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.

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.

STATE AND MUNICIPAL DEFENDANTS' RESPONSE TO PLAINTIFFS' 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)

[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.

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PRELIMINARY STATEMENT

Defendants[1] submit the following response to the Plaintiffs' and Plaintiff-Intervenor's 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 Plaintiffs' Complaints be dismissed, except those claims relating to the lands located in an area of Franklin County known as the Hogansburg Triangle and, as to those lands only, the motions be denied. Plaintiffs objected to those portions of the Report that recommended that Defendants' Motions for Judgment on the Pleadings be granted with respect to the lands within the Town of Fort Covington and the rights-of-way claims involving New York State Route 37 and Niagara Mohawk[2].

For the reasons set forth below, Plaintiffs' Objections are without merit and those portions of the Report to which Plaintiffs object should be adopted by the District Court. In addition, for the reasons set forth in Defendants' Objections to the Magistrate's Report and Recommendation (Dkt. No. 589), that portion of the Report that recommended that Defendants' Motions should be denied with respect to the Hogansburg Triangle should be rejected by the District Court and the Court should grant Defendants' Motions in their entirety.

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[1] This Response is submitted jointly on behalf of the State of New York and its Governor (the "State Defendants") and the Municipal Entities and Corporate Entities ("Municipal Defendants") – together meant to mean all defendants except the New York Power Authority ("NYPA"). NYPA has submitted a separate response which the State Defendants and Municipal Defendants adopt and incorporate by reference as and for their response to the objections lodged by Plaintiffs and Plaintiff-Intervenor concerning the recommended dismissal of the Islands claims.

[2] Plaintiffs have not made – and have therefore waived – any objection to the Magistrate's recommendation that the Village of Massena, Grasse River Meadows and Village of Fort Covington claim areas be dismissed. *See*, St. Regis Mohawk Tribe and Longhouse Objections (Dkt. No. 594) at pp. 10-11, 14-21 (objecting only to Town of Fort Covington portion of Mainland claims); U.S. Objections (Dkt. No. 592) at pp. 32-33 (same); Canadian St. Regis Band objections (Dkt. No. 590) at pp. 9-10 (deferring to St. Regis Mohawk Tribe and Longhouse's objections on any "Mainland" claims). Therefore, the Court should adopt the Report's recommendation (Dkt. No 581 at pp. 36-38) as to those claims.

DEFENDANTS' RESPONSE

POINT I

THE MAGISTRATE PROPERLY CONCLUDED THAT LACHES MANDATES DISMISSAL OF PLAINTIFFS' CLAIM TO THE FORT COVINGTON CLAIM AREA WITHOUT THE NEED FOR ADDITIONAL DISCOVERY

There is no merit to Plaintiffs' objections to that portion of the Magistrate's Report which recommends dismissal of the "Original Reservation" or "Mainland" claim to lands located in the Town of Fort Covington as barred by equitable defenses. Plaintiffs specifically suggest in their objections: (a) that Plaintiffs' claims herein are somehow distinguishable from each of those cases within the long line of previously dismissed ancient Indian land claims addressed within this Circuit; (b) that additional discovery should be allowed prior to dismissal: and (c) that the well-established precedent should not be followed by this Court.

Defendants respond below to each of these objections and submit that, whether reviewed *de novo* or for clear error, the Court should adopt the Magistrate's conclusion that laches presents a "mandatory basis" for dismissal of the Plaintiffs' claims to land located in the Town of Fort Covington[3] without the need for additional discovery.

A. The Magistrate Correctly Recommended Dismissal of Plaintiffs' Claims to Land within the Town of Fort Covington.

Defendants submit that the Magistrate correctly determined that "[d]ismissal of the Town of Fort Covington area claim on laches grounds is also warranted." Report at pp. 38-40. Plaintiffs' objections in this regard should be overruled because the "[t]hree specific factors [that] determine when ancestral land claims are foreclosed on equitable grounds" (*Onondaga Nation v. State of New*

[3] Defendants have previously set forth in their own objections (*see* Dkt. No. 589) why it was improper to divide the "Mainland" or "Original Reservation" claim into discrete parcels for separate consideration and also why the claims concerning the Hogansburg Triangle should be dismissed even if considered separately. Accordingly, such presentation is not repeated here.

York, Dkt. No. 10-4273, 2012 U.S. App. LEXIS 21843, at *2-3, 2012 WL 5075534, at *1 (2d Cir. Oct. 19, 2012) (Summary Order), *reh'g en banc denied*, Docket No. 10-4273 (2d Cir. Dec. 21, 2012)[4] ("*Onondaga*")) are all satisfied with respect to the Town of Fort Covington claim area. The three factors listed by the Second Circuit 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).

As to the first factor (lengthy delay), the Magistrate correctly noted that the "Town of Fort Covington claim area has not been possessed by the Mohawks as a tribal entity since 1816" and that the "Mohawks did not seek to recover possession of the claim areas ... until the commencement of this possessory litigation in 1982 and 1989, a delay of over a century and a half." Report at pp. 38-39. The Magistrate, therefore, properly concluded that such a significant delay between the alleged historical injustice and the commencement of suit weighs in favor of applying the equitable defense. Report at p. 39, *citing Cayuga Indian Nation of New York v. Pataki,* 413 F.3d 266 (2d Cir. 2005), *cert. denied,* 547 U.S. 1128 (2006) (*"Cayuga"*).

As to the second factor (disruptive nature of the claim), the Magistrate properly concluded that both Plaintiffs' and Plaintiff-Intervenor's possessory land claims, as well as all other claims predicated entirely on the possessory claim (whether phrased as claims for money damages, for fair rental value, waste, other damages, or restitution), are "by their nature disruptive," such that the

[4] A copy of the Second Circuit's Order denying rehearing *en banc* in *Onondaga* is attached hereto as an Appendix. All other unreported decisions cited herein were previously provided to the Court and Plaintiffs as attachments to Defendants' Objections (Dkt. No. 589).

laches defense set forth in *City of Sherrill, New York v. Oneida Indian Nation of New York*, 544 U.S. 197, 215-16, 125 S. Ct. 1478, 1490-91 (2005) ("*Sherrill*") applies. Report at pp. 25-26 & n.20, *citing Oneida Indian Nation v. County of Oneida*, 617 F.3d 114, 125 (2d Cir. 2010) ("*Oneida*") *cert. denied*, 132 S. Ct. 452 (2011); *Cayuga*, 413 F.3d at 278.

Regarding the third factor (upset of justifiable expectations), the Magistrate correctly took judicial notice that the property in the Town of Fort Covington claim area "has been owned and developed largely by non-Indians and has been under the governance and regulation of New York State and its local governmental units for more than 190 years." Report at p. 39. Almost 200 years of non-Indian governance and regulation should be given "heavy weight" in the Court's analysis. *Sherrill*, 544 U.S. at 215-16, 125 S. Ct. at 1490-91.

The upset of justifiable expectations of individuals and entities far removed from the dates of the complained-of conveyances are the same as those recognized and considered by the United States Supreme Court in *Sherrill*, the Second Circuit in *Cayuga*, this Court and the Second Circuit in *Oneida* and *Onondaga*, and the District Court in the Eastern District of New York in *Shinnecock Indian Nation v. State of New York*, Case No. 05-CV-2887 (TCP), 2006 U.S. Dist. LEXIS 87516, at *3-4, 2006 WL 3501099, at *1-2 (E.D.N.Y. Nov. 28, 2006) ("*Shinnecock*"). Those whose justifiable expectations would be upset here can be identified by looking at Plaintiffs' captions and pleadings – to wit, in addition to the State, a State power authority and various local governmental entities, the named defendants representing the defendant class include a financial institution, an insurance company, a real estate holding company, an electric power company, a railroad company and a defendant class comprised of over two thousand owners of parcels of two acres or more. *See e.g., Shinnecock*, 2006 U.S. Dist. LEXIS 87516, at *17-18, 2006 WL 3501099, at *5 (noting "drastically changed conditions in the subject lands" is "evidenced by the types of defendants being sued").

Further, the Magistrate took judicial notice that Plaintiffs' claims upset settled expectations with respect to the presence of public highways, including Route 37 (a major North Country thoroughfare running through the Town of Fort Covington claim area), bridges and rivers used for transportation. *See* Report at p. 40, n. 32 (noting "justified societal expectations" with respect to road and water transportation in this area).

Similarly, this Court should not entertain Plaintiffs' Objections based on their arguments that they, the land at issue and their claims are somehow different than the tribal plaintiffs, the land and the claims in every other Indian land claim dismissed within this Circuit because the Mohawks are not claiming major cities, are claiming areas that are more rural or agricultural in character than the areas claimed by other tribes, are seeking less acreage than other tribal claimants, are seeking lands adjacent to their reservation, and did not "mass-migrate" away from the area. Neither the 12,000-plus acres claimed by the Plaintiffs herein overall on the Mainland, nor the 8,000-plus acres claimed within the Town of Fort Covington[5], can be considered small or in any way less significant than those claims presented by other tribal plaintiffs. As the Magistrate correctly observed (Report at p.25 n.19), while the claims in *Cayuga* involved "a large swath of Central New York State," the Second Circuit in *Oneida* clarified that "any claims" premised upon a right of possession may be inherently disruptive of justified societal expectations without regard to the size of the claim or the number of landowners whose titles may be placed in jeopardy. *Oneida*, 617 F.3d at 126-27 (claim to 250,000 acres); *Cayuga*, 413 F.3d at 266 (claim to over 64,000 acres); *Onondaga Nation v. State of New York,* Case No. 05-CV-00314 (LEK/DRH), 2010 U.S. Dist. LEXIS 99536, at *6, 2010 WL 3806492, at *2, *aff'd* 2012 U.S. App. LEXIS 21843, 2012 WL 5075534 (2d Cir. Oct. 19, 2012)

[5] *See* Plaintiffs' Complaints (maps attached thereto)(Canadian Band Amended Complaint, 82-CV-783, filed September 30, 1982, attachment; St. Regis Mohawk Tribe and Longhouse Complaint, 89-CV-829, filed June 30, 1989, attachment).. The acreage consists of 7,758 acres in the Town of Fort Covington, 640 acres in the former Village of Fort Covington and 85 acres to the east of the Village of Fort Covington.

(Summary Order), *reh'g en banc denied*, Dkt. No. 10-4273 (2d Cir. Dec. 21, 2012)(claim to an area some ten to forty miles wide stretching from Lake Ontario and the St. Lawrence River south to the Pennsylvania border which the Onondagas described as 2.5 million acres). *See also Shinnecock*, 2006 U.S. Dist. LEXIS 87516, at *17-18, 2006 WL 3501099, at *5 (smaller parcel of land (approximately 3,600) and fewer owners at risk of ejectment did not distinguish the Shinnecock's claim from *Cayuga* because "the test for disruptiveness is not based upon strict numeric calculations."); *Onondaga*, 2010 U.S. Dist. LEXIS 99536, at *23, 2010 WL 3806492, at *7 (naming a limited set of defendants could not save claim from dismissal).

Plaintiffs argue that the "checkerboard of jurisdictions" concerns identified by the Supreme Court in *Sherrill* would not be present if Plaintiffs were successful in their claim over the Town of Fort Covington area because the claimed land is adjacent to Plaintiffs' current reservation. Such an argument does not save Plaintiffs' claims to the Town of Fort Covington land. Even though the Magistrate found that the contiguity of Fort Covington to the current St. Regis Mohawk Reservation mitigated *Sherrill*'s checkerboard jurisdiction concerns, she nonetheless found dismissal of the claim to Fort Covington was mandatory on the laches ground. Report at pp. 35, 38-40.

Although Defendants agree with the Magistrate's ultimate decision to recommend dismissal as to the Fort Covington land claim areas, Defendants submit that checkerboard jurisdiction concerns are in fact present, and that such concerns constitute an additional element weighing in favor of applying the laches defense to the Town of Fort Covington claim area. *See e.g.*, Report at pp. 40-41, fn. 32 (noting extent of disruption that would result from checkerboard regulatory control over rivers and highways in this area). With the exception of *Cayuga*, each of the various other land claims that this Court and the Second Circuit have considered and dismissed also involved claims to lands in contiguity with or in close proximity to those tribal plaintiffs' current reservations, and, accordingly,

these facts cannot save Plaintiffs' claims from dismissal. *See e.g.* 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).

Moreover, because the March 15, 1816 treaty (*see*, Report at p. 28, n. 28) included a one-mile square (640 acres) area, the separately-considered Village of Fort Covington area, in addition to the adjacent Town of Fort Covington claim area (7758 acres) to which Plaintiffs' object, checkerboarding implications are definitively present. Indeed, allowing the Plaintiffs to move forward with the Town of Fort Covington claim would imply the invalidity of title in the separately-dismissed Village of Fort Covington claim, which cannot be allowed. *See e.g.*, *Onondaga*, 2010 U.S. Dist. LEXIS 99536, at *23, 2010 WL 3806492, at *7 ("Nation seeks an order by this Court that title to various parcels of land in New York State under public and private ownership belongs to the Onondagas. Indeed the declaratory relief sought would apply to all land conveyed by the challenged treaties, despite the Onondagas naming a limited set of defendants").

Also in regards to the third factor, the Magistrate properly concluded that even if "there is no evidence of mass migration by the Mohawks away from the original reservation area as there was with the Oneida move to Wisconsin" (Report, p. 37), judicial notice may be taken of the United States Census data presented by Defendants which establishes that the area has a "longstanding and distinctly non-Indian Character." Report at pp. 36-38, *citing Cayuga*, 413 F.3d at 277 and *Onondaga*, 2010 U.S. Dist LEXIS, at *24-25, 2010 WL 3806492, at *8. Taking notice of such population data offered by Defendants was wholly proper. *See e.g., Sherrill*, 544 U.S. at 211, 124 S. Ct. at 1488 (citing 2000 Census data); *Onondaga*, 2010 U.S. Dist LEXIS 99536, at *24-25, 2010 WL 3806492, at *8 (taking "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") *aff'd* 2012 U.S. App. LEXIS 21843, at *6, 2012 WL 5075534, at *2 (*quoting same and stating*, "It was not an abuse of discretion for the trial court to take judicial notice of such obvious facts."). This taking of judicial notice was proper, as it was in *Onondaga*, notwithstanding that Plaintiffs here and in that case amassed a large factual record in an effort to demonstrate, among other things, their continued 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).

Defendants have separately briefed below why the Court should not take judicial notice of Plaintiffs' proffered census block data purporting to show an increase in Indian population and increase in Indian owned land in the area since the filing of the Complaints. Here, Defendants submit that the Magistrate properly concluded that "[e]ven if the Court were to give judicial notice to the census figures presented by the Mohawks and reject those presented by Defendants, the Indian presence in Fort Covington is still not sufficient to avoid dismissal of the Town [of] Fort Covington area claim on laches." Report at p. 40. Additionally, the well-settled expectations here are not diminished by the presence of, or land purchases by, individual tribal members whose land ownership rests on the same chain of title that this suit would disrupt. *See e.g., Sherrill*, 544 U.S. at 202-03, 125 S. Ct. at 1483 (finding impermissible disruptiveness despite acquisition by tribe of fee title to large number of discrete parcels of historic reservation land on open market). Any parcels within the claim area that were acquired in fee by individual Mohawk members 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.

Cayuga, *Oneida*, *Onondaga* and *Shinnecock* are not "extreme" examples as argued by Plaintiffs in their Objections. Instead, the predicates for Plaintiffs' claims here are "nearly identical to the underlying claims made by the [other tribal] plaintiffs" and any "attempt to cast their claims in such a way as to avoid [the] equitable defense" should fail because "the equitable principles that informed [the prior cases] are no less present in this case." *Oneida*, 617 F.3d at 139-140 (bracketed language substituted). The considerations mandating dismissal of Plaintiffs' claims "are manifestly present here," just as the Court concluded they were in *Onondaga*. 2010 U.S. Dist. LEXIS 99536, at *26, 2010 WL 3806492, at *7.

Given the above, Plaintiffs' claims to the Town of Fort Covington claim area are "located at the center of the range of claims barred under *Cayuga*...situating those claims well within the scope of the equitable bar outlined by controlling precedent." *Onondaga,* 2010 U.S. Dist. LEXIS 99536, at *23, at *26; 2010 WL 3806492, at *7-8.

B. The Magistrate Properly Concluded That Additional Discovery Is Unnecessary Given the Mandatory Basis For Dismissal.

Without identifying what discovery would be sought, from whom, or what it would reveal, Plaintiffs repeatedly suggest in their objections that additional discovery should be allowed prior to dismissal of the Town of Fort Covington claims.

The Magistrate, however, properly concluded that "[g]iven the mandatory basis for dismissal of the claim based upon the pleadings and the materials the Court is authorized to consider on a Rule 12(c) motion, discovery and further development of the record with regard to the claim would, as in *Onondaga*, appear to be 'inappropriate and superfluous.'" Report at p. 40, citing *Onondaga*, 2010 U.S. Dist. LEXIS 99536, at *25, 2010 WL 3806492, at * 8. As this Court noted in *Onondaga*, the

> [D]ispositive considerations which compel this Court to dismiss the

> claims are 'self-evident,' *Oneida Indian Nation*, 500 F.Supp.2d at 136 n.2 (N.D.N.Y. 2007); and the *Cayuga* court expressly instructs a district court to dismiss a complaint when confronted with one such as the plaintiff Tribe filed in that case. *Cayuga*, 413 F.3d at 278."

Onondaga, 2010 U.S. Dist LEXIS 99536, at *26, 2010 WL 3806492, at * 8. Here, Plaintiffs' Complaints also assert claims "which are equitably barred on their face" and "subject to dismissal *ab initio* on the basis of laches" such that discovery is unnecessary. *Id.*, (citing *Cayuga*, 413 F.3d at 278).

As the Second Circuit observed in affirming this Court's judgment in *Onondaga*, additional fact discovery will be of no avail to Plaintiffs – even if such discovery were allowed, "the standards of federal Indian law and federal equity practice stemming from *Sherrill* and its progeny would nonetheless bar [Plaintiff's] claim." *Onondaga*, 2012 U.S. App. LEXIS 21843, at *5-6, 2012 WL 5075534, at *2 (quoting *Sherrill*, 544 U.S. at 214, 125 S. Ct. at 1489-90.

C. Plaintiffs' Other Objections Present Arguments Which Have Already Been Squarely Rejected By The Supreme Court And Second Circuit

Plaintiffs present a variety of other objections to the application of equitable defenses to their land claim. Such objections, however, do not warrant extended discussion since identical arguments have already been made by tribal plaintiffs and squarely rejected by the Supreme Court and Second Circuit.

In their Objections, Plaintiffs continue to argue that *Cayuga* and *Oneida* were wrongly decided and should not be followed. *See*, U.S. Objections (Dkt. No. 592) at p. 34 (disagreeing with the reasoning of *Cayuga* and *Oneida*); Canadian St. Regis Band Objections (Dkt. No. 590) at p. 9 (suggesting that Second Circuit's rulings cannot "be justified at all"). Neither this Court nor the Second Circuit, however, may repudiate the controlling precedent and, instead, is bound to follow it. *See Oneida*, 617 F.3d at 122. *See also Onondaga*, 2010 U.S. Dist. LEXIS 99536, at *22, 2010 WL

3806492, at *7-8 ("*Sherrill*, *Cayuga* and *Oneida* foreclose any possibility that the Onondaga Nation's action may prevail; the Court is bound by these precedents to find the Nation's claims equitably barred and subject to dismissal" and the "controlling precedent" presents "mandatory basis" for dismissal).

Plaintiffs further assert in their Objections (*see e.g.*, Canadian St. Regis Band objections (Dkt. No. 590) at pp. 29-32) that equitable defenses may not be applied to bar their claims because their claims are within the statute of limitations and Congress allegedly intended such claims to be preserved and viable under the Non-Intercourse Act or Indian Claims Limitations Act. The Second Circuit has expressly held, however, that, based upon the Supreme Court's ruling in *Sherrill*, the equitable defense invoked by Defendants here (and in every other prior Indian land claim litigated in this Circuit) is appropriately applied to bar Plaintiffs' claims even, assuming *arguendo*, that such claims are "legally viable and within the statute of limitations." *Cayuga*, 413 F.3d at 273. *See also*, *Shinnecock*, 2006 U.S. Dist. LEXIS 87516, at *19, 2006 WL 3501099, at *6 ("Equitable considerations bar plaintiffs' claims irrespective of their viability."). As the Supreme Court observed in *Sherrill*, there is "sharp distinction between the *existence* of a federal common law right to Indian homelands and how to *vindicate* that right … including whether plaintiffs' claims are foreclosed" based upon equitable principles. 544 U.S. at 213-14, 125 S. Ct. at 1488 (emphasis in original, internal citations omitted).

The Second Circuit has further expressly rejected the additional arguments made in Plaintiffs' Objections that dismissal would conflict with the Supreme Court's rulings in "*Oneida I*" (414 U.S. 661 (1974)) or "*Oneida II*" (470 U.S. 226 (1985)), and/or that such equitable defense should not be applied to claims that may be brought by the United States. *See Oneida*, 617 F.3d at 140 (application of defense does not overrule *Oneida II*); at 129 & n.7 (intervention of the United

States does not change the outcome). *See also Cayuga,* 413 F.3d at 276 ("Our reading is not in conflict with the Supreme Court's decision in *Oneida[I]*"); at 278-79 (concluding that delay-based "laches" defense may be applied to claims by United States).

For all the above-stated reasons, the Court should reject Plaintiffs' Objections to the Magistrate's determination as to Plaintiffs' claims to land within the Town of Fort Covington and, instead, should adopt the Magistrate's recommendation that equitable considerations present a mandatory basis for dismissal of Plaintiffs' claims regarding the Town of Fort Covington without the need for additional discovery.

POINT II

THE COURT SHOULD REJECT PLAINTIFFS' ATTEMPT TO SUBMIT EXPERT REPORTS IN OPPOSITION TO DEFENDANTS' MOTIONS FOR JUDGMENT ON THE PLEADINGS

Plaintiffs, in their Objections to the Report, continue to proffer evidence of alleged changes in the character of the Hogansburg Triangle and the Town of Fort Covington by submitting a supplemental expert report detailing the alleged change in the character of the land claim area since 2007 when the initial expert report was submitted in support of Plaintiffs' request to convert Defendants' Rule 12(c) Motions for Judgment on the Pleadings to Rule 56 Motions for Summary Judgment. First, even if the data were properly the subject of judicial notice and were considered, the applicable and relevant time period for the data is the period between the alleged wrong and the commencement of the Plaintiffs' actions, to wit, 1982 for the Canadian Band and 1989 for the American Tribe and Longhouse, not decades later after the Plaintiffs have made a concerted effort to skew the nature of the land claim area by purchasing land on the open market. Secondly, the Court should not consider expert reports on a Rule 12(c) Motion for Judgment on the Pleadings. Absent conversion of this motion to a motion for summary judgment, a request by Plaintiffs that was expressly rejected by the Magistrate, the Court should not take judicial notice of the expert reports

proffered by Plaintiffs. The concept of "judicial notice" in the context of a Rule 12(c) motion is simply not sufficiently broad to cover reports of the type proffered by Plaintiffs. In fact, individual opinions and individual interpretation of data contained in an expert report are at the opposite end of the spectrum from facts appropriate for judicial notice: courts permit expert opinions and interpretations because of the specialized nature of the material which is not in the ken of average people, while the facts subject to judicial notice are those generally known and accepted. The Court should reject the Plaintiffs' attempt to submit such evidence and should not consider such reports in ruling on Defendants' motions.

A. The Court Should Not Take Judicial Notice Of Or Consider Plaintiffs' Arguments That There Has Been A Recent Increase In Indian Population Or Land-Holdings Subsequent To The Filing Of The Complaints.

In an effort to argue that their claims are not disruptive of justified societal expectations of individuals and entities far removed from the events giving rise to the Plaintiffs' alleged injury, Plaintiffs in their Objections to the Report ask the Court to take judicial notice of purported facts and consider their argument that there has been a recent (*i.e.*, since the filing of the Complaints herein) increase in Indian population and/or in land-holdings by individual Indians in the claim area. *See,* St. Regis Mohawk Tribe and Longhouse Objections (Dkt. No. 594) at p. 11 (offering "addition of new census data" purporting to show increase in Mohawk population between 2000 and 2010 in Town of Fort Covington portion of claim area); at pp. 16-17 (offering " . . . .land ownership patterns in Fort Covington (and the Hogansburg Triangle), all intended to illustrate the character of the area" citing data through 2011); at pp. 18-19 and Supplemental Declaration of Charles Mann (offering interpretation of 2010 census data on issue of non-Indian character of land). *See also*, Canadian Band Objections (Dkt. No. 590) at p. 8 ("Mohawk population at Akwesasne has steadily grown…"); at pp. 13, 15-16 (asserting that the Mohawks have steadily grown in number "to over 20,000"); at p.

6, fn. 9 (offering purported 2005 and 2007 population data from sources other than U.S. Census Bureau).

Defendants respond to Plaintiffs' Objections in this regard, in first part, by observing that to take judicial notice of such alleged facts or consider such arguments would be directly contrary to Second Circuit precedent that establishes that the time *between the last alleged wrongful act and the filing of the Complaint in this action* is the operative time frame during which disruption of societal expectations must be analyzed. It would also be contrary to the U.S. Supreme Court's holding in *Sherrill* that an Indian tribe's modern-day open market purchases of land within the tribe's former reservation cannot serve to revive ancient sovereignty or Indian character lost long ago.

In *Oneida,* the Second Circuit made clear that the equitable defense first recognized in *Sherrill* and consistently applied to ancestral land claims since then, "is properly applied to bar any ancient land claims that are disruptive of significant and justified societal expectations *that have arisen as a result of a lapse of time during which the plaintiffs did not seek relief.*" *Oneida,,* 617 F.3d at 135 (emphasis added)(citing *Sherrill*, 544 U.S. at 215, n.9, 125 S. Ct. at 1490, n.9). The operative time for assessing the developments which give rise to justified societal expectations is, quite specifically, the "tremendous expanse of time that had passed *between the initial, allegedly unlawful transactions and the eventual initiation of the action at issue.*" *Oneida* at 127 (emphasis added), *citing Sherrill*, 544 U.S. at 221. *See also, Oneida* at 126-27 (societal expectations are derived from events during the "tremendous expanse of time [which] separates the events forming the predicate of the [plaintiffs'] claims and their eventual assertion.").

Both this Court's decision and that of the Second Circuit in *Onondaga,* also make clear that the time between the last alleged wrongful act and the filing of the Complaint in this action is the operative period during which disruption of societal expectations must be analyzed. This Court

observed that it was "[d]uring the long period between the signing of the challenged treaties and filing of the instant suit" that "long-settled expectations concerning land ownership" were created and maintained. *Onondaga*, 2010 U.S. Dist. LEXIS 99536, at *25, 2010 WL 3806492, at *8. It was those many years which "separate the Onondagas' filing of this action from the most recent occurrence giving rise to their claims" which formed the basis for this Court and the Second Circuit to conclude that justified expectations had arisen. *Id.* *See also*, Onondaga, 2012 U.S. App. LEXIS 21843, at * 3, 2012 WL 5075534, at *1.

Defendants' point in this regard is not only in accord with the Second Circuit cases cited above, but is also fully reinforced by the Supreme Court's holding in *Sherrill*. In *Sherrill*, the Supreme Court rejected the plaintiff's request for declaratory and equitable relief regarding the tax exempt status of lands that Oneidas had purchased through contemporary open-market transactions. 544 U.S. at 220, 125 S. Ct. at 1494. The Supreme Court determined that the plaintiffs were barred from seeking their desired remedy due to the long lapse of time between the Oneida's ancient dispossession and their attempt to revive sovereignty, and the attendant development of justified societal expectations during that period. *Id.*, at 216 and n.11, 125 S. Ct. at 1491. The "critical question therefore was . . . whether an award of relief would be disruptive of justified societal expectations arising at least in part *from the long lapse of time between the conduct complained of and the effort to obtain relief*." *Oneida*, 617 F.3d at 136 (explaining import of *Sherrill*) (emphasis added). Accordingly, just as the Oneida Indian Nation could not revive their ancient sovereignty lost long ago through modern day purchases of land on the open market, so too should Plaintiffs herein not be allowed to assert in their Objections that the land has somehow regained "Indian character" through recent (post-complaint) purchases. *Sherrill*, 544 U.S. at 202-03, 125 S. Ct. at 1483.

Therefore, evidence of population and land ownership subsequent to the filing of the Complaints, as offered by Plaintiffs in their Objections, should not be considered for the threshold reason that it is not relevant to the Court's analysis. Plaintiffs' Complaints should be judged to be "subject to dismissal *ab initio*"(*Cayuga*, 413 F.3d at 277) – that is, "from the beginning…from the inception" (Blacks Law Dictionary (6th Ed. 1991).

B. The Court May Not Consider Plaintiffs' Expert Declarations On A Motion For Judgment On The Pleadings.

With respect to the Hogansburg Triangle, the Magistrate held that there is no factual support to conclude that the Hogansburg Triangle has a "long-standing, distinctly non-Indian character." Report at p. 43. In arriving at this conclusion, the Magistrate relied on an expert report submitted by the American Tribe in support of its motion to convert Defendants' Rule 12(c) Motions for Judgment on the Pleadings to Rule 56 Motions for Summary Judgment, to wit, the Declaration of Charles R. Mann, Ph.D, dated June 21, 2007 ("Mann Declaration"), and Mann's analysis and interpretation of the U.S. Census block data attached to his Declaration (Dkt No. 474-13 through 474-20). Simultaneously, the Magistrate rejected the United States Census data submitted by Defendants for the years 1980, 1990, and 2000, finding that a question of fact exists as to the non-Indian character of the Hogansburg Triangle this area. *See* Report at p. 44, fn. 38. As set forth fully in Defendants' initial Objections (Dkt. No. 589 at pp. 24-27), and below, the Magistrate's reliance on the Mann expert report in partially denying the Defendants' Motion for Judgment on the Pleadings was improper.

Now, in an attempt to exploit the Magistrate Judge's mistaken reliance on the Mann Declaration (which Plaintiffs admit was prepared by their expert), Plaintiffs improperly insist that the Court consider yet another expert report by Mann, offered in the Affidavit of Marsha K. Schmidt in Support of Objections Brief of the St. Regis Mohawk Tribe and the Mohawk Nation Council of

Chiefs (Dkt. No. 594-1)(undated but filed November 16, 2012) as Objection Exhibit 1 and entitled First Supplemental Declaration of Charles R. Mann, Ph.D., with Attachments A and B, dated November 15, 2012 ("Supplemental Mann Declaration")(Dkt. No. 594-2 through 594-4), asking this Court to deny Defendants' Motions for Judgment on the Pleadings as to both the Town of Fort Covington and the Hogansburg Triangle. Plaintiffs' attempt to submit what they readily admit to be an "expert's" affidavit and opinion in opposition to Defendants' Motions for Judgment on the Pleadings is improper and should be rejected.

1. *The Court Cannot Consider Plaintiffs' Expert Declarations Because Plaintiffs' Request To Convert Defendants Rule 12(c) Motions For Judgment On The Pleadings To A Rule 56 Motion For Summary Judgment Was Denied.*

As a threshold matter, it is improper for the Court to consider either Plaintiff's original or supplemental "expert" declarations for purposes of deciding a Motion for Judgment on the Pleadings. On a Motion for Judgment on the Pleadings, if matters outside the pleadings are presented and not excluded by the court, the motion must be treated as one for summary judgment and disposed of as provided in Rule 56 of the Federal Rules of Civil Procedure with all parties being given a reasonable opportunity to present all material made pertinent to such a motion by Rule 56. *See Cascio v. Nettles*, Case No. 09-CV-1128 (GTS/DRH), 2011 U.S. Dist. LEXIS 97200, at *6; 2011 WL 3847337, at * 7 (N.D.N.Y. Aug. 30, 2011); *Byerly v. Ithaca College*, 290 F. Supp. 2d 301, 306 (N.D.N.Y. 2003).

Affidavits by parties and experts are considered to contain "matters outside the pleadings" and should not be relied upon in deciding a motion for judgment on the pleadings. *See, e.g., Murchison v. Kirby,* 27 F.R.D. 14 (S.D.N.Y. 1961) (affidavits submitted in support of the motion for judgment on pleadings necessitated that the court consider the motion as one for summary judgment under Rule 56 of the Federal Rules of Civil Procedure); *Roberts v. Fuquay-Varina Tobacco Bd. of*

Trade, Inc., 223 F. Supp. 212, 214 (E.D. N.C. 1963) (where the parties submitted their pleadings, affidavits, oral testimony, and briefs, much of which was outside the pleadings and none of which was excluded by the Court, the Court, in accordance with the mandate of Rule 12(c), treated the motion for judgment on the pleadings as one for summary judgment); *Collier v. City of Chicopee,* 158 F.3d 601 (1st Cir. 1998), *cert. den.*, 526 U.S. 1023, 119 S. Ct. 1262 (1999) (Where plaintiff attached affidavits to his opposition to defendant's motion for judgment on pleadings under Rule 12(c), plaintiff implicitly invited conversion of motion to motion for summary judgment according to Rule 56).

A review of the extensive history of filings by the parties on this motion reveals that the original Mann Declaration was submitted by the St. Regis Mohawk Tribe on July 13, 2007, along with a host of other "evidence". The references and quotations below clearly establish that this "evidence" was submitted in support of, and in anticipation that the court would grant the Plaintiffs' request that the motion be converted to Rule 56 Motions for Summary Judgment. *See* Dkt. No. 470 at pp. 1-2 ("Plaintiffs request that this Court convert Defendants' Motions for Judgment on the Pleadings to Motions for Summary Judgment on the ground that the Defendants have relied upon facts that are outside of the pleadings and because there are genuine issues of material facts in dispute. The facts are outlined in the accompanying Response to Statement of Material Facts. The St. Regis Mohawk Tribe and the Longhouse have also filed in support a Memorandum in Opposition to the Motions for Judgment on the Pleadings."); Dkt No. 474, Schmidt Affidavit at pp. 1, 2 and 3 in ¶¶ 1 and 2 (supporting exhibits, including *inter alia* Exhibit 3, Declaration of Dr. Charles Mann, with accompanying attachments A through H) and ¶3 ("Based on the motion and memorandum of law and accompanying exhibits and evidence by the Mohawks, this Court should convert the Defendants' motions for judgment on the pleadings to motions for summary judgment … and should

deny Defendants' motions"); Dkt. 472, St. Regis Mohawk Tribe's and Mohawk Nation Council of Chiefs' Response to Defendants Statement of Material Facts ("The Defendants were not required to file a Statement of Material Fact in support of [their] Motions [for Judgment on the Pleadings]. However, because the Defendants submitted facts outside the Complaint, and the Mohawk Plaintiffs filed oppositions that rely on factual submissions that dispute many of the facts relied upon by the Defendants, this Court may decide to convert the pending motions to motions for summary judgment ... In anticipation of a possible conversion, and to avoid any possible inference that we do not contest the Statement of Facts in Defendants' brief, the Tribe and MNCC file this response to certain facts stated in Defendants' brief"; refers to Mann as expert, ¶1, fn 3, 4, *et seq.*).

Plaintiffs' request for conversion was properly denied, (*see* Report at pp. 15-16, fn. 13.), as the same request was denied by this Court in *Onondaga*. *See* Order, *Onondaga Nation v. State of New York*, 05-CV-00314 (N.D.N.Y. Sept. 21, 2009), Dkt. No 95, attached hereto as part of Appendix. Consequently, it was improper for the Magistrate to consider the Mann Declaration and its attachments in the first instance. Now, Plaintiffs, in their Objections to the Magistrate's Report, should not be permitted to exploit the Magistrate's mistaken reliance by submitting yet another declaration from Mann (which, as discussed below, is nothing more than an additionally improper supplemental "expert" affidavit) to support the denial of Defendants' Motions for Judgment on the Pleadings as to the Hogansburg Triangle and in support of their Objections to the Magistrate's granting of Defendants' Motions as the Town of Fort Covington. Notably, neither the Magistrate's finding in connection with the Hogansburg Triangle nor the findings urged by Plaintiffs concerning the Town of Fort Covington, (positing that a question of fact exists as to the Indian population in those areas) applies the appropriate standard of review for denying the instant motion.

2. *Plaintiffs' Expert Declarations Do Not Fit Within The Acceptable Categories of Documents Which a Court May Review On A Motion For Judgment On The Pleadings.*

If a court chooses to consider a motion for judgment on the pleadings, and denies a request to convert the motion to one for summary judgment (as it did here), it may consider only: (i) pleadings, (ii) the documents referenced in the pleadings, (iii) written instruments attached to the complaint as exhibits; (iv) documents integral to the offering parties' claim and undisputed, or (v) documents which are judicially noticed. *See L-7 Designs v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002). It is error for a court to grant a motion for judgment on the pleadings if it goes beyond the pleadings in reaching its decision. *Hal Roach Studios, Inc. v Richard Feiner & Co.*, 896 F.2d 1542, 1590 (9th Cir. 1989). Neither Mann's original Declaration nor his Supplemental Declaration fit within any of the above categories.

a. *Plaintiffs' expert declarations are not judicially noticeable.*

Generally, courts have held that expert reports are not judicially noticeable under the Federal Rules of Evidence. *See San Luis Unit Food Producers v. United States*, 772 F. Supp. 2d 1210, 1216, fn. 1 (E.D. Cal. 2011) (a court may not take judicial notice of one party's opinion of how a matter of public record should be interpreted); *Rubert-Torres ex rel. Cintron-Rupert v. Hospital San Pablo, Inc.*, 205 F.3d 472, 475 (1st Cir. 2000)(court converted defendant's motion for judgment on the pleadings into one for summary judgment *sua sponte*, and granted summary judgment in favor of the defendant because the plaintiff attached an expert witness report to her opposition to the motion for judgment on the pleadings); *Provencio v. Vazquez*, 258 F.R.D. 626, 638, fn. 4 (E.D. Cal. 2009) (expert medical consultant report is not judicially noticeable under Federal Rule of Evidence 201(b)).

Plaintiffs argue that the Court may take judicial notice of its newly submitted "census data", *e.g.*, the Supplemental Mann Declaration, even though it was not presented to the Magistrate Judge in the underlying motion. *See* St. Regis Mohawk Objections, p. 12, fn. 7. What Plaintiffs misconstrue as "census data" in one breath, Plaintiffs admit is a supplemental "Mohawk expert" declaration in another. *See* St. Regis Mohawk Objections, p. 11, fn. 6. Plaintiffs also admit that "[t]he Census Bureau does not treat the relevant portion of Fort Covington (or the Hogansburg Triangle) as separate census tracts for which data is available" and that the Mann Declaration contains Mann's "estimations" of the population of those areas using census block data. *See* St. Regis Mohawk Tribe Objections, p. 11, fn. 6. By Plaintiffs' own admissions, Mann's interpretation of the census block data to "estimate" Indian population within the Town of Fort Covington, like the Hogansburg Triangle, is an expert opinion, subject to reasonable dispute, and is not judicially noticable.

Likewise, to the extent that Plaintiffs seek to have the Court take judicial notice of the census block data attached to the Supplemental Mann Declaration, such data in and of itself lacks foundation and is not judicially noticeable. While Defendants do not deny that public documents which a party attaches to an expert or other affidavit may be subject to judicial notice (*Alvarez v. Hill*, Case No. CV 04-884-BR, 2010 U.S. Dist. LEXIS 12637, at *19-20, 2101 WL 582217 (D. Ore. Feb. 12, 2010)), public documents which lack foundation (such as the census block data attached to the Mann Declarations here) are not judicially noticeable. *See Hough-Scoma v. Wal-Mart Stores, Inc.*, Case No. 96-CV-707(S),1999 U.S. Dist. LEXIS 7046, at *7-9, 1999 WL 261857 (W.D.N.Y. Apr. 15, 1999), *aff'd, Hough-Scoma v. Wal-Mart Stores, Inc.*, Dkt. No. 99-7518(L), 2000 U.S. App. LEXIS 304, at *4-5, (2d Cir. Jan. 7, 2000) (it was inappropriate to take judicial notice of work-life expectancy tables generated by plaintiff's expert using U.S. Census material, and U.S. Census

material analyzed in ruling on a motion for judgment as a matter of law, where, among other things, the date the tables were compiled or the age of the data upon which they were based was not in the record).

As addressed more fully in the Defendants' objections (Dkt. No. 589 at pp. 24-27), the face of the census block data documents do not indicate what blocks make up the Hogansburg Triangle and the Town of Fort Covington, and what portions of those blocks only partially within the Hogansburg Triangle or Town of Fort Covington are most heavily populated by Indians. They also do not indicate the percentage of Indian population in the non-land claim area depicted. Without any indication of whether the figures adequately represent the Indian population within areas which Mann purports them to depict, the census block data lacks foundation and is not judicially noticable. Consequently, the Court cannot take judicial notice of the original Mann Declaration, the Supplemental Mann Declaration, or the attached census block data, and cannot rely on those documents to partially deny Defendants' Motions.

b. *The Plaintiffs' expert declarations are not integral to the Complaints.*

The Complaints filed in this case are replete with allegations that Defendants, and *not* Plaintiffs, were in possession of the entire land claim area (including the Hogansburg Triangle and the Town of Fort Covington) for hundreds of years prior to the commencement of this action. *See* American Tribe's Complaint, filed 6/30/89 at pp. 10 - 14, ¶¶21-26 (reciting conveyances of land claim area to New York State between 1816 to 1845), p. 14, ¶26 ("The defendants and the members of the class represented by the class defendants claim title to, interests in and are in possession of the subject land."), p. 15, ¶27 ("Defendants and the members of the defendant class and/or their predecessors in interest have been in possession of the subject land, without lawful authority, variously from 1816 to 1845 until the present."), p. 15, ¶29 ("Defendants and members of the

defendant class have encroached upon and are now in possession of other lands, including but not limited to the surface and right of way of N.Y.S. Route 37, and certain portions of the Town of Bombay, which were part of the original reservation, but which were not included in any of the purported transactions enumerated in paragraph 21 above."); p. 15, ¶31 ("Defendants and members of the defendant class wrongfully keep plaintiffs out of possession of the lands referred to in paragraph 29 above."), Exhibit A, Newspaper Article, "Mohawk Indians Announce Lawsuit to Reclaim Homeland", embargoed for release at 11am, June 30, 1989; *see also* Canadian Band's Amended Complaint, filed 9/30/82, at pp. 9-11, ¶¶49-59 (reciting conveyances of land to New York State between 1816 to 1845), p. 11, ¶59 (alleging that "defendants and members of the defendant class have claimed title to land that is not theirs, have used and occupied that land, and taken the revenues therefrom for their own benefit").

Plaintiffs now, after 30 years of litigating this matter without amending their complaints in this regard, attempt to argue that the Hogansburg Triangle and the Town of Fort Covington are heavily populated by Indians and never lost their Indian character. The very nature of Plaintiffs' arguments and objections contradict the allegations in the Complaints. As the Magistrate Judge recognized, Plaintiffs are "not entitled to amend [their] pleading through statements in [their] brief." *See* Report and Recommendation, p. 8, fn. 9 (*citing Jacobson v. Peat, Marwick, Mitchell & Co.*, 445 F. Supp. 518, 526 (S.D.N.Y. 1977)). In viewing the allegations contained in the Complaints in the light most favorable to Plaintiffs, it is undisputed that the entire land claim area has nothing other than a longstanding, non-Indian character. The court should arrive at no other conclusion than that Defendants' Motions for Judgment on the Pleadings should be granted in their entirety.

Notwithstanding this obvious conclusion, the "evidence" submitted by Plaintiffs establishes only that the Indian population in the Town of Fort Covington and the Hogansburg Triangle

increased after the commencement of this action. As set forth in Point II(A), *supra*, and in *Sherrill*, 544 U.S. at 202-03, 125 S. Ct. at 1483, the simple fact that Indians have purchased parcels in the land claim area on the open market does not mean that the land, which was undisputedly owned by Defendants for hundreds of years, has somehow regained "Indian character". Nothing contained in the pleadings, expert reports, or census block data justifies making such a significant inferential leap as to assume that these private landowners, because they have identified themselves as Indian, have altered the "longstanding, distinctly non-Indian character" of such parcels, established over the 150 years of non-possession, during which such lands were freely alienable, were greatly improved from the way they were when transferred to the State, and were subject to the governmental jurisdiction and tax authority of the State and local governments.

POINT III

THE MAGISTRATE PROPERLY DISMISSED PLAINTIFFS' RIGHTS-OF-WAY CLAIMS

In response to Plaintiffs' Objections, Defendants submit that the Magistrate properly recommended: (a) that Plaintiffs' right-of-way claim against Niagara Mohawk be dismissed as unpled and not stating a cause of action, and; (b) that Plaintiffs' claim concerning Route 37 be dismissed as "almost unthinkable."

A. The Magistrate Judge Properly Dismissed Plaintiffs' Right-Of-Way Claim Against Niagara Mohawk Based On The Failure To State A Claim For Which Relief Can Be Granted.

Plaintiffs St. Regis Mohawk Tribe and Longhouse object to that portion of the Magistrate's Report that recommends dismissal of the rights-of-way claims as against Niagara Mohawk (Report at p. 8, n.9), arguing that Plaintiff's Complaint adequately pled such claims and, in the alternative, that Plaintiffs' brief could explain the basis of the claims and, thus, avoid dismissal of the claim. (Dkt. No. 594 at pp. 35-40). As is demonstrated below, Plaintiffs stretch the liberal pleading rules of

the Federal Rules of Civil Procedure beyond the breaking point. Plaintiffs' Complaint provides no factual basis for any claim against Niagara Mohawk with respect to the right-of-way claims. Absent even the sparsest factual allegations, Plaintiffs' attempt to cure that defect in response to Defendants' Motion for Judgment on the Pleadings must be rejected.

Pursuant to Rule 8(a)(2) of the Federal Rules of Civil Procedure, "[a] pleading that states a claim for relief must contain: . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief; . . .." The United States Supreme Court in *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S. Ct. 1937 (2009), held that:

> Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As the Court held in *Twombly*, 550 U.S. 544, 127 S. Ct. 1955, the pleading standard that Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of further factual enhancement."
>
> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to the "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between the possibility and plausibility of relief."

556 U.S. at 677-78, 129 S. Ct. at 1949 (citations omitted).

In considering an appeal of a district court judgment dismissing plaintiff's complaint pursuant to Rule 12(c), the United States Court of Appeals for the Second Circuit, in *Johnson v. Rowley,* 569 F.3d 40 (2d Cir. 2009), held that:

> We review a district court's dismissal pursuant to Fed. R. Civ. P. 12(c) *de novo*, employing the same . . . standard applicable to dismissals pursuant to Fed. R. Civ. P. 12(b)(6). Thus, we will accept all factual allegations in the complaint as true and draw all reasonable inferences in Johnson's favor. To survive a Rule 12(c) motion, Johnson's "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 U.S. 1937, 1949 (2009)(quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955 (2007)).

569 F.3d at 43-44 (citations omitted). A review of Plaintiffs' Complaint in 89-CV-829 reveals that the allegations in that Complaint failed to adequately plead any claim as against Niagara Mohawk, let alone plead sufficient facts to satisfy the *Iqbal* standard.

Plaintiffs argue that their Second Claim for Relief sufficiently pleads claims against Niagara Mohawk, yet Niagara Mohawk is not even named or identified in that Claim. (Dkt. No. 594 at pp. 36-37). Paragraph 29 of the Complaint states that:

> Defendants and members of the defendant class have encroached upon and are now in possession of other lands, including but not limited to the surface and right of way of N.Y.S. Route 37, and certain portions of the Town of Bombay, which were part of the original reservation, but which are not included in any of the purported transactions enumerated in paragraph 21 above.

Although named as a defendant in the caption of the Complaints, there are absolutely no allegations in the Complaint identifying Niagara Mohawk (or any other Municipal Defendant), as an actual defendant in the Second Claim for Relief.

In addition, nowhere in the Second Claim for Relief, or anywhere else in the Complaint, are the "other lands" or "certain portions of the Town of Bombay" ever identified. Paragraphs 30 and 31 are nothing but legal conclusions, insufficient to satisfy the pleading requirements of Rule 8(a)(2). Furthermore, the basis of Plaintiff's First Claim for Relief, that portions of the land set aside for the use of the Indians of the Village of St. Regis by the 1796 Treaty with the Seven Nations of Canada were improperly purchased by the State of New York, provides absolutely no notice to the

"Defendants" of the factual basis of Plaintiff's Second Claim for Relief, especially where the Plaintiffs now take the position that this Second Claim for Relief involves rights-of-way traversing the existing St. Regis Reservation. Absent any allegations that identify Plaintiffs' claims against Niagara Mohawk with any specificity, Plaintiffs' Complaints do not comply with the requirements of Rule 8(a)(2).

Plaintiffs, citing *Dunn v. Albany Medical College*, Case No. 09-CV-1031(LEK/DEP), 2010 U.S. Dist. LEXIS 55314, 2010 WL 2326127 (N.D.N.Y. June 7, 2012) argue that the true substance of their Second Claim for Relief in the Complaints is clear and not "well disguised." *Dunn*, however, involved the completely opposite problem that Niagara Mohawk faced in the instant case. The defendant in *Dunn* moved to strike certain allegations in plaintiff's complaint because the allegations were confusing, prolix and rambling. Similarly, in *Salahuddin v. Cuomo*, 861 F.2d 40 (2d Cir. 1988), cited in *Dunn*, the complaint contained 23 causes of action and 88 paragraphs that the district court found were in violation of the short and concise pleading requirement of Rule 8. The Second Circuit, in *Salahuddin,* held that:

> When a complaint does not comply with the requirement that it be short and plain, the court has the power, on its own initiative or in response to a motion by defendant, to strike any portions that are redundant or immaterial, *see* Fed. R. Civ. P. 12(f), or to *dismiss the complaint.*

861 F.2d at 42 (emphasis supplied).

As noted by the Magistrate in her Report, a party may not seek to amend its complaint to add new claims by raising them for the first time in motion papers. (Report, at p.8, n.9.) The plaintiff in *Wright v. Ernst & Young LLP*, 153 F.3d 169 (2d Cir. 1998), cited by the Magistrate, attempted to proffer allegations with respect to a missing element of her claim for the first time in response to

defendant's motion to dismiss. The United States Court of Appeals for the Second Circuit, affirming the trial court, held that:

> In this case, . . . although the amended complaint alleges that the prospectus contained false statements (*i.e.,* the inaccurate 1994 results) in 1995, it does *not* allege the misrepresentations claim that Wright presses on appeal – namely, that Ernst & Young made a false statement (by omission) in 1996 as a result of its duty and subsequent failure to correct those statements. In fact, an alleged duty to correct does not appear anywhere in the amended complaint and did not enter the case until Wright mentioned it for the first time in her opposition to the motion to dismiss. *See Cornfeld*, 619 F.2d at 914 & N. 6 (a party is not entitled to amend its complaint through statements made in motion papers); *see also Jacobson v. Peat, Marwick, Mitchell & Co.*, 445 F. Supp. 518, 526 (S.D.N.Y. 1977) (party may not amend a pleading through statements in briefs).

152 F.3d at 178.

Similar to the situation in *Wright,* Plaintiffs here attempt to allege, for the first time in their opposition to Defendants' Motions for Judgment on the Pleadings, that Niagara Mohawk violated the Non-Intercourse Act by entering into a right-of-way agreement with the St. Regis Mohawk Tribe in 1949. Absolutely none of those allegations were contained in the Complaint and the Plaintiffs cannot attempt to plead them in their answering papers.

Plaintiffs also cite the United States Supreme Court's decision in *Pegram v. Herdrich*, 530 U.S. 211, 120 S. Ct. 2143 (2000) for the proposition that a court may use a plaintiff's brief to clarify allegations in their complaint whose meaning is unclear. *See* St. Regis Mohawk Tribe and Longhouse Objections (Dkt. No. 594 at p. 37). That case is not controlling here. The issue in *Pegram* was whether decisions made by treating physicians in an HMO could be considered a breach of fiduciary duty under the Employee Retirement Income Security Act ("ERISA"). The Court described two basic types of decisions made by such a physician, eligibility decisions and treatment decisions, and then stated that:

> The closest Herdrich's ERISA count comes to stating a claim for a pure, unmixed eligibility decision is her general allegation that Carle determines "which claims are covered by the Plan and to what extent." But this vague statement, difficult to interpret in isolation, is given content by the other elements of the complaint, all of which refer to decisions thoroughly mixed with medical judgment. Any lingering uncertainty about what Hendrich has in mind is dispelled by her brief, which explains that this allegation, like the others, targets medical necessity determinations.

530 U.S. at 230, 120 S. Ct. at 2155 (citations omitted). The complaint in *Pegram*, therefore, contained the basic factual allegations to state a claim for relief. The Court merely used the plaintiff's brief to clarify those allegations.

Unlike the complaint in *Pegram*, Plaintiffs' Complaints in the instant case do not even contain the basic factual allegations underlying the right-of-way claim. Plaintiffs' Second Claim does not specifically identify any defendant against whom the cause of action is pled. The Second Claim for Relief identifies neither the actual rights-of-way involved nor the land actually involved. Nor does the Second Claim for Relief identify how the rights-of-way violate the Non-Intercourse Act. Nothing in *Pegram* ratifies Plaintiffs' attempt here to cure their pleading deficiency, as opposed to clarify a properly pled cause of action.

Plaintiffs also cite *Ideal Steel Supply Corp v. Anza*, 652 F.3d 310 (2d Cir. 2011) for the proposition that evidence produced during discovery could fill in the gaps in a complaint. Dkt. 594 at p. 39. *Ideal Steel Supply*, however, is readily distinguishable. First, the *Ideal Steel Supply* defendants' Motion for Judgment on the Pleadings was made after the completion of discovery. The Second Circuit also noted that the case had been through all three levels of the federal court system (including the United States Supreme Court). In that context, the Second Circuit held that a motion for judgment on the pleadings should not be granted if the evidence produced during discovery could fill in the gaps in the pleading.

Here, there has been no discovery. Plaintiffs, citing this Court's decision in *Evans v. Excellus Health Plan, Inc.*, Case No. 11-CV-1248 (LEK/DEP), 2012 U.S. Dist. LEXIS 109849, 2012 WL 3229292 (N.D.N.Y. August 6, 2012), argue that the court could take judicial notice of a 1949 right-of-way agreement between Central New York Power and the St. Regis Mohawk Tribe. Dkt. 594 at pp. 37-38. The issue in *Evans*, in which this Court took judicial notice of the Equal Employment Opportunity Commission ("EEOC") intake questionnaire, was whether the plaintiff's complaint was timely. This Court took judicial notice of the intake questionnaire and the date that the questionnaire was filed with the EEOC to determine that, in fact, plaintiff's claims of discrimination were timely. At no time did the Court take judicial notice of the factual allegations contained in the questionnaire. *Evans*, therefore, does not support Plaintiffs' assertion that the court may take judicial notice of the right-of-way agreement to cure defects in the complaint.

Plaintiffs argue that, at no time prior to filing their Motion for Judgment on the Pleadings, did Defendants move either to dismiss Plaintiffs' Second Claim for Relief or for a more definite statement, citing *Dunn v. Albany Medical College, supra* and *Pelman v. McDonald's Corp.*, 396 F.3d 508 (2d Cir. 2005). As discussed above, *Dunn* involved a complaint that the court held was unduly prolix and confusing, not a complaint with the sparse allegations as those contained in the Plaintiffs' complaint. In *Pelman*, the district court had dismissed plaintiffs' complaint finding that plaintiffs had "failed to draw an adequate causal connection between their consumption of McDonalds food and their alleged injuries." *Id.*, 396 F.3d at 511. The Second Circuit found, however, that the plaintiffs' complaint adequately alleged such causation and that the issues that the district court raised were appropriately the subject of discovery. *Id.* at 512. The Second Circuit did note that the district court had dismissed plaintiffs' complaint on the grounds that the allegations of a generalized campaign to create a false impression were vague and conclusory and that the remedy

for such pleading was a motion for a more definite statement. In *Pelham*, however, the plaintiff at least attempted to plead the elements of a cause of action and the defendant was put on sufficient notice of the factual allegations underlying the plaintiffs' claims. Such is not the case here. In addition, given the basis for Defendants' Motions for Judgment on the Pleadings, that Plaintiffs' claims are barred as a matter of law notwithstanding the underlying facts, there was no need for Defendants to make a motion for a more definite statement.

Plaintiffs, in clear violation of the proscriptions of Rule 408(a) of the Federal Rules of Evidence, proffer a Settlement Agreement negotiated between the State of New York and the St. Regis Mohawk Tribe as proof that Niagara Mohawk knew that its right-of-ways were at issue in this case. The obvious inadmissibility of such an agreement notwithstanding, there is no evidence that Niagara Mohawk even knew of the provision cited by the Plaintiffs, much less evidence that Niagara Mohawk was involved in the negotiation of that provision. In addition, even if the agreement were appropriate for consideration in these Motions for Judgment on the Pleadings, which Defendants argue it is not, the document itself establishes that Niagara Mohawk, itself, was neither a party to nor a signatory of that agreement.

Finally, although the Magistrate recommends dismissal of Plaintiffs' rights-of-way claims on procedural grounds, those claims are also subject to dismissal on substantive legal grounds. Niagara Mohawk has a legitimate expectation with respect to the procurement, development and maintenance of the rights-of-way for its distribution and supply circuits. Similarly, Niagara Mohawk customers have a legitimate expectation that they will receive power on demand and that Niagara Mohawk would be responsible for the maintenance of its transmission and distribution lines. Granting of the relief sought by Plaintiffs' Complaint would be unduly disruptive of those legitimate expectations.

B. The Magistrate Judge Properly Found That Laches Barred Plaintiffs' Rights-of-Way Claim Involving Route 37.

Plaintiffs object to that portion of the Report that recommends dismissal, based on laches, of Plaintiffs' claim that the rights-of-way for Route 37 violate the Non-Intercourse Act. Report, at pp. 40-41 n. 32. Defendants submit that the Magistrate properly relied on the Supreme Court's holding in *Sherrill*, 544 U.S. at 200, and the district courts' holdings in *Cayuga Indian Nation of New York v. Pataki,* Case No. 80-CV-930, 1999 U.S. Dist. LEXIS 10579, at *98, 1999 WL 509442, at *29 (N.D.N.Y. July 1, 1999) and *Shinnecock*, 2006 U.S. Dist. LEXIS 87516, at *15-16, 2006 WL 3501099, at *5, in determining that such a claim is barred by equitable defenses.[6] As held by the courts in those decisions, and reasoned by the Magistrate here, long-delayed claims that interfere with pre-existing transportation facilities such as public highways and railroads are so significantly and inherently disruptive of settled expectations that dismissal is required.

Further, the Magistrate properly observed that judicial notice may be taken that "Route 37 is a main thoroughfare that runs across the north country...". Report, at pp.40- 41 n. 32 (emphasis added). Affording it the appropriate high importance it deserves, the Magistrate additionally stated that the "Court may take judicial notice that Route 37 has been under the regulatory control of the State since it was first assigned as a highway." *Id.* Given these judicially noticed facts, the Magistrate was correct to conclude, wholly in line with the applicable precedent cited above, that the "extent of the disruption for individuals and on commerce that would result from checkerboard regulatory control over the highway, or the need to reroute the highway altogether were the Mohawks to be granted possession of Route 37 in the claim areas is 'almost unthinkable.'" *Id.* (citations omitted).

[6] Plaintiffs have not objected to that portion of the Magistrate's Report (Report, at pp. 40-41, n. 32) which recommends dismissal of Plaintiffs' claim that the 1810 State Act declaring portions of the Racquette and St. Lawrence Rivers to be public highways violated the Non-Intercourse Act. Accordingly, dismissal of that claim should be adopted as matter of course.

Plaintiffs attempt to avoid application of laches to the Route 37 right-of-way claim by arguing, as they do with the Islands claim, that federal law supposedly provides a non-disruptive remedy for Plaintiffs' claim. The short retort to that argument is that the courts in the cases cited above held such a claim is so delayed and disruptive so as to be equitably barred, any alleged federal remedy notwithstanding. The potential availability of particular remedies does not salvage a claim where the claim's essential premise threatens to disrupt justified societal expectations thereby making it subject to outright and immediate dismissal. *See Cayuga,* 413 F.3d at 277-78; *Oneida*, 617 F.3d at 124-27, 135-36, 138-40. Moreover, the Defendants also refer the Court to their responses to the Plaintiffs' similar objections to the Islands claims (*see*, NYPA brief (as adopted herein), at Points I and II) for the points that any federal regulatory powers conferred upon the Secretary of the Interior are not relevant to the disruptiveness analysis and in no way effect the mandatory grounds for dismissal based upon laches.

In addition, Plaintiffs ignore the fact that the State of New York purchased the road that became Route 37 in the Treaty of February 20, 1818 in which the Mohawks conveyed to the State:

> Also four rods wide of land through the entire length of their Reservation for a public road to the west bounds thereof, together with four rods wide of land for the same purpose commencing at the boundary line near the village of St. Regis to run in a direction so as to intersect the aforementioned road … westerly of the place where it shall cross the St. Regis River which will be about one mile and three quarters in length.

See Complaint (89-CV-829), ¶ 20B, p. 10; Report at p. 7. The State, therefore, possessed Route 37 long before the enactment of 25 U.S.C. § 323 (effective February 5, 1948), the federal statute upon which the Plaintiffs rely, or 25 U.S.C. § 311 (enacted March 3, 1901) that governs the opening of roads through Indian reservations. Further, 25 U.S.C.§ 323 can have no application given the fact that the Route 37 lands were not, in 1948, "now or hereafter owned…by individual Indians or Indian

tribes..." but were instead by that time owned by the State.

Likewise, 25 CFR § 169.28, also cited by Plaintiffs, states that:

> The appropriate State or local authorities may apply under the regulations in this part 169 for authority to *open* public highways across tribal and individually owned lands in accordance with State laws as authorized by the Act of March 3, 1901 (31 Stat. 1084; 25 U.S.C. 311)(emphasis supplied)

There are, therefore, two fatal defects in Plaintiffs' reliance on that section. First, the State never sought to open a highway in the location of Rt. 37 because the highway predated the statute. Second, given the conveyance of 1818, the State already owned the land outright such that Route 37 was not on tribal land or land owned by individual Indians within the meaning of the cited regulation.

Plaintiffs also argue that pursuant to 25 CFR §169.18, a right-of-way may not exceed fifty years, and, therefore, the doctrine of laches cannot apply. Plaintiffs, however, are simply wrong. 25 CFR § 169.18 states that:

> All rights-of-way granted under the regulations in this part 169 shall be in the nature of easements *for the periods stated in the conveyance instruments*. Except as otherwise determined by the Secretary, and stated in the conveyance instrument, rights-of-way granted under the Act of February 5, 1948 (62 Stat. 17; 25 U.S.C. 323-328), for railroad, telephone lines, telegraph lines, *public roads and highways, ... may be without limitation as to term of years.* (emphasis supplied)

There is no restriction, per the regulation's express terms, on the duration of a right-of-way for a highway.

Overall, Plaintiffs' attempt to avoid application of the squarely applicable equitable defense to the Route 37 right-of-way claim must be rejected. With the State of New York having owned, maintained, patrolled[7] and regulated the highway for more than 160 years before the Plaintiffs filed

[7] Plaintiffs also argue (in apparent attempt to try and mitigate the obvious disruption of settled expectations) that "the Tribe does police the reservation, including State roads and in the land claim area," citing N.Y. Indian Law § 114(1).

their action, there exist well settled societal expectations regarding the main public thoroughfare in the area which would be so highly disrupted by Plaintiffs' long-delayed claims over Route 37 that they should properly be dismissed as "almost unthinkable" just as the Magistrate has recommended.[8]

CONCLUSION

Based upon Defendants' Responses to Plaintiffs' Objections, as well as all underlying briefing, the Court should adopt in part and reject in part the Magistrate's Report such that Defendants' Motions for Judgment on the Pleadings should be granted in their entirety and all claims in Plaintiffs' Complaints should be dismissed.

DATED: February 4, 2013
Albany, New York

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(Dkt. 594, p. 41.) However, nothing in §114(1) grants the St. Regis Tribal Police *exclusive* jurisdiction to patrol that Section of Route 37 passing through the reservation. The State Police have primary jurisdiction over all public highways, which jurisdiction extends across the Reservation, since by federal statute the State has "jurisdiction over offenses committed by or against Indians on Indian reservations within the State of New York to the same extent as … offenses committed elsewhere within the State" pursuant to 25 U.S.C. § 232. In addition, any limited powers conferred to St. Regis Police Officers (within the boundaries of the Reservation per §114(8)) are secondary to, derive from and are subject to the primary and superior jurisdiction and control of the State. For example, St. Regis Police officers are actually appointed by the Superintendent of the New York State Police and serve at his pleasure. *See* N.Y. Indian Law §§ 114(2), 114(11). Further, §114(8) makes it crystal clear that the St. Regis Tribe Police Force is authorized "to exercise the duties or functions of a police officer within the county of Franklin, and within that county, only within the boundaries of the St. Regis Reservation, except that such officer may follow a person for whom he or she has the authority to arrest on the reservation in continuous close pursuit, commencing on the reservation, in and through any county of the State, and may arrest such person in any county in which the officer apprehends him or her." The situations in which the St. Regis Tribe police officer is authorized to police in the land claim areas are, thus, limited to a single circumstance, a chase commencing on the reservation. *See also U.S. v. Wilson*, 754 F. Supp. 2d 450 (N.D.N.Y. 2010), *rev'd and remanded on other grounds* 699 F.3d 235 (2d Cir. 2012). The State of New York, therefore, maintains jurisdiction over that section of Route 37 that passes through the Reservation and in the land claim areas, just as it has for the last 195 years. Plaintiffs' reference to Indian Law §114 is of no avail.

[8] The Magistrate's recommendation in this regard to dismiss the Route 37 claims as barred extends to all sections of the entire Original Reservation claim area, not just the Town of Fort Covington. Report at pp. 40-41, n. 32.

DATED: February 4, 2013
Syracuse, New York

HISCOCK & BARCLAY, LLP

s/ Alan R. Peterman

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APPENDIX

1. *Onondaga Nation v. State of New York*, Dkt. No. 10-4273 (2d Cir. Dec. 21, 2012) - Order denying motion for panel hearing or, in the alternative for rehearing *en banc*, denied.

2. *Onondaga Nation v. State of New York,* Civil Action No. 5:05-CV-00314 (N.D.N.Y., September 21, 2009), Dkt. No. 95 – Order denying Plaintiff's request to convert motions to dismiss to motions for summary judgment.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 21st day of December, two thousand twelve,

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Onondaga Nation,

Plaintiff - Appellant,

v.

State of New York, George Pataki, In His Individual Capacity and as Governor of New York State, Onondaga County, City of Syracuse, Honeywell International, Inc., Trigen Syracuse Energy Corporation, Clark Concrete Company, Incorporated, Valley Realty Development Company, Incorporated, Hanson Aggregates North America,

Defendants - Appellees.

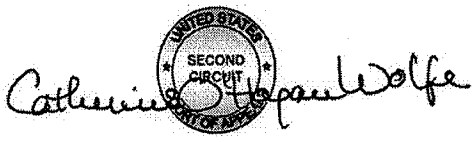
ORDER

Docket No: 10-4273

Appellant Onondaga Nation filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ONONDAGA NATION,

Plaintiff,

-v.- 5:05-CV-00314 (LEK/DRH)

THE STATE OF NEW YORK, *et al.*,

Defendants.

ORDER

Presently before the Court is a Motion by the Onondaga Nation ("Plaintiff") seeking a continuance for the opportunity to conduct discovery and further historical research. Motion (Dkt. No. 49). Plaintiff states that "[t]his motion will be contingent upon whether the Court converts Defendants' motions to dismiss into motions for summary judgment . . . ." Id. Based upon its review of the record, the Court concludes that it does not intend to convert Defendants' motions to dismiss into motions for summary judgment at this time. Accordingly, Plaintiff's Motion is denied.

WHEREFORE, based on the foregoing, it is hereby

ORDERED, that Plaintiff's Motion seeking a continuance to conduct discovery (Dkt. No. 49) is **DENIED**; and it is further

ORDERED, that the Clerk serve a copy of this Order on the parties.

IT IS SO ORDERED.

DATED: September ___, 2009
Albany, New York

Lawrence E. Kahn
U.S. District Judge