds of laches required dismissal of plaintiffs' challenges to legislation declaring portions of the Racquette and St. Lawrence Rivers to be public highways and plaintiffs' claims that State Route 37's alleged encroachment on original reservation lands violated the Nonintercourse Act. Report at p. 40, fn. 32. The Magistrate's recommendation to dismiss those claims under *Cayuga* and *Oneida* extends to the entire Original Reservation claim area, including the Hogansburg Triangle, and was explicitly based upon the "checkerboard regulatory" problems that would result if possession and control of parts of those rivers and highway within the Triangle were returned to the plaintiffs. *Id.* The Magistrate's reasons for excepting those "almost unthinkable" claims from both the Triangle and the Original Reservation claim as a whole are equally applicable to the Magistrate's proposed separate treatment of the five areas making up the Original Reservation. *Sherrill*, 544 U.S. at 221 (inequitable "piecemeal shift in governance" should be avoided).

In summary, the Court should reject the piecemeal approach recommended by the Magistrate of dividing the Original Reservation claim into sub-parts and then further distinguishing within those sub-parts themselves when applying the laches defense. The Magistrate's approach is at odds with the Supreme Court's decision in *Sherrill* as well as this Court's and the Second Circuit's prior applications of the laches defense to ancient Indian land claim areas as a whole. Taken to its extreme, this approach would require analysis not only of each separate treaty tract, but then also

each parcel subsequently conveyed in later smaller transactions, perhaps down to each individual tax map plot. The Magistrate's approach is unwarranted and unworkable and this Court should reject it. Instead, the Court should dismiss plaintiffs' claim in its entirety. *See Cayuga,* 413 F.2d at 278 (expressly instructing district courts to dismiss a complaint similar to the one plaintiffs filed in that case since it would be "subject to dismissal *ab initio*" based upon laches).

OBJECTION II

EVEN IF THE HOGANSBURG TRIANGLE CLAIM IS CONSIDERED SEPARATELY, THE WELL-SETTLED LAW MANDATES ITS DISMISSAL ON THE PLEADINGS WITHOUT THE NEED FOR DISCOVERY

Even assuming solely for the purpose of argument that the Hogansburg Triangle claim warrants consideration separately from the rest of the land claim area, the controlling law mandates dismissal of that claim on the pleadings and without the need for discovery. The Magistrate erred in recommending that defendants' motions be denied with respect to the Hogansburg Triangle area of the Original Reservation claim and that the issue of the Indian or non-Indian character of such land be subject to discovery and subsequent judicial fact finding. Report at pp. 41-47.

The Magistrate made three errors in analyzing the Hogansburg Triangle area: (A) the Magistrate gave dispositive weight to statistics regarding the makeup of the population of the Hogansburg Triangle despite the fact that other facts not in dispute readily establish that the plaintiffs' claims regarding the Triangle area are subject to dismissal because the claims upset the justifiable expectations of individuals and entities far removed from the events giving rise to plaintiffs' injury; (B) in examining the population of the Hogansburg Triangle, the Magistrate further erred because she failed to take judicial notice of the defendants' census data showing that the non-reservation area has a relatively low Indian population and improperly took notice of the plaintiffs' expert report, and; (C) contrary to controlling precedent holding that such land claims are dismissible on the face of the pleadings, the Magistrate concluded that there should be discovery and further

proceedings concerning the Hogansburg Triangle claim area. We detail each of the Magistrate's errors below and explain that, even under her mistaken piecemeal approach to the Hogansburg Triangle, the Magistrate erred in not dismissing that claim.

A. The Magistrate Misapplied The Controlling Precedent to The Hogansburg Triangle Area.

As we explain in Point II(B) below, the Magistrate erred in concluding that there was a factual dispute regarding the population statistics relevant to the Hogansburg Triangle, because she failed to take judicial notice of the defendants' census data and instead improperly took judicial notice of the plaintiffs' expert report on the make-up of the Hogansburg Triangle. In doing so, however, the Magistrate committed a far more significant error: even when the Hogansburg Triangle is considered separately, and even assuming that the population statistics were properly in dispute, the now well-settled and controlling law mandates dismissal on the pleadings of plaintiffs' claims over that area.

This case should be "decided on the basis of the equitable bar on recovery on ancestral land" articulated in *Sherrill* and the Second Circuit's cases of *Cayuga* and *Oneida*. *See Onondaga*, 2012 WL 5075534 at *1. "Three specific factors determine when ancestral land claims are foreclosed on equitable grounds." *Id.* They are:

> (1) the length of time at issue between an historical injustice and the present day; (2) the disruptive nature of claims long delayed; and (3) the degree to which these claims upset the justifiable expectations of individuals and entities far removed from the events giving rise to the plaintiffs' injury.

Id. (internal quotation marks and citations omitted).

In this case, the Magistrate correctly concluded that "[t]he Hogansburg Triangle does not differ from the other parts of the Original Reservation claim with regard to most of the *Sherrill* factors the Court is required to consider in determining whether an Indian land claim should be

dismissed on laches grounds." Report at p. 42. For example, the Magistrate noted that there had been a delay of over a century and a half from the time possession of the land was lost and then sought to be recovered – thereby satisfying the first of the three factors outlined above. *Id.* Additionally, the Magistrate properly noted the disruptive nature of the plaintiffs' long-delayed claims, both generally and also with respect to the Triangle, in satisfaction of the second factor. *See e.g.,* Report at p. 25 (holding that plaintiffs' claims as a whole are "by their nature disruptive"), p. 40-41, fn. 32 (finding serious disruptive and "almost unthinkable consequences" of returning to the plaintiffs parts of rivers claimed and Route 37 which runs through the Triangle).

However, the Magistrate misapplied the third factor by opining – based solely on population percentages – that "[t]he critical distinction between the Hogansburg Triangle and the other claim areas is that the pleadings and other materials and information that may properly considered on a Rule 12(c) motion fail to establish that the Hogansburg Triangle and its inhabitants have a 'longstanding and distinctly non-Indian character'…". Report at p. 42. The proper analysis of the third factor demonstrates that it, like the first two factors, supports dismissal of the Hogansburg Triangle claim.

In this case, substantial and indisputable evidence bearing on the third laches factor establishes that plaintiffs' claims over the Triangle area are highly disruptive of and upset justifiable expectations. *Onondaga* is again instructive and governs the Court's analysis here.[4] In that case, the Second Circuit expressly approved of the fact that:

> As to settled expectations, the district court took "judicial notice that the contested land has been extensively populated by non-Indians, such that the land is predominantly non-Indian today, and has

[4] Although *Onondaga* is an unpublished summary order, it may still be cited for "persuasive value" in accordance with the Advisory Committee's Notes to Fed. R. App. P. 32.1(a) and to "acknowledge the continued precedential effect" of the cases upon which it relied. Moreover, "denying summary orders precedential effect does not mean that the court considers itself free to rule differently in similar cases." *United States v. Payne*, 591 F.3d 46, 58 (2d Cir. 2010).

> experienced significant material development by private persons and enterprises as well as by public entities."

2012 WL 5075534 at *2. Accordingly, the *Onondaga* court determined that "[u]nder the Supreme Court's *Sherrill* precedent, the Government and current occupants of the land therefore have 'justifiable expectations' to ownership." *Id.*, *citing Sherrill* 544 U.S. at 217. The Second Circuit's determination was made without regard to any specific population figures and despite the fact that the plaintiff in *Onondaga* amassed a large factual record in an effort to demonstrate, among other things, the Onondagas' presence in the area and the alleged Indian character of the land, in opposition to a finding of "settled expectations." *See* Dkt. No. 554 at pp. 10-11 (summarizing materials submitted by plaintiff in *Onondaga* as attached to Roberts Aff. at Ex. Y (Dkt. No. 554-7)); Dkt Nos. 561-2 through 561-8 (further materials submitted in *Onondaga* litigation).

The same result should be reached in this instance as was reached in *Onondaga* and each and every other Indian land claim in this Circuit which has addressed the question of "settled expectations." *See generally, Cayuga, Oneida and Shinnecock*. Generally summarized, the following indisputable facts bear upon this third laches element and mandate dismissal here.

Most importantly, while the Magistrate correctly concluded that "judicial notice may be taken that the Triangle has been governed and regulated by the State of New York and its local units during the time of the Mohawk's dispossession" (Report at p. 42), the Report, fails to give the State's longstanding jurisdiction over the area its proper great significance in this regard. Almost 200 years of non-Indian governance and regulation is entitled to "heavy weight" in a court's analysis. *Sherrill*, 544 U.S. at 215-16.

Moreover, the plaintiffs' own pleadings confirm that they have been out of possession of the claimed land in the Triangle since at least 1825 and the Magistrate correctly noted that the

"Hogansburg Triangle has not been possessed by the Mohawks as a tribal entity for nearly 190 years." Report at p. 42.

Additionally, judicial notice may be taken upon common knowledge that the land in the Triangle, like the other Original Reservation claim areas, "although sparsely developed in comparison to a more urban area, has been owned and developed largely by non-Indians" (Report at p. 39), thereby "dramatically changing its character" (report at p. 37) and giving rise to settled expectations.

One need only look to the defendant class here to see the extensive non-Indian presence in the area. By the plaintiffs' own estimation, a defendant class of over two thousand non-Mohawk title holders occupied the land claim tracts as of 1989 and the other defendants named herein include not only the State and various counties and municipalities, but also various lending institutions, insurance companies, real estate holding companies, a power company, power authority, and a railway. *See Shinnecock*, 2006 WL 3501099 at *5 (noting "drastically changed conditions in the subject lands" is "evidenced by the types of defendants being sued").

In addition to homes and businesses, judicial notice should be taken, for example of the presence of roadways, bridges and public facilities, including a Department of Transportation facility and Route 37 (a major North Country thoroughfare in the Triangle). *See* Report at fn. 32 (noting "justified societal expectations" with respect to transportation in this area).

Finally, the presence of individual Mohawk landowners in the area today should not factor against a finding of "settled expectations." The Magistrate's Report fails to appreciate the fact that, even as to parcels within the Triangle that were acquired in fee by individual Mohawk members, titles are founded on the same "settled societal expectations" as to ownership as are shared by all: the parcels are freely alienable, subject to local property taxes, and have been subject to State and local

governance for nearly two centuries. *See generally Thompson v. County of Franklin*, 314 F.3d 79 (2d Cir. 2002) (rejecting claim by individual Mohawk holding fee title to a parcel in the Hogansburg Triangle alleging that the property was within "Indian country" and therefore not subject to real property taxes – plaintiff did not (and pragmatically could not) challenge the validity of the ancient cession treaties upon which her warranty deed and her chain of title were dependent). Therefore, the well-settled expectations here are not diminished by the presence of tribal members in the area whose land ownership rests on the same chain of title that this suit would disrupt.

All of the above evidence bears heavily on the third laches factor and establishes that plaintiffs' claims over the Triangle area are highly disruptive of and upset justifiable expectations, thereby mandating dismissal of the Triangle claim on the pleadings.

The Magistrate, however, erred in analyzing settled expectations by solely focusing on population statistics. The Magistrate seems to have applied a bright line test for the percentage of population that satisfies an unstated definition of "Indian character." For example, the Report suggests that even if plaintiffs' proffered figures of 9.3% non-reservation Indian population for the Fort Covington claim area are accepted, "the Indian presence in Fort Covington is still not sufficient to avoid dismissal of [that claim area] on laches." Report at p. 40. In the very next section, however, the Report suggests that even if the Court took judicial notice of defendants' census data in analyzing the Hogansburg Triangle area (showing a non-reservation Indian population percentage for the Town of Bombay between 8.741% for the year 1980 and 14.89% in the year 2000 (Report at p. 44)), then it would "not provide a basis upon which to conclude that the Hogansburg Triangle and its inhabitants have a 'longstanding and distinctly non-Indian character.'" Report at p. 45.

The proper test for disruptiveness of justifiable expectations "is not based on strict numeric calculations" (*Shinnecock*, 2006 WL 3501099 at *5) and population percentages are merely one

consideration in analyzing the third factor of the laches test. Here, the Magistrate mistakenly treated the population percentages as trumping not only the other relevant considerations bearing upon the third factor, but also the first two factors, which she had correctly concluded favored dismissal. The Court should reject the Magistrate's recommendation that would make any population figures entirely controlling.[5]

The Magistrate's error in this regard appears to be based on a misapplication of *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977), a case addressing diminishment of an Indian reservation, which the Magistrate read as allowing a finding of "justifiable expectations" only where a state has assumed jurisdiction over land that is 90% non-Indian in population and land use. Report at fn. 35. However, as the Supreme Court later clarified in *Solem v. Bartlett*, 465 U.S. 463, 471-72, fn. 13 (1984), subsequent population/demographic statistics are but "one additional clue" in this regard and one that can be "potentially unreliable."[6] *See also Wisconsin v. Stockbridge-Munsee Community*, 366 F. Supp. 2d 698, 779 (E.D. Wis. 2004) ("Although demographic evidence [referred to as 'also a matter for the court's consideration'] shows that the Indian character of the 1856 reservation has remained strong, in light of the other substantial evidence in the record, the demographic evidence is insufficient to support a finding that the reservation was not disestablished."). In any event, *Sherrill* and the other land claim decisions that followed it are controlling in this case, and as explained above, those decisions mandate dismissal of the Hogansburg Triangle claim.

---

[5] This is especially true since both plaintiffs' and defendants' data show an increase in non-reservation Indian population in the claim area from 1980 to 2000 (Report at p. 44) based upon individuals' open-market purchases of properties, which cannot serve to revive the ancient Indian character of the area. *See Sherrill*, 544 U.S. at 202-03. Moreover, plaintiffs' census information improperly includes non-reservation Indians who reside on properties foreclosed by Franklin County for failure to pay taxes, but who have been allowed to remain pending outcome of this litigation (Report at fn. 44; Dkt. Nos. 498 at 17-18 and 471 at 44 fn. 22).

[6] Both of these Supreme Court cases do note that where an area "is predominantly populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of State and local governments." *Solem*, 465 U.S. at 472, fn. 12.

In conclusion, even if the Hogansburg Triangle claim area is addressed separately, the Court should conclude that like all of the other Original Reservation claim areas, this claim area too is foreclosed on equitable grounds.

B. The Magistrate Failed To Take Judicial Notice Of The Defendants' Census Data And Improperly Took Notice Of The Plaintiffs' Expert Report On The Make-Up Of The Hogansburg Triangle.

In addition to mistakenly giving controlling weight to the population data, the Magistrate erred as a preliminary matter in determining that there is a question of fact with respect to the composition of the population of the Hogansburg Triangle. There is no such question – only defendants' census data is properly the subject of judicial notice, and defendants' data establish the "distinctly non-Indian character of the area and its inhabitants." *Sherrill*, 544 U.S. at 202. This Court should reject the Magistrate's conclusion that there is a question of fact regarding the area's population.

1. The Magistrate Erred in Failing to Take Judicial Notice of Defendants' Census Data.

On their motions to dismiss and in support of their laches defense, the defendants offered, among other things, United States Census data (summarized at pp. 43-44 of the Report) showing that the Counties of Franklin and St. Lawrence and the Town of Bombay had relatively low non-reservation Indian population percentages for the years 1980, 1990 and 2000. The Magistrate, however, mistakenly failed to take judicial notice of the defendants' census data and instead improperly took notice of the plaintiffs' expert report on the make-up of the Hogansburg Triangle.

Rule 201(b) of the Federal Rules of Evidence states that:

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Fed. R. Evid. 201(b). The Comments on Rule 201 state that a "high degree of indisputability is the essential prerequisite" to judicial notice. The Comment on Rule 201(b) states that:

> With respect to judicial notice of adjudicative facts, the tradition has been one of caution in requiring the matter to be beyond reasonable controversy. The tradition of circumspection appears to be soundly based, and no reason to depart from it is apparent.

An appropriate application of judicial notice in the context of an Indian Land claim can be found in *Onondaga*. In that case, judicial notice was taken notwithstanding that, like the plaintiffs in this action, the Onondagas countered defendants' motions to dismiss with a large factual record in attempts to argue that judicial notice should not be taken and that there were questions of fact requiring discovery and precluding dismissal. Notwithstanding such submissions by the Onondagas, this Court in *Onondaga* took:

> judicial notice that the contested land has been extensively populated by non-Indians, such that the land is predominantly non-Indian today, and has experienced significant material development by private persons and enterprises as well as by public entities.

2010 WL 3806492 at *8. The Second Circuit rejected the Onondagas' challenge to this determination on appeal, holding that:

> We reject the argument that it was inappropriate for the district court to take judicial notice of population and development at this stage of litigation. Discovery is not needed to ascertain whether the City of Syracuse has been extensively developed and populated over the past 200 years. It is not an abuse of discretion for the trial to take judicial notice of such obvious facts.

2102 WL 5075534, *2.

Therefore, in this case, the Magistrate erred in refusing to take judicial notice of the United States Census data proffered by defendants documenting the low non-reservation Indian population in the claim area. *See also Sherrill*, 544 U.S. at 211 (citing 2000 Census data); *Cayuga*, 413 F.3d at 275.

The Magistrate's reliance on *Shalvoy v. Curran*, 393 F.2d 55 (2d Cir. 1968), for the proposition that "census reports are not immune from challenge" is misplaced. In *Shalvoy*, the census report at issue (from seven years prior) was susceptible to challenge only because since the time of the report "such large and obvious changes in population ha[d] occurred as to be the subject of judicial notice." 393 F.2d at 57-58. No such changes are present here so as to make defendants' census data subject to challenge as was the case in *Shalvoy*.

2. The Magistrate Erred in Taking Judicial Notice of Plaintiffs' Census Data

Moreover, the Magistrate compounded this error by mistakenly taking judicial notice of plaintiffs' expert report which culls census data from small "census blocks" into what they term "counts" which in turn purport to estimate the population of the Hogansburg Triangle. *See* Mann Declaration at Dkt. No. 474-13. Plaintiffs' data failed to satisfy the standards of Rule 201(b); in particular, the requirement that there be a high degree of indisputability, and the Magistrate Judge should not have relied on it in determining the Rule 12(c) motion. Report at pp. 42-46. The Report, at page 15, states that:

> In considering a Rule 12(c) motion, "the court considers the complaint, the answer, any written documents attached to them, and any matter of which the court can take judicial notice for the factual background of the case." *L-7 Designs, Inc. v. Old Navy, LLC,* 647 F.3d 419, 422 (2d Cir. 2011). Even where a document is not incorporated by reference, the court may never the less consider it where the complaint relies heavily upon its terms and effect, which render the document integral to the complaint. *Chambers v. Time Warner, Inc.,* 282 F.3d 147, 153 (2d Cir. 2002).

The cases cited by the Magistrate do not support her decision here to take judicial notice of the plaintiffs' data. In both *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419 (2d Cir. 2011) and *Chambers v. Time Warner*, 282 F.3d 147 (2d Cir., 2002) the court took judicial notice of documents relied upon in drafting or incorporated into the pleadings and of which the opposing party had

advance notice and knowledge. In the instant case, however, the census data submitted by the St. Regis in response to defendants' Rule 12(c) motion does not fall within the parameters set forth in *L-7 Designs* and *Chambers.* The data did not even exist at the time the complaints were filed. Plaintiffs could not have relied on the data in framing the complaints. In addition, the defendants had no knowledge of the census data before plaintiffs submitted their response to the motion. Therefore, such material extraneous to the complaints should not have been considered.

The Report further states that the "Court may take judicial notice of the St. Regis's narrowly tailored census data as rebuttal to the broader census data relied upon by the Defendants," citing *United States v. Esquivel*, 88 F.3d 722, 727 (9th Cir.), *cert. denied* 519 U.S. 985 (1996). Report, p. 44 n. 18. *Esquivel* does not support the Magistrate's recommendation here. In that case, the United States asked the court to take judicial notice of the United States Census to rebut an expert report relied upon by the plaintiff. The court took such notice, finding that

> "[T]he Government's evidence is of the same type and taken from the same source – the United States Department of Commerce, Bureau of Census – as [plaintiff's]. Further the census documents meet the requirement of Rule 201(b), Fed. R. Evid., in that they are 'not subject to reasonable dispute' because they are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

88 F.3d at 727.

Contrary to the assertion in the Report, the court in *Esquivel* did not address the issue of whether the census data relied upon the United States was "narrowly tailored." The issue in *Esquival* was whether the census data relied upon by the plaintiff – the number of Hispanics in the San Diego area – was an accurate reflection of the pool of available grand jurors when there were numerous additional eligibility requirements for serving as a grand juror. The United States

therefore requested that the court take notice of the census data showing the number of Hispanics eligible for jury service. *See* 88 F.3d at 726.

In this case, the census data submitted by the plaintiffs in opposition to defendants' Rule 12(c) motion does not fall within the category of evidence found acceptable to the court in *Esquivel.* There is no evidence that the "census block" methodology employed by plaintiffs' expert is a generally accepted methodology for analyzing such data much less that the data is capable of "accurate and ready determination." Absent that foundation, the Magistrate should not have taken judicial notice of the plaintiffs' expert report. *See In re Pfizer Inc. Sec. Litig.,* 584 F. Supp. 2d 621, 634 (S.D.N.Y. 2008) (declining to take judicial notice of the meaning of the statistical significance of the data interpretations proffered by defendants in the context of motion practice).

In addition, a review of the Mann Declaration and the accompanying exhibits reveals internal inconsistencies that reinforce the conclusion that the Magistrate should not have taken judicial notice of the "data" included therein. Initially, it is not possible to coordinate the census block maps for the Hogansburg Triangle, Mann Dec., Exhibits A and B, with the census data for 2000 attached to the declaration as Exhibit G. The maps do not contain the census block numbers included in the census print out. Moreover, there is no explanation as to why the census block numbered 418 in the 1990 census was numbered 4018 for the 2000 census and similarly no explanation as to why the total population for census block 418 in 1990 was 21 when the total population for census block 4018 in 2000 was 0. Such inherent inconsistencies further remove the Mann Affidavit and the conclusions contained therein from the realm of facts not subject to reasonable dispute of which a court can take judicial notice. Accordingly, this Court should refuse to take judicial notice of plaintiffs' expert report.

The Report also mistakenly states that the defendants "did not dispute the accuracy of the plaintiffs' census information." Report, p. 44, n. 39. The Report refers to the Defendants' Joint Supplemental Memorandum of Law and ignores the earlier filed Joint Reply Memorandum. The defendants did challenge plaintiffs' census data in their Reply Memorandum:

> Plaintiffs have advanced their own census data, asserting in particular that within the Hogansburg Triangle (approximately 2,000 acres) the percentage of the population claiming Indian ancestry is much higher than county wide and town wide U.S. Census Bureau data that Defendants have cited. . . . The methodology used in Plaintiffs' study departs from the census tracts employed by the Census Bureau . . ., and included properties that have been foreclosed upon for non-payment of taxes, amounting to more than a quarter of the "Indian-owned" land identified in their study of the Triangle.

See Defendants' Joint Reply Memorandum, (Dkt. No. 498) at pp. 13-14.

The Magistrate, therefore, improperly took judicial notice of plaintiffs' census data and improperly failed to take notice of the defendants' census data. As set forth above, however, even assuming that the population statistics were properly contested, defendants were still entitled to judgment on the pleadings. No discovery or judicial hearing is needed to reach this conclusion as set forth below.

C. No Discovery Is Needed Prior To Dismissal Of The Hogansburg Triangle Claim.

Contrary to the Magistrate's recommendation (Report at pp. 45-46), discovery and hearings concerning the Hogansburg Triangle claim area are entirely unnecessary and completely contrary to existing precedent holding that such claims are dismissible on the face of the pleadings. *See Cayuga,* 413 F.2d at 278 (instructing that similar complaints should be "subject to dismissal *ab initio*" based upon laches); *Onondaga*, 2012 WL 5075534 at *2 (affirming grant of motions to dismiss under Rule 12(b)(6) since discovery was not needed to ascertain applicability of three laches factors).

As this Court did in *Onondaga* when applying the laches analysis in the context of motions to dismiss, the court should now properly determine the issue of "justifiable expectations" as a matter

of law and dismiss this case on the pleadings. *See Onondaga*, 2010 WL 3806492 at *8 ("The dispositive considerations which compel this Court to dismiss the claims are 'self-evident'" such that "discovery and further development of the record would be inappropriate and superfluous."). *See also Cayuga,* 413 F.2d at 280 (finding that there was "no need to remand to the District Court [for further factual development] for a determination of the laches question").

The Magistrate recommends that the plaintiffs be given their "day in court" to further litigate the "character – Indian or non-Indian – of the Hogansburg Triangle." Report at p. 45, fn. 40. Defendants submit, however, that this Court's own experience has shown that factual development and evidentiary hearings on such issues prove to be an "academic exercise" that are wholly counterproductive and "needlessly prolong" the litigation. *See Oneida Indian Nation of New York State v. County of Oneida*, 199 F.R.D. 61, 92 (N.D.N.Y. 2000) (discussing *Cayuga* litigation). Here, as in *Cayuga*, the factual development suggested by the Magistrate would involve adducing proof that falls "into the category of commonsense observations" that are "self evident" and would result in the Court gaining "little if any insight – either factually or legally." *Id*. It was for this very reason that the Second Circuit recently affirmed the dismissal of the Onondagas' claims on the pleadings, without permitting discovery. *Onondaga*, 2102 WL 5075534 at *2. In this case, the Magistrate erred by not recommending that plaintiffs' claims be dismissed in their entirety.

CONCLUSION

Based upon the above objections, the Court should adopt in part and reject in part the Magistrate's Report such that the defendants' motions should be granted in their entirety and all claims in the plaintiffs' Complaints should be dismissed on grounds of laches, inclusive of those claims relating to the Hogansburg Triangle.

DATED: November 16, 2012
Albany, NY

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
The Capitol
Albany, New York 12224-0341
Attorney for State Defendants

s/ Aaron M. Baldwin

By: Aaron M. Baldwin
(Bar Roll No. 510175)
Assistant Attorney General, of Counsel
Telephone: (518) 473-6045
e-mail: Aaron.Baldwin@ag.ny.gov

DATED: November 16, 2012
Syracuse, NY

HISCOCK & BARCLAY, LLP

s/ Alan R. Peterman

Alan R. Peterman
(Bar Roll No. 102358)
Attorneys for Non-State Defendants
COUNTY OF ST. LAWRENCE, COUNTY OF FRANKLIN, VILLAGE OF MASSENA, TOWN OF MASSENA, TOWN OF BOMBAY, TOWN AND VILLAGE OF FORT COVINGTON, FARMERS NATIONAL BANK, n/k/a KEY BANK OF NORTHERN NEW YORK, N.A., NATIONWIDE MUTUAL INSURANCE CO., NIAGARA MOHAWK POWER CO., MARINE MIDLAND PROPERTIES CORP., WALSH REALTY CORP., and CANADIAN NATIONAL RAILWAYS, and the DEFENDANT CLASS
One Park Place
300 South State Street
Syracuse, New York 13202
Telephone: (315) 425-2775
email: apeterman@hblaw.com