UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

TOWN OF VERONA (Oneida County), the TOWN OF VERNON (Oneida County), MICHAEL McDONOUGH, DANIEL DEAL, JAMES ANDERSON, and MELVIN PHILLIPS,

Plaintiffs,

- against -

13-CV-1100 (LEK)(DEP)

HON. ANDREW CUOMO, as Governor of the State of New York, MADISON COUNTY, JOHN M. BECKER, as Chairman of the Board of Supervisors of Madison County, ONEIDA COUNTY, ANTHONY J. PICENTE, JR.. as Oneida County Executive, the NEW YORK STATE GAMING COMMISSION, SHELDON SILVER, as Speaker of the New York State Assembly, DEAN SKELOS, as Co-Majority Leader of the New York State Senate, and JEFFREY KLEIN, as Co-Majority Leader of the New York State Senate,

Defendants.

REPLY MEMORANDUM OF LAW IN SUPPORT OF THE DEFENDANTS' MOTION TO DISMISS AND IN OPPOSITION TO THE CROSS MOTION

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Preliminary Statement

Plaintiffs are complete strangers to the negotiation of the comprehensive and historic agreement between the Oneida Nation, the State of New York, the County of Madison, and the County of Oneida, ratified by the county and State legislatures and statutorily denominated as the Oneida Settlement Agreement, resolving decades of disagreements over the extent of State and Indian sovereignty, taxation and the use of police powers, and copious federal litigation. See Executive Law §11. As outsiders with no knowledge of the negotiations, they claim the Settlement Agreement is unlawful. Central to their efforts to undermine the Agreement, plaintiffs offer a unilateral construction of the Agreement that is unsupported by the plain text of the agreement, in violation of contract construction principles, and rejected by the parties who drafted the Agreement. Those contracting parties understood the Oneida Nation, by agreeing to support the pending referendum, was simply making an explicit representation that it would not seek to obstruct the holding of the referendum, directly or indirectly, and thereby deprive the State of a central benefit of the Agreement. In other words, the language challenged by plaintiffs serves as an express statement of the covenant of good faith and fair dealing that otherwise is implicit in the Agreement under settled contract rules. There was and is nothing unlawful about the Agreement and plaintiffs' efforts to conjure up constitutional infirmities at the Eleventh hour should be rejected.

Defendants, relying in full upon their earlier submissions in support of their motion to dismiss the complaint in its entirety, submit this Memorandum of Law in reply to plaintiffs' opposition to that motion and in opposition to plaintiffs' cross motion to remand this matter to State court.

Point I

The Complaint Should Be Dismissed in Its Entirety.

1) Plaintiffs state no plausible facts supporting their unilateral interpretation of the Settlement Agreement and they fail to state a claim as to federal rights.

Plaintiffs urge in their complaint that the Settlement Agreement's provisions damage federally protected rights, plaintiffs having unilaterally interpreted the Agreement to require support of the proposed constitutional amendment. In opposing the motion to dismiss, plaintiffs continue to ignore fundamental principles of contract construction inextricably intertwined with their federal claims – that the intent of the parties to a contract be discerned from the plain meaning of the parties' terms. Crane Co. v. Coltec Indus., Inc., 171 F.3d 733, 737 (2d Cir. 1999) [quoting Am. Express Bank Ltd. v. Uniroyal, Inc., 194 AD2d 275, 277 (1st Dep't 1990)]. There is nothing in the Agreement which requires a vote in a particular way and there is nothing in the complaint that plausibly alleges otherwise. Indeed, as we noted in detail in the earlier memorandum, the Settlement Agreement terms requiring support for the pending referendum simply ensure that dubious efforts to prevent the measure from appearing on the ballot would not be undertaken. Plaintiffs, while urging this plain meaning of the terms used in the Agreement is "ludicrous," (see Plaintiffs' Memorandum Dkt # 12-1 p. 27 of 32) actually put into the record on these motions an example of an effort to strike the referendum from the ballot, the case Snyder v. Walsh, (Sup Ct, Albany County, Index No. 5449-13) See Murray Aff. Exhibits E and F. There, the plaintiff sought to enjoin the referendum, the very type of effort which the parties to the Settlement Agreement mutually and expressly agreed would not be supported. By providing such evidence establishing their complaint is implausible on its face, plaintiffs simply plead themselves out of court. See, Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

Plaintiffs also inexplicably fail to address the mandate that, should there be any ambiguity found in a contract's terms and one construction is purportedly unlawful as plaintiffs suggest, the construction to be adopted by the Court is an interpretation that makes the agreement lawful. Hobbs v. McLean, 117 U.S. 567, 576 (1886). There is no reasonable inference on this record which permits the Court to join plaintiffs' strained attempt to make the parties' Agreement an unlawful one, where, as here, there is a perfectly reasonable interpretation that ensures that efforts to prevent the holding of the referendum, like the one supplied by plaintiffs in Snyder v Walsh, be avoided. As there is a plausible, entirely lawful construction for the parties' Settlement Agreement, arising from its plain terms and supported by the very evidence plaintiffs supply in opposition to the motion to dismiss their complaint, plaintiffs simply fail to demonstrate that they have a plausible claim as to a violation of their constitutional rights. See, Ashcroft v. Iqbal, supra.

In sum, rather than addressing the merits of the motion to dismiss their unilateral interpretation of the Settlement Agreement and rather than addressing the unambiguous terms therein, plaintiffs actually supply evidence supporting the plain meaning of the Agreement as proffered by the parties thereto, as merely requiring support for the holding of the vote. Indeed, plaintiffs wholly fail to place plausible facts on the record which suggest that plaintiffs have been unlawfully deprived of any rights by the Settlement Agreement. Since being put on notice of this action, the Oneida Nation has expressly rejected any claim that the Agreement compels a vote in favor of the proposition to be decided and declared its members can freely educate others about the underlying proposition. McGowan Dec. Ex. 1. In sum, despite the plaintiffs' hyperbole, there is no plausible claim here of purchased votes, wasted tax dollars, or any

infringement of a constitutional right arising from this Settlement Agreement. Plaintiffs fail to demonstrate standing as they fail to demonstrate they are aggrieved by the Agreement. Plaintiffs are free to garner all the advice they want from the Oneida Nation and no facts appear in the complaint or the record which plausibly suggest that votes on the constitutional amendment are in any way impaired.[1]

Plaintiffs' flawed taxpayer standing argument is predicated on their purported challenge to "whether the Governor and the State Legislature have the power to contract with the Oneida Indian Nation regarding *how the Tribe will vote* on a casino gambling referendum by using the resources of the State *to get the Tribe to vote a certain way*." (Plaintiffs' Memorandum Dkt# 12-1, p. 26 of 32) (emphasis added). The "Tribe," as an entity, obviously has no right to vote in the November 2013 referendum. As such, neither the Governor nor the State Legislature can contract with the Tribe or use State resources to get "the Tribe" to vote in a certain way. To the extent plaintiffs argue that "the Tribe" refers to the State contracting with individual Oneida members to vote a certain way, that argument fails too. The Oneida Settlement Agreement cannot rationally be construed as restricting the right of any individual member to vote or compelling a member to vote a certain way. The November 2013 referendum will obviously be conducted via secret ballot and individuals may vote either for or against the constitutional amendment. Moreover, plaintiffs simply do not identify any unlawful expenditure of tax dollars

[1] Plaintiffs have abandoned their claims that they can seek to address the free speech rights of third parties and present no evidence or assertions which suggest that the Oneida Nation can be compelled to speak on their behalf. See Defendants' Memorandum of Law Dkt # 8-1, p. 10 of 27 et seq.; Cf., Plaintiffs' Memorandum Dkt 12-1. Where, as here, a party abandons a claim, dismissal is the appropriate remedy. See, Southerland v. City of New York, 680 F3d 127, 139, n. 12 (2d Cir. 2011); see also Brandon v. City of New York, 705 F.Supp.2d 261, 268 (SDNY 2010)(collecting cases dismissing claims as abandoned for failure to address them on motion.)

particularly in light of their misinterpretation of the parties' settlement agreement, and their mere claim that State funds are not being spent wisely does not establish "that it is illegal to spend money at all for the questioned activity" as is required under State Finance Law §123-b for citizen taxpayer standing. Saratoga County Chamber of Commerce, 100 NY2d at 813-814.

Recognizing their equal protection claims alleging vote buying by the State and improper attempts to influence the vote "by buying the support of and silencing the opposition from the powerful Oneida Indian Nation" (Plaintiffs' Memorandum of Law in Support of Order to Show Cause, Dkt # 1-8, p. 30-31 of 41) are devoid of merit, plaintiffs fail to refute virtually all of Defendants' arguments concerning their lack of standing, except to argue yet again that Shakman v. Democratic Organization of Cook County, 435 F.2d 267 (7th Cir. 1970) applies here. It does not. Contrary to plaintiffs' assertion, Defendants explained why the "legal principle involved" in Shakman (Plaintiffs' Memorandum Dkt # 12-1, p. 27 of 32) does not apply. None of the equal protection-based "interests" that were "entitled to constitutional protection" in Shakman (i.e., the alleged misuse of public employees to support favored political candidates) are even remotely implicated here. As previously explained, the only alleged constitutional interest identified by plaintiffs that they argue will impact the vote on the statewide casino referendum – the right to hear the Oneida Nation speak on the referendum against its wishes – is not entitled to any constitutional protection. (Defendants' Memorandum of Law Dkt # 8-1, p. 10-13 of 27). Nothing plaintiffs allege restricts, impacts, or even touches upon, their right to vote on the casino referendum.

2) To the extent that Plaintiff Towns rely on Home Rule provisions for standing, they fail.

Plaintiffs seek guidance from the Court with respect to the State's Home Rule provisions,

inquiring "[i]f loss of sovereignty does not affect Home Rule, then what does?" Plaintiffs' Memorandum Dkt # 12-1, p. 31 of 32. The answer to this question is well settled and is neither novel nor complex. The relevant Home Rule sections of the State Constitution appear in Article IX, which provide in pertinent part:

> §2 (b) Subject to the bill of rights of local governments and other applicable provisions of this constitution, the legislature:
>
> . . . .
>
> (2) Shall have the power to act in relation to the property, affairs or government of any local government only by general law, or by special law only (a) on request of two-thirds of the total membership of its legislative body or on request of its chief executive officer concurred in by a majority of such membership, or (b) except in the case of the city of New York, on certificate of necessity from the governor reciting facts which in the judgment of the governor constitute an emergency requiring enactment of such law and, in such latter case, with the concurrence of two-thirds of the members elected to each house of the legislature.
>
> §3 (a) Existing laws to remain applicable; construction; definitions
>
> . . .
>
> (3) Except as expressly provided, nothing in this article shall restrict or impair any power of the legislature in relation to . . . [m]atters other than the property, affairs or government of a local government.

The New York State Court of Appeals has noted that a great deal of legislation can affect both "the property, affairs or government of a local government" and to "[m]atters other than the property, affairs, or government of a local government" – meaning, matters of substantial State concern. See Empire State Ch. of Associated Bldrs. & Contrs., Inc. v. Smith, 21 NY3d 309, 317 (2013). Wherever this is true, the Court of Appeals has clearly enunciated that the Home Rule provisions do not prevent the Legislature from acting by special law. Id.; Wambat Realty Corp. v State of New York, 41 NY2d 490, 494 (1977).

Here, as the Court and parties are no doubt aware, there are substantial State concerns at stake in the Settlement Agreement, the federal litigation which it affects, and the underlying sovereignty and jurisdictional disputes. As noted earlier, in adopting Chapter 174, the Legislature expressly provided in the new Executive Law § 11 for ratification of the Oneida Settlement Agreement, which "SHALL BE DEEMED TO SUPERSEDE ANY INCONSISTENT LAWS AND REGULATIONS." See Complaint Ex. H. Plaintiff Towns' parochial concerns simply do not trump the State's interests or the Legislature's power to address the State's interests here in Chapters 174 and 175 of the Laws of 2013.

3) Plaintiffs do not establish that an ineffective statute is ripe for judicial review.

Plaintiffs concede that Chapters 174 and 175 of the Laws of 2013, to the extent they authorize casino gaming should the constitution be amended, are not yet effective. See Complaint Dkt# 1-1 pp. 30-31 of 261. In light of that admission, plaintiffs have no current grievance arising from the speculation that the amendment might be adopted. Moreover, whatever the result of the referendum, plaintiffs' imagined harm evaporates: Should casino gaming become constitutional then the legislation is both effective and constitutional; should casino gaming be unconstitutional the allegedly offensive legislation will never be effective. Plaintiffs do not offer any opposition to defendants' ripeness arguments in this regard, and the Court should conclude that plaintiffs have abandoned the claim that that matter is justiciably ripe at this time. See, Southerland v. City of New York, 680 F3d 127, 139, n. 12 (2d Cir. 2011); see also Brandon v. City of New York, 705 F.Supp.2d 261, 268 (SDNY 2010)(collecting cases dismissing claims as abandoned based on failure to address them in opposition to defendants' motions.) The lack of merit in plaintiffs' position is even more apparent when one considers

that the Legislature is free to pass the same legislation after the election.

4) Plaintiffs do not establish that the Towns' claim alleging loss of sovereignty and jurisdiction is ripe for judicial review.

To the extent plaintiffs urge that the Towns' lawsuit challenging the trust application has been "compromised" as a result of the Oneida Settlement Agreement (Plaintiffs' Memorandum, Dkt # 12-1, p. 31 of 32), the injury the Towns' complain of in the second cause of action (the loss of sovereignty and jurisdiction) has not occurred yet, and thus the claim is not ripe for judicial review. Title to the land in question does not transfer to the DOI (to be held in trust for the Oneida Nation's benefit) until the DOI issues an "amended Record of Decision" and all the litigation challenging it is finally resolved. (Defendants' Memorandum of Law, Dkt # 8-1, p. 25 of 27). The Towns can also lodge objections to the Oneida Settlement Agreement in the Town of Verona, et al. v. Salazar, et al., No. 6:08-CV-00647 (N.D.N.Y) action, which is "related" to State of New York v. Salazar, No. 08-cv-644-LEK (N.D.N.Y.), the case in which the Oneida Settlement Agreement will be submitted for this Court's approval.

5) The claims against the individual defendants fail.

We noted in the motion to dismiss that the individual defendants are not proper parties and that they are absolutely immune in their legislative capacities. Defendants' Memorandum of Law Dkt # 8-1, p. 25 of 27 et seq. Plaintiffs urge, in reply, that the State officials were sued in their official capacity under CPLR article 78, "for having exceeded their authority." Plaintiffs' Memorandum Dkt # 12-1 pp. 31-32.

It seems undisputed, therefore, that to the extent plaintiffs intended to sue the defendant individuals for their legislative activities, they are concededly immune. In general, a proceeding pursuant to CPLR article 78 is not available to challenge the validity of the substance of a

legislative act. American Ind. Paper Mills Supply Co., Inc. v. County of Westchester, 16 A.D.3d 443, 444 (2d Dep't 2005). Obviously Defendants Cuomo, Silver, Skelos and Klein had the legislative authority to adopt Chapters 174 and 175 of the Laws of 2013, and there can be no dispute that the Settlement Agreement, here ratified and given the force of law within Chapter 174, was within their legislated powers. Plaintiffs point to no administrative activity of any of these defendants which was outside the scope of their authority – it being absolutely clear from the cases plaintiffs cite, including Saratoga County Chamber of Commerce v. Pataki, 100 NY2d 801 (2003) and Dalton v. Pataki, 5 NY3d 243 (2005), that the Governor had the authority, with legislative ratification, to enter into the Settlement Agreement with the Oneida Nation.

Point II

The Cross Motion to Remand Should Be Denied.

Plaintiffs concede their action lies within the original jurisdiction of this Court. Indeed, in paragraph 4 of their complaint, plaintiffs alleged "[t]his case raises profound issues involving fundamental rights that are the bedrock of a Constitutional democracy; namely the right to vote, the integrity of the voting process, the right to freedom of speech and association; the right to equal protection, and the right of the People to amend or not amend, as they see fit, the Constitution via a free and open process." It is beyond dispute that such claims fall within the original jurisdiction of this Court, that they may be removed pursuant to FRCP 1441(a), and that this Court has supplemental jurisdiction over all the claims which arise from the same nucleus of operative facts. See 28 USC §1367(a). Indeed, this court cannot avoid its responsibility to address such claims within its original jurisdiction and the exercise of supplemental jurisdiction is favored where, as here, judicial economy, convenience and fairness to the parties all weigh

toward exercising such jurisdiction. See, e.g., Promisel v. First Am. Artificial Flowers, Inc., 943 F2d 251, 254 (2d Cir 1991). The interpretation of the Settlement Agreement presents a common nucleus of fact with respect to both the federal and state law claims, and, therefore, is one properly resolved by this Court. See, e.g, Achtman v. Kirby, McInterney & Squire, LLP, 464 F3d 328 (2d Cir 2006). Indeed, it is entirely fitting that this Court exercise its jurisdiction here and deny the cross motion seeking a remand, as this Court has already found (and even plaintiffs admit) this case is related to extensive pending federal litigation, including Case Nos. 5:08-cv-633 (LEK/DEP); 6:08-cv-644 (LEK/DEP); 6:08-cv-647 (LEK/DEP); 5:08-cv-648 (LEK/DEP); and 6:08-cv-660 (LEK/DEP). See Dkt. # 7.

To support a remand, plaintiffs now contend that "[t]his is a case in which the state law claims strongly predominate over any claims over which this Court has original jurisdiction." Plaintiffs' Memorandum Dkt. 12-1, p. 25 of 32. Those two state law claims, as recently re-framed by the plaintiffs, include 1) a "novel question" as to whether under state law an admittedly ineffective statute which is to become effective only if there is a constitutional amendment should be declared unconstitutional (Plaintiffs' Memorandum Dkt # 12-1 p. 20 of 32); and 2) whether the "State Defendants can, by contract, give favorable treatment to an Indian tribe in exchange for their commitment to support a Constitutional amendment on the ballot." Plaintiffs' Memorandum Dkt# 12-1 p. 22 of 32. As previously discussed, neither of those claims is viably presented in the complaint and in their implausible, speculative and contingent forms cannot predominate over the federal claims pleaded here. The "novel question" as to whether an ineffective statute should be declared ineffective is not novel – indeed it presents no question at all. Neither state nor federal courts engage in such fanciful exercises. Should the Constitution

be amended, the statute would be in accord. Should the Constitution not be amended, the statute is admittedly ineffective. Thus as to "state law" question "Number 1," an ineffective statute, under both state and federal law, by definition, is ineffective. As to plaintiffs' state law question "Number 2," the Settlement Agreement cannot be plausibly read to compel individual Oneida voter support of the constitutional amendment on the ballot. Plaintiffs' hypothetical questions lack substance and meaning. Neither provides a basis to delay a decision on the federal issues presented in the complaint.

For the same reasons this Court should reject plaintiffs' request to abstain on the basis of *Pullman* abstention, which rests on the same meritless contention that plaintiffs' claim raises a "novel or complex issue of State law.'" Plaintiffs' Memorandum Dkt # 12-1 p. 24 of 32. *Pullman* abstention is only appropriate "when three conditions are met: (1) an unclear state statute is at issue; (2) resolution of the federal constitutional issue depends on the interpretation of the state law; and (3) the law is susceptible to an interpretation by a state court that would avoid or modify the federal constitutional issue." Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 100 (2d Cir. 2004) (declining to abstain). "Even when these conditions are fulfilled," federal courts "are not required to abstain, and, to the contrary, important federal rights can outweigh the interests underlying the *Pullman* doctrine." Id. The policy served by *Pullman* abstention is to "avoid the need to address difficult constitutional questions dependent on the interpretation of state law in a situation where a decision on the ambiguous state law could not 'escape being a forecast rather than a determination' and might be 'supplanted by a controlling decision of a state court.'" Id. (quoting Railroad Com. of Texas v. Pullman Co., 312 U.S. 496, 499-500 (1941)).

The only thing supporting plaintiffs' argument that their state law claims are "novel" is

the complete absence of any legal authority that would permit any court – state or federal – to invalidate a state statute that is admittedly ineffective (Chapters 174 and 175 of the Laws of 2013 addressing casino gaming if the referendum passes) and whose effectiveness is contingent upon a future event (i.e., voters approving the referendum in November). Plaintiffs cite nothing in New York law – let alone a statute that is purportedly unclear – that supports their contention about the sequence of legislative action and constitutional referendum, simply asserting that "the question of whether the State Legislature and Governor may together enact legislation that is currently unconstitutional, but that may become constitutional upon the passage of a constitutional amendment, is an open question in the State of New York." (Plaintiffs' Memorandum, Dkt# 12-1, p. 22 of 32). The only law ever mentioned by plaintiffs that ostensibly prohibits the Legislature's action is Article I Section 9's current prohibition on casino gambling (see Complaint/Petition ¶¶ 97-98); however, that state constitutional provision does not divest the Legislature of the authority to pass a law that regulates casino gambling if the voters approve an amendment to the provision to permit commercial casino gambling as regulated by the State. Plaintiffs therefore fail to identify an unclear state statute or uncertain state law issue warranting *Pullman* abstention on this state law claim.

Plaintiffs likewise fail to identify any state law or statute that is unclear with respect to the construction of the Oneida Settlement Agreement. As set forth above, plaintiffs lack standing to make that assertion and in any event offer up a mistaken construction – belied by the plain language of the agreement and the parties' actual contemporaneous understanding of their own agreement -- that the Oneida Nation was given "favorable treatment" by contract "in exchange for their commitment to support a Constitutional amendment on the ballot."

Controlling principles of contract construction compel a rejection of their unilateral claims.

Plaintiffs' invocation of *Pullman* abstention principles should be rejected on the further grounds that (1) *both* the federal and state law claims warrant dismissal on threshold standing and/or ripeness grounds, (2) this action is related to extensive pending litigation in this Court and (3) the comprehensive and historic Oneida Settlement Agreement being challenged here will soon be presented to this very Court for approval.

Accordingly, this Court need not weigh into the "merits" of plaintiffs' state law claims and may dismiss on threshold grounds, but even if the Court deemed it necessary to address the merits, there is no reason for this Court to abstain from deciding meritless and unsupportable state law claims. See, e.g., Moore v. County of Suffolk, 851 F. Supp. 2d 447, 457-58 (E.D.N.Y. 2012) (declining to abstain under *Pullman* where all three requirements were not met and noting that *Pullman* abstention is an "'extraordinary and narrow exception' to a district court's duty to adjudicate the case before it") (quoting Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188 (1959)).

Conclusion

The complaint must be dismissed in its entirety and the cross motion denied.

Dated: Albany, New York
October 21, 2013

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