UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UPSTATE CITIZENS FOR EQUALITY, INC.,
DAVID VICKERS, SCOTT PETERMAN,
RICHARD TALLCOT, AND DANIEL T. WARREN,

Plaintiffs,

PLAINTIFFS' REPLY TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Vs.

UNITED STATES OF AMERICA, et al,

Defendants.

5:08-cv-633 (LEK / DEP)

I. Applicable Standard for Summary Judgment

Summary judgment is appropriate where there is no genuine dispute as to any material fact. Fed. R. Civ. P. 56(a). For a fact to be "material" it must affect the outcome of the case under the governing law in question. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). An issue of fact is "genuine" if "a reasonable jury could return a verdict for the nonmoving party" based on the evidence presented. Id. The initial burden of proof as to whether no genuine issue of material fact exists, rests on the moving party. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

"[A]lthough the Court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury would not be required to believe." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 151, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000); see In re Dana Corp., 574 F.3d 129, 152 (2d Cir. 2009) [*20] (emphasizing

that "a jury is free to believe part and disbelieve part of any witness's testimony" (citations omitted)); Zellner v. Summerlin, 494 F.3d 344, 371 (2d Cir. 2007) (same); cf. Haywood v. Koehler, 78 F.3d 101, 105 (2d Cir. 1996) (noting that "the jurors were not required to accept the entirety of either side's account, but were free to accept bits of testimony from several witnesses and to make reasonable inferences from whatever testimony they credited."). The Court thus considers only the facts admitted by the nonmoving party as to those issues upon which the moving party bears the burden of proof, and views all disputed facts in the light most favorable to the nonmoving party.

Declaring that "the court may grant summary judgment for a nonmovant," Rule 56 (f)(1) of the Federal Rules of Civil Procedure as amended in 2010 now makes explicit what has long been the law in the Second Circuit: a party that moves for summary judgment runs the risk that if it makes a woefully inadequate showing, not only might its own motion for summary judgment be denied, the court may grant summary judgment sua sponte against the movant.[1] Coach Leatherware Co. v. Ann Taylor, Inc., 933 F.2d 162, 167-68 (2d Cir. 1991) (recognizing that there is no need for notice when entering summary judgment against the moving party because the movants have "significant incentive to put forward any compelling evidence in support of their summary judgment motion since the law prevent[s] the district court from drawing favorable inferences on their behalf"); see also Garanti Finansal Kiralama A.S. v. Aqua Marine & Trading Inc., 697 F.3d 59, 64 (2d Cir. 2012) ("District courts have the discretion to grant summary judgment sua sponte, even without notice in certain

[1] Federal Rule of Civil Procedure 56(f) states that the court "may grant summary judgment for a nonmovant" only "[a]fter giving notice." Fed. R. Civ. P. 56(f)(1). Even after this amendment went into effect, however, courts within the Second Circuit have continued to grant sua sponte summary judgment without notice by applying the standard set forth in Coach Leatherware Co. v. Ann Taylor, Inc., 933 F.2d 162, 167-168 (2d Cir. 1991). See, e.g., Williams v. Secure Res. Commc'n Corp., No. 11 Civ. 03986 (PAC) (JCF), 2013 U.S. Dist. LEXIS 129256, 2013 WL 4828578, at *4 (S.D.N.Y. Sept. 10, 2013); Bank of N.Y. Mellon Trust, Nat'l Ass'n v. Morgan Stanley Mortgage Capital, Inc., No. 11 Civ. 0505 (CM) (GWG), 2013 U.S. Dist. LEXIS 87863, 2013 WL 3146824, at *16 (S.D.N.Y. June 19, 2013).

circumstances.") (quoting Schwan-Stabilo Cosmetics GmbH & Co. v. PacificLink Int'l Corp., 401 F.3d 28, 33 (2d Cir. 2005)); First Fin. Ins. Co. v. Allstate Interior Demolition Corp., 193 F.3d 109, 115 (2d Cir. 1999) ("as long as some party has made a motion for summary judgment, a court may grant summary judgment to a non-moving party, provided that party has had a full and fair opportunity to meet the proposition that there is no genuine issue of material fact to be tried."). The First Circuit holds likewise. Sanchez v. Triple-S Mgmt. Corp., 492 F.3d 1, 7-9 (1st Cir. 2007); Berkovitz v. Home Box Office, Inc., 89 F.3d 24, 29-30 (1st Cir. 1996); see Rothschild v. Cree, Inc., 711 F. Supp. 2d 173, 195 (D. Mass 2010). In a recent opinion, I discussed the patent bar's common practice of overloading courts with summary judgment motions. See Ambit v. Delta, 707 F. Supp. 2d 74, 77-79 (D. Mass. 2010). In that opinion, I warned the patent bar to ensure that in making a motion for summary judgment upon an issue as to which they bear the burden of proof, they "lay every bit of evidence before the court - once." Id. at 78.

This body of precedent constitutes more than adequate notice that the Court may enter summary judgment against the moving party and in favor of the Plaintiffs.

In addition to the exhibits attached to the Declaration of David B. Vickers dated March 20, 2014 and the exhibits attached thereto, Plaintiff also relies on their First Amended Supplemental Verified Civil Complaint (Doc. # 35) in opposing Defendants' motion for summary judgment. Verified complaints may be treated as an affidavit for summary judgment purposes. See Patterson v. Cnty. of Oneida, 375 F.3d 206, 219 (2d. Cir. 2004) ("[A] verified pleading . . . has the effect of an affidavit and may be relied upon to oppose summary judgment."); Fitzgerald v. Henderson, 251 F.3d 345, 361 (2d Cir. 2001) (holding that plaintiff "was entitled to rely on [his verified amended complaint] in opposing summary judgment").

II. Background

On May 20, 2008, the United States Department of the Interior ("DOI") issued a Record of Decision ("ROD") that purported to authorize the United States to acquire sovereign New York State land from said state and transfer fee ownership to the federal government for the benefit of the Oneida Indian Nation of New York ("OIN"). This land, some 13,033.89 acres, would be held in "trust" for the OIN and only very limited New York State law or jurisdiction would attach to said 13,003.89 acres.

On June 16, 2008, (supplemented by an amended complaint) the Upstate Citizens for Equality ("UCE") filed a Civil Complaint challenging the validity of this ROD and the attendant land transfer. Central to UCE's challenge was an argument rooted in the US Constitution; namely that the federal government has no authority to acquire sovereign New York State land by federal legislation (here, 25 USC 465 with respect to the 13,000 + acres and 40 USC 523 with respect to 18 acres "transferred" by the General Services Administration ("GSA") on December 30, 2008), regardless of how that legislation may be applied in other non-New York venues.

Also included in UCE's challenge to this land transfer was a challenge to the validity of the ROD on procedural grounds. In Shenandoah v. United States DOI, 159 F.3d 708 (2nd Cir. 1998), serious questions about A. Raymond Halbritter's legitimacy and authority to act for the Oneida people (tribe) were raised and never answered.

Additionally, the UCE has asserted that the land in question is not the proper type of land to be the subject of this federal land acquisition and the federal government has no role to play in disputes between the State of New York and the tribes that are the subject of pre- Constitutional treaties, such as the Treaty of Fort Schuyler (1788).

On March 4, 2010, this Court issued a Memorandum-Decision and Order. That document effectively dismissed most of the UCE's claims. (Upstate Citizens for Equality, Inc., et al v. Salazar, 2010 U.S Dist. LEXIS 19787 (N.D.N.Y. Mar. 4, 2010)). It is Plaintiffs' position that this Court transformed this motion to dismiss into one for summary judgment and deprived Plaintiffs the opportunity to argue the merits of their Constitutional challenge. Plaintiffs raise what would have been their merits argument here in order to preserve these issues for appellate review. It is important to note for the Court here that not all claims were dismissed; only those that relied on "non-delegation" and "lack of intelligible principle" theories were dismissed. "The Court addresses here only the Plaintiff's non-delegation claim, … which … shall be dismissed." (P. 10 of doc. 49, Judge Kahn's Memorandum-Decision and Order).

On December 23, 2013, the DOI amended the ROD to state that the OIN was under federal jurisdiction in 1934. Shortly thereafter (March 12, 2014), the DOI issued an Opinion in which it makes this Administration's position very clear: There will never be any Indian Tribe anywhere whose land into trust application will be

denied based on the Carcieri 1934 ruling. This is clear bias and demonstrable emasculation of the Supreme Court's ruling in Carcieri, but since this Court has apparently already sanctioned such a result, the Plaintiffs herein will raise arguments against this decision in their anticipated appeal.

III. Questions Still Open After This Court's Ruling

This Court failed to clarify in its Memorandum-Decision and Order was its ruling of UCE's broader constitutional argument that no federal legislation can be enacted that does what 25 USC 465 effectively purports to do here, which is to eliminate vital aspects of a State's sovereignty if a Tribe and the DOI team up to simply take land and reduce New York State to mere fragments and remnants of a true Constitutional sovereign. "The powers of Congress over Indian Affairs ... is not absolute." Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 84 (1977), (quoting United States v. Alcea Band of Tillamooks, 329 U.S. 40, 54 (1946)). Also, "Congress may not employ its delegated powers to displace ... State territorial integrity." (Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550 (1985). Congress may not exercise power in a fashion that impairs the States' integrity." Fry v. United States, 421 U.S. 542, 547 n.7 (1975). There is no constitutional hook upon which one may hang this garment. The DOI argues that the Indian Commerce Clause justifies the existence and current application of 25 USC 465, but that argument is best fought in a higher Court.

On March 7, 2014, the Defendants filed a motion for summary judgment and a memorandum of law in support of the motion in which the Defendants reiterated their position. The following is Plaintiffs' response.

IV. The Defendants' Position on Federalism

The Defendants herein have claimed that since land under federal "trust" status would not be land that is subject to exclusive federal jurisdiction, the UCE's argument that the acquisition of the land in question is not to be characterized as an attack on State sovereignty, but rather an appropriate exercise of federal power to favor tribes over sovereign states where those two entities may have disagreements as to obligations of citizenship. The Defendants have cited numerous federal policy preferences and hope to convince Courts that federal policy trumps a state's right to its own Constitutionally chartered sovereignty, regardless of the actions of that State's temporary custodian – its governor. However, the Defendants fail to bring to the attention of the Court several cases that recognize the States' rights to jurisdictional and complete sovereignty: "Of all the attributes of sovereignty, none is more indisputable than that of [a State's] actions upon its own territory." Green v. Biddle, 21 U.S. 1, 43 (1823). Also, Congress has no power to "reserve or convey … lands that ha[ve] already been bestowed upon a State." Idaho v. United States, 533, U.S. 262, 280 n.9 (2001). This stands for the proposition that even if a State's governor and a State's legislative body consented to a conveyance to the federal government, that conveyance is not Constitutionally permissible. Along those same lines -- that a State is a greater entity than its temporary custodians (its governor and

its legislative body) - there are several cases; to name but a few: "[It] would raise grave Constitutional concerns" if Congress "purported to cloud [a State's] title to its sovereign lands" by recognizing a native land claim long after the State's admission to the Union. Hawaii v. Office of Hawaiian Affairs, 129 S.Ct. 1436, 1445 (2009). Also, "[C]ongressional action that causes a State to suffer a loss of political jurisdiction over land – including by expansion of tribal prerogatives – unlawfully interfere[s] with the sovereignty of the State." Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 534 and n. 58 (1941). The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, not prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Constitution, Amendment X. "The framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves[.]" Bond v. United States, 131 S.Ct. 2355, 2364 (2011). This case stands for the idea that even if a State's governor and its legislative body desire to sell the integrity of the State for short term political priorities and hard cold cash, the federal Constitution protects against such derelictions of duty and preserves the integrity of a State until such time as its people elect a governor and a legislature who respect the Constitutional framework and the freedom it is designed to protect more than they respect selling out for twenty-five cents on the dollar to the nearest tribal casino. This is also a case in which the Guarantee Clause of the U.S. Constitution has been violated; in such a case, it is the nature of the claim that determines whether the case is justiciable or not. Baker v. Carr, 369 U.S. 186, 211, 217 (1962); Reynolds v. Sims, 311 U.S. 533, 582 (1964).

The Supreme Court in New York v. United States, 505 U.S. 144, 185 (1992), indicated that certain claims brought under the Guarantee Clause of Article IV, section 4 of the Constitution are in fact justiciable. (*See also various legal scholars:* L. Tribe, American Constitutional Law 398 (2d ed. 1988); J. Ely, Democracy and Distrust: A Theory of Judicial Review 118, and n., 122-23 (1980); W. Wiecek, The Guarantee Clause of the U.S. Constitution 287-289, 300 (1972); Merritt, 88 Colum. L. Rev., at 70-78; Bonfield, The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude, 46 MinnL.Rev. 513, 560-565 (1962). When this Court rubber stamped the Cuomo/Madison County/ Oneida County / OIN revenue sharing deal (submitted herein in its entirety as Exhibit "A"), it sanctioned the State's unconstitutional action to deprive many of its Indian residents and citizens of a Republican form of government. The "government" of the Oneida Indian Nation, under the control of A. Raymond Halbritter, is of a non-democratic and decidedly non-republican nature.

V. The Defendants' Position on the Indian Commerce Clause.

The Defendants argue that the Indian Commerce Clause in the US Constitution is to be interpreted so broadly that it has virtually no limits (See Defendants' Motion citing both Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) and Seminole tribe of Fla. Florida, 517 U.S. 44,62 (1966)). But the Indian Commerce Clause does have limits, just as the (non-"Indian") Commerce Clause was found to have limits in the Lopez case. (For a history of the Indian Commerce Clause, *See* Robert G.

Natelson, The Original Understanding of the Indian Commerce Clause, Denver University LawRev. Vol. 85:2, P. 201-266 (2007)). When the activity in question is not principally about "commerce," the federal government may not use the Commerce Clause to "interfere with States' jurisdiction over affairs with Indians residing within State boundaries." (Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2568 (2012) Justice Thomas, concurring opinion discussing the history of the Indian Commerce Clause).

VI. The Defendants' Position on the Property Clause

Just in case the Court finds that there actually might be some outer limit to the scope of the Indian Commerce Clause, the Defendants claim that the Property Clause allows the federal government to simply acquire whatever land Congress seems to think a Tribe should have (See Defendants' Memorandum in which Defendants cite United States v. Johnson, 994 F.2d 980, 984 (2d Cir. 1993)). The Defendants assert (without explaining) that the Property Clause is to be interpreted as a land-grabbing power tool reserved to the federal government so long as anything that happens on the seized land is construed to be a "needful building." The cited Property Clause establishes no power for the federal government to seize a State's land simply because a Tribe wants to use that land as a base of power to circumvent State laws and jurisdiction. The Defendants claim that the Property Clause makes 25 USC 465 a legal land grab because the federal government will not be acquiring exclusive jurisdiction over the property. So what sort of jurisdiction is left to the State? Only that which doesn't

conflict with federal "enactments." So, the State can exercise jurisdiction until such time as the federal government enacts (not necessarily through an act of Congress, apparently) laws, rules, regulations or orders that would "conflict" with State jurisdiction. This position renders a State a mere sock puppet of the Congress, Executive agency rule-making authority or Executive orders. This is not the intent or the express purpose of the Indian Commerce Clause or the Property Clause.

VII. The Defendants' Position on Indian Tribal Sovereignty.

This position makes Indian Tribal "Sovereignty" a true conundrum: On the one hand the federal government has "plenary power" over all Indian Affairs, which would mean that Tribes exist only and exclusively at the pleasure of Congress. Yet on the other hand, if Congress sides with a tribe, then and only then, does a Tribe's sovereignty not only exist, it trumps the sovereignty of the States that make up the federal government in the first place.

Since this position is preposterous on its face, the Defendants piece together snippets from Court cases to hedge this position and make it sound plausible and legal.

Should the federal Courts sanction these positions, States would be reduced to a status that could only be defined as vestiges of jurisdiction awaiting the eventual diminishment by the combined activity of tribes and the federal government. This is an insult to the framers of the Constitution, the Ninth and Tenth Amendments of the Constitution, and the very idea of government by the consent of the governed as Americans have come to know that concept.

VIII. The Defendants' Position Regarding A. Raymond Halbritter.

The Defendants assert that there is no room to question the role that A. Raymond Halbritter played or continues to play regarding making the initial request to have land placed into trust for the Oneida Tribe of New York. The Defendants state, "[T]his Court lacks subject matter jurisdiction to decide who should be the Nation's Representative," citing Runs After v. United States, 766 F.2d 347,352 (8th Cir. 1985).

The federal government and Mr. Halbritter find themselves in another very curious position: Mr. Halbritter was removed from his responsibilities as a tribal leader in 1993 (*See* Shenandoah v. U.S. Dep't of Interior, 159 F.3rd 708 (2nd Cir.1998) and here, the federal agency position is that the Court should defer to tribes regarding matters of internal leadership disputes (See Defendants' Motion at Doc. No. 79-1 at page 33). If the Court were to pay attention to the tribe and not the BIA, the Court would realize that Mr. Halbritter has usurped tribal authority to turn the tribe into his own personal vehicle to amass wealth and power.

The Defendants state that a group such as the Upstate Citizens for Equality would "lack standing" to challenge the leadership dispute and the resultant chaos that has stemmed from it (See Defendants' Motion, Doc. No. 79-1 at page 33). History is littered with accounts of the true tribal entity being cast aside by some government entity or individual who thinks that the tribe can't possibly know what is best for itself; that the federal (or State) government can decide matters concerning tribal leadership better than the tribe can itself. Standing aside, the Court should take a long hard look at simply rubber-stamping the actions of Mr. Halbritter as "legitimate" when there is both internal tribal

history to illustrate the opposite as well as federal court cases that brought these matters to the attention of the Court. This case involves far more than an "internal tribal dispute." Vital interests of our members who are citizens of the Towns of Vernon and Verona are at stake. The federal court system has the jurisdiction to review the actions of A. Raymond Halbritter (as does any federal agency, such as the FBI, for example). In cases in which the interests of others were impacted by "internal tribal disputes," the federal courts have seen fit to intervene. See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); Montana v. United States, 450 U.S. 544 (1981), Brendale v. Yakima Indian Nation, 492 U.S. 408 (1989); Duro v. Reina, 495 U.S. 676 (1990); A1 Contractors v. Strate, 520 U.S. 438 (1997); and Plains Commerce bank v. long Family Land and Cattle Co., 554 U.S. 316 (2008).

Unless and until tribes present unquestioned leaders to act on their behalf, any future tribal government can petition the Court to have decisions vacated based on claims that illegitimate leaders undertook actions that the tribe itself did not sanction. UCE urges that the Court take judicial notice and therefore points out for the Court's sake that the Mohawks have a split leadership crisis; the Cayugas are constantly fighting internally about leadership questions; the Senecas are currently embroiled in a leadership battle; the Oneidas deposed their federally recognized leader in 1993 and again in 1995. The UCE raises the issue for the Court to consider.

IX. The Defendants' position concerning some 300,000 acres of "reservation" land.

The Defendants herein claim that the Oneida Tribe has a 300,000 acre reservation; The basis for making this claim is that the

1794 Treaty of Canandaigua somehow "federalized" the pre-existing 1788 Treaty between the Oneida Tribe and the State of New York. Since the Treaty of Canandaigua, the "reservation" has not been "dis-established" according to the Defendants. Apparently, according to the Defendants, the only method of "dis-establishing" a "reservation" is by Congressional action – even though the reservation in question was created by the State of New York in 1788 before the current Constitution was in place as a governing document. This Court made "rule" has no application to this land.

The truth about this land is far more complex and is actually supported by looking at the facts of history as well as the details of early Congressional legislation. 25 USC 465 does not apply to the land in question. The Oneidas have no federal reservation in NY. It is Plaintiffs contention that the Oneidas of NY are not a tribe and have no reservation at all - federal, State or any other category. The Treaty of 1788 ceded all Oneida land to NY; the treaty of Canandaigua 1794 illustrates that the federal government recognized and approved of the NY / Oneida treaty of 1788. All the Oneidas had left was possessory interests, which they properly sold to NY from 1795 forward. The 1794 Treaty did not establish anything. The 1793 Trade and Intercourse Act exempted land such as that sold by the Oneidas from the requirement that the federal government oversee such land transfers; 25 USC 177 (which is what emerged from the 1793 TIA, not the 1790 TIA) never applied to land surrounded by NY settlements and under NY ordinary jurisdiction. (*See Act of March 2, 1793, Section 8,* 1 Stat. 329,330). Every time the OIN sold land, they themselves were in the process of dis-establishing their own possessory "reservation" rights. There is no role for the federal government to play in "dis-

establishing" this "reservation." If there is no OIN reservation, then the DOI must follow 25 CFR 151.3, which requires an Act of Congress before the Executive agency can acquire land for a tribe. (See *Hynes v. Grimes Packing Co.,* 337 U.S. 86 (1949); See also *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973). This Court maintains that there is an OIN reservation, but can't define its boundaries, can't sculpt any of its features and can't (or won't) tell any person living near the supposed "reservation" if they actually live on or off and Indian "reservation." The Court simply states that there is a reservation because Congress has not "dis-established" one that never was "established" in the first place. The Court is content to let that assertion stand. (See Memorandum-Decision at page 13: "The Second Circuit's holding in *Oneida Indian Nation* that the OIN reservation has not been disestablished remains binding precedent in this Court." This Court should reverse its own prior rulings which ignore history and Congressional Acts and wrongly diminish New York State's sovereignty.

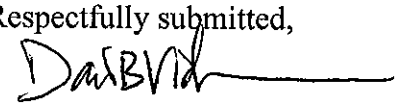
X. CONCLUSION

The Defendants' position on federalism reduces the state of New York to a mere satellite of the federal government whenever a tribe and the DOI decide to reduce the State to such a subordinate status. The Defendants fail to weigh the scope of the limits of the Indian Commerce Clause rendering this clause a tool for the complete diminishment of a State. The Defendants' position concerning the Property Clause is not supported by evidence or jurisprudence. The result would be to create a government that violates the Guarantee Clause of the U.S. Constitution by establishing a non-republican form of government that U.S. citizens would be subject to. The Defendants would elevate tribal

sovereignty above a State's sovereignty unless the federal government wanted to eliminate the tribe's sovereignty altogether. The ROD fails to account for the history of the inapplicability of 25 USC 465 in New York; it fails to weigh the internal truths of the Oneida Indian population and its many leadership and political disputes; the ROD displays arbitrary decision-making in disallowing a genuine analysis of New York's Constitution as well as a factually accurate reading of the U.S. Constitution and early Congressional legislation. For all these reasons, the DOI has engaged in arbitrary and capricious conduct and the Defendants herein do not merit summary judgment.

DATED: April 1, 2014

Respectfully submitted,



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